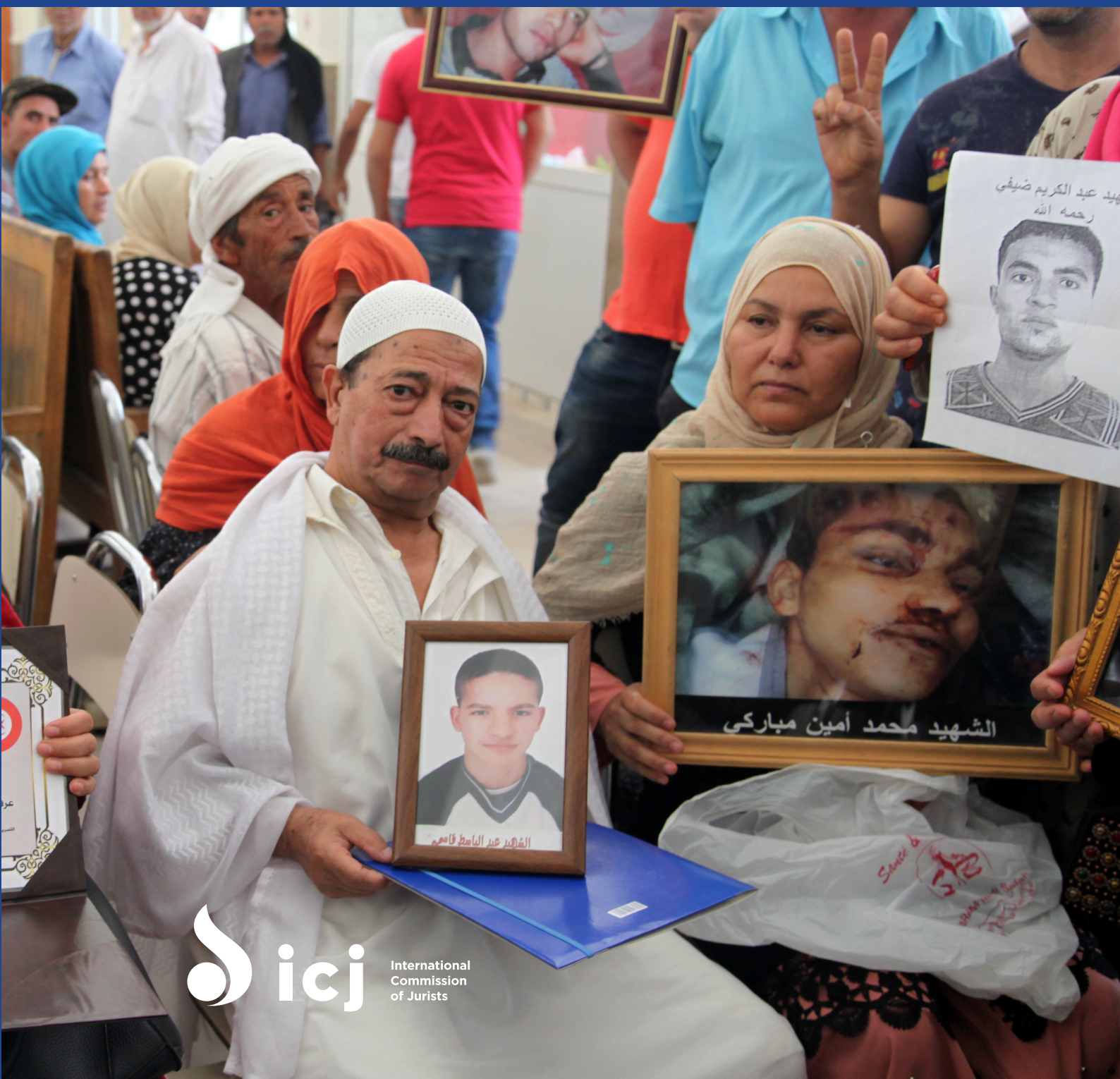
Accountability Through the Specialized Criminal Chambers

Modes of Individual Criminal Liability Under Tunisian and International Law

Practical Guide 4



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April 2023

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AEC	African Extraordinary Chambers
CAT	Committee against Torture
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
HRC	Human Rights Committee
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICPPED	International Convention for the Protection of all Persons from Enforced Disappearance
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IMT	Nuremberg International Military Tribunal
IMTFE	International Military Tribunal for the Far East
IVD	Instance Vérité et Dignité
JCE	Joint Criminal Enterprise
KSC	Kosovo Specialist Chambers and Specialist Prosecutor's Office
MICT	International Residual Mechanism for Criminal Tribunals
SCC	Specialized Criminal Chambers
SCSL	Special Court for Sierra Leone
SPSC	Special Panels for Serious Crimes in East Timor
STL	Special Tribunal for Lebanon
UN	United Nations
UNCAT	United Nations Convention against Torture

I. Introduction

The present Guide is the fourth in a series of Practical Guides issued by the International Commission of Jurists (ICJ) to assist legal practitioners to ensure that the Specialized Criminal Chambers (SCC) fulfil their role in delivering justice in Tunisia in light of the country's obligations under international law.

Decree No. 2014-2887 of 8 August 2014 formally established the SCC within the Tribunals of First Instance of 13 Courts of Appeal across Tunisia.[1] Under article 42 of Organic Law No. 2013-53 of 24 December 2013 on the Establishment and Organization of Transitional Justice (the 2013 Law)[2] and article 3 of Organic Law No. 2014-17 of 12 June 2014 on Transitional Justice and Cases Linked to the Period from 17 December 2010 to 28 February 2011[3], the SCC exercise jurisdiction over cases involving "gross human rights violations" referred by the Truth and Dignity Commission ("*Instance Vérité et Dignité*", IVD). By 31 December 2018, the IVD had referred 200 cases to the SCC.[4] On 29 May 2018, the first hearing before the SCC was held in the Tribunal of First Instance of Gabès.

While the opening of trials before the SCC constitutes a fundamental step in Tunisia's path toward justice and accountability, a number of enduring legal obstacles may undermine the trials' effectiveness and, as a result, the right of victims of gross human rights violations to justice and effective remedies. Such an outcome, in turn, would constitute a violation of Tunisia's obligations under international law and standards.

Through an analysis of both the Tunisian legal framework and relevant international law and standards, the ICJ Practical Guide series on *Accountability Through The Specialized Criminal Chambers* aims primarily to serve as a reference to assist lawyers, prosecutors and judges involved in SCC proceedings arising from gross human rights violations that constitute crimes under international law to try and adjudicate such cases effectively, while ensuring full respect for the defendants' right to a fair trial, and simultaneously guaranteeing the victims' right to access to justice and effective remedies under international law and standards.[5]

Civil society organizations may also find this series useful to raise awareness about the enforcement of Tunisia's existing legal framework on criminalization, investigation, prosecution, sanctioning of, and redress for serious human rights violations in accordance with international law and standards and, where necessary, to advocate for its reform.

This fourth Practical Guide focuses on the various modes of individual criminal liability – namely, the different ways in which a person may have committed, participated in or contributed to the commission of a crime and, therefore, be lawfully held individually criminally liable for it –

1. See Decree No. 2014-4555 of 29 December 2014 modifying Decree No. 2014-2887 on the Creation of the Specialized Criminal Chambers in the Field of Transitional Justice within the Tribunals of First Instance in the Courts of Appeals of Tunis, Gafsa, Gabés, Sousse, Le Kef, Bizerte, Kasserine and Sidi Bouzid, further amended by Decree No. 2016-1382 of 19 December 2016 to include additional chambers in Mednine, Monastir, Nabeul and Kairouan.
2. Article 42 of Organic Law No. 2013-53 of 24 December 2013 on the Establishment and Organization of Transitional Justice (2013 Law) states that the Instance Vérité et Dignité (IVD) "shall refer to the public prosecution the cases in which the perpetration of gross human rights violations is proven and shall be notified of all the measures which are subsequently taken by the judiciary [ICJ's unofficial translation]."
3. Article 3 of Organic Law No. 2014-17 of 12 June 2014 on Transitional Justice and Cases Linked to the Period from 17 December 2010 to 28 February 2011 provides that "[i]n the event of transmission of the files [linked to the gross violations inflicted on the martyrs and wounded of the revolution] to the public prosecutor by the *Instance Vérité et Dignité* (IVD), in accordance with article 42 of Organic Law No. 2013-53 of 24 December 2013 on the Establishment and Organization of Transitional Justice, the public prosecutor shall automatically forward them to the specialized chambers mentioned in article 8 of the same Organic Law. Upon their transmission to the specialized chambers by the public prosecutor, these files have priority regardless of the stage of the procedure [ICJ's unofficial translation]."
4. IVD, Final report, Executive Summary, pp. 85-107 (English version).
5. In previous publications, the ICJ addressed the substantive and procedural legal challenges that might impede the SCC work and their ability to adequately address Tunisia's legacy of gross human rights violations. See ICJ, *Illusory Justice, Prevailing Impunity: Lack of Effective Remedies and Reparation for Victims of Human Rights Violations in Tunisia*, May 2016; *Tunisia: The Specialized Criminal Chambers in Light of International Standards*, November 2016; and *Tunisia: Procedures of the Specialized Criminal Chambers in Light of International Standards*, July 2017.

applicable to the crimes falling within the SCC's jurisdiction. While holding perpetrators of gross human rights violations criminally accountable is one of the key pillars of Tunisia's ongoing transitional justice process,[6] the 2013 Law is silent on the modes of individual criminal liability applicable to the crimes within the jurisdiction of the SCC. Indeed, article 7 of the 2013 Law limits itself to referencing the legislation in force to be applied by the competent authorities, albeit it is unclear whether this refers to the principles of individual accountability or to the jurisdiction of the said authorities.[7]

Given the gravity of the human rights violations giving rise to the cases before the SCC, and over which they have jurisdiction, it is crucial that the SCC try the defendants in a manner that fully complies with international law and standards, including:

(i) the presumption of innocence;
(ii) the right of the accused to a fair trial;
(iii) the principle of legality, i.e., crimes and punishments must be defined by law, along with its criminal law corollary, the non-retroactivity of a heavier criminal penalty;
(iv) the rights of victims of gross human rights violations to access justice and effective remedies, including criminal justice remedies.

The right not to be accused of, tried for, let alone found guilty of any criminal offence in connection with any act or omission that did not constitute a criminal offence under national or international law when it was committed is an essential element of the rule of law; its purpose is to ensure that nobody be subjected to arbitrary prosecution, conviction or punishment.[8] This right, as well as the right to be presumed innocent, require that criminal law be narrowly construed and that, in case of ambiguity, criminal law be interpreted in favour of the defendant.[9]

There is no inconsistency, however, between, the principle of legality, on the one hand and, on the other, the gradual clarification of the rules of individual criminal liability through judicial interpretation, including with respect to various modes of individual criminal liability, as long as the developments to which such judicial interpretations may give rise are consistent with the core of the criminal offences concerned, and may have been reasonably foreseen, including in light of international law.[10] Moreover, the principle of legality does not prohibit the retroactive application of national criminal law to conduct (whether by act or omission) that was not proscribed as an offence under national law at the time it was committed, but that was criminalized under international law at that time; nor does it bar the application of international law to criminally sanction certain conduct even where national law did not at that time criminalize it – or did not do so consistently with international law – providing that, international law in existence at the time the conduct concerned was committed proscribed it.[11]

6. 2013 Law, art. 1.
7. Article 7 of the 2013 Law reads: "The enforcement of accountability principles falls within the jurisdiction of the judicial and administrative powers and institutions pursuant to the legislation in force [ICJ's unofficial translation]."
8. See International Covenant on Civil and Political Rights, art. 15, which reads: 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby. 2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.
9. See e.g., Rome Statute on the International Criminal Court, art. 22(2) on the principle of legality. The *in dubio pro reo* principle also stems from and is a facet of the right to the presumption of innocence.
10. See *S.W. v. The United Kingdom*, ECtHR, Application No. 20166/92, Judgment of 22 November 1995, paras 34-36. See also *C.R. v. The United Kingdom*, ECtHR, Application No. 20190/92, Judgment of 22 November 1995, paras 32-34. This principle was reaffirmed in *Vasiliauskas v. Lithuania*, ECtHR (Grand Chamber), Application No. 35343/05, Judgment of 20 October 2015, para. 155. Streletz, *Kessler and Krenz v. Germany*, ECtHR (Grand Chamber), Applications Nos 34044/96, 35532/97 and 44801/98, Judgment of 22 March 2001, paras 90-108.
11. See Chapter 2, Section c of this Guide.

The present Guide examines a number of modes of individual criminal liability that are relevant and may apply to the crimes under international law falling within the SCC's jurisdiction. The Guide focuses on those modes of individual criminal liability whose definitions and elements are well established in international criminal law and, indeed, are beyond dispute. As a result, the Guide does not address the controversies and debates to which certain modes of liability have given rise in international jurisprudence and legal literature. Accordingly, the Guide does not outline modes of individual criminal liability that are not considered to reflect customary international law[12] over the period covered by the SCC's temporal jurisdiction, given that the SCC's reliance on them would likely be contrary to and violate the rights and principles of legality, non-retroactivity of criminal law, the presumption of innocence and the right of the accused to a fair trial.

The Guide is divided into three parts. The first part examines modes of individual criminal liability under international criminal law, and the second part focuses on modes of individual criminal liability under Tunisian domestic criminal law.[13] In its third and final part, the Guide concludes with some remarks on the application of domestic law in accordance with Tunisia's obligations under international law and standards.

The Guide should be read together with the ICJ's Practical Guide No. 1 on *Accountability Through the Specialized Criminal Chambers: The Adjudication of Crimes Under Tunisian and International Law* (hereinafter Practical Guide 1),[14] which addresses the penalization of crimes over which the SCC have jurisdiction. Practical Guide 1 examines the applicability of international law by the SCC, including the principles of legality and non-retroactivity under international law and their application in the domestic system, and outlines an analysis of the definition of crimes under domestic law vis-à-vis international law with respect to arbitrary deprivation of life, arbitrary deprivation of liberty, torture and other ill-treatment, enforced disappearance, rape, sexual assault (short of rape) and crimes against humanity.

The present Guide is also preceded by two other ICJ's guides. Practical Guide No. 2 on *Accountability Through the Specialized Criminal Chambers: The Investigation and Prosecution of Gross Human Rights Violations Under Tunisian and International Law* discusses the international standards pertaining to the pre-trial and trial stages of SCC cases and the rights of the accused and victims.[15] In particular, it sets out the international fair trial rights law and standards applicable during the investigation, prosecution, trial and adjudication of cases before the SCC. Finally, the present Guide should also be read in conjunction with the ICJ's Practical Guide No. 3 on *Accountability Through the Specialized Criminal Chambers: Principles and Best Practices in the Collection, Admissibility and Assessment of Evidence*,[16] which addresses the principles and recommended practices under international law that apply to the collection, admissibility and evaluation of evidence during the investigation, prosecution, trial and adjudication of gross human rights violations.

Each guide seeks to reflect and be consistent with international law and standards governing the rights of the accused and the rights of victims in criminal proceedings.

12. Customary international law is composed of rules that generally bind all States, regardless of whether the State is party to any particular treaty. The existence of such a rule is established through (i) State practice and (ii) *opinio juris* (a sense of legal obligation). It is a binding source of international law. See ICJ Practical Guide 1, chapter 2, in particular fns 17 and 27.
13. The Tunisian laws quoted throughout the report are unofficial translations of the French or Arabic texts undertaken by the ICJ.
14. ICJ, *Accountability Through the Specialized Criminal Chambers: The Adjudication of Crimes Under Tunisian and International Law* - Practical Guide 1 (2019), available at https://www.icj.org/tunisia-the-role-of-international-law-and-standards-in-proceedings-before-the-specialized-criminal-chambers/.
15. ICJ, *Accountability Through the Specialized Criminal Chambers: The Investigation and Prosecution of Gross Human Rights Violations Under Tunisian and International La*w - Practical Guide 2 (2020), available at https://www.icj.org/wp-content/uploads/2020/12/Tunisia-SSC-guide-series-no2-Publications-Reports-Thematic-reports-2020-ENG.pdf.
16. ICJ, *Accountability Through the Specialized Criminal Chambers: Principles and Best Practices in the Collection, Admissibility and Assessment of Evidence* - Practical Guide 3 (2020), available at https://www.icj.org/wp-content/uploads/2020/12/Tunisia-SSC-guide-series-no3-Publications-Reports-Thematic-reports-2020-ENG.pdf.

II. Modes of individual criminal liability under international criminal law

Individual criminal responsibility is a long-established principle in international law. The Nuremberg International Military Tribunal (IMT) was the first judicial, adjudicatory mechanism to affirm the capacity of individuals to commit crimes under international law and, most fundamentally, to acknowledge the distinction between the responsibility of States for violations of international law and the criminal responsibility of individuals for certain crimes under international law. At Nuremberg, defendants had submitted that criminal liability should be ascribed to the State, since "international law is concerned with the actions of sovereign States and provides no punishment for individuals."[17] The IMT, however, rejected the claim that individuals may eschew liability for their crimes by hiding behind States, or other organizational structures. It held that "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced".[18]

The principle of individual criminal responsibility was subsequently reflected in declaratory instruments and other international legal documents focusing on crimes under international law,[19] including the *Principles of International Law Recognised in the Charter of the Nürnberg Tribuna*l and in the *Judgment of the Tribunal* (Nuremberg Principles),[20] the International Law Commission (ILC) *Draft Code of Offences against the Peace and Security of Mankind*,[21] as well as the Statutes of modern international criminal courts and tribunals, such as the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL), the East Timor Special Panels for Serious Crimes (SPSC), the Extraordinary Chambers in the Courts of Cambodia (ECCC), the Special Tribunal for Lebanon (STL), the African Extraordinary Chambers (AEC), the Kosovo Specialist Chambers and Specialist Prosecutor's Office (KSC) and the International Criminal Court (ICC).[22] Today, the principle of individual criminal responsibility is considered to reflect customary international law.[23]

The principle of individual criminal responsibility rests on doctrines of personal culpability, which is a basic rule of most, if not all, legal systems.[24] The principle of personal culpability, according

17. IMT Judgment (1947), 41 *American Journal of International Law*, p. 220. See also H. Kelsen, "Collective and Individual Responsibility in I
18. IMT Judgment (1947), 41 *American Journal of International Law*, p. 221.
19. In 1946, the United Nations (UN) General Assembly adopted resolution 95 (I) entitled "Affirmation of the Principles of International Law Recognised by the Charter of the Nürnberg Tribunal". See UN General Assembly, resolution 95 (I), 11 December 1946. Resolution 95 (I) was followed by resolution 177 (II), entitled "Formulation of the Principles of International Law Recognised by the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal" in which the Assembly directed the International Law Commission (ILC) to formulate these principles and to prepare a draft Code of Offences against the Peace and Security of Mankind. See UN General Assembly, resolution 177 (II), 21 November 1947.
20. See Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, adopted by the International Law Commission at its second session, in 1950, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. The report, which also contains commentaries on the principles, appears in *Yearbook of the International Law Commission*, 1950, vol. II, para. 97. The principles are available at: https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_1_1950.pdf. Principle I reads: "any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment".
21. Following UN General Assembly resolution 177 (II), the ILC completed a first version of the Draft Code in 1954. The Draft Code was subsequently subject to multiple revisions until 1996 when the ILC adopted a revised version with commentaries. The text of the Draft Code is available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/7_4_1996.pdf. Article 2, paragraph 1, of the 1996 Draft Code reads: "A crime against the peace and security of mankind entails individual responsibility." Article 4 provides that this "is without prejudice to any question of the responsibility of States under international law."
22. See below Section b of this Chapter.
23. See *ICRC Customary IHL Database*, Study on Customary International Humanitarian Law conducted by the International Committee of the Red Cross, 2005, Rule 102 and relevant practice.
24. See for instance article 121(1) of the French Penal Code: "Nul n'est responsable pénalement que de son propre fait." ("No one shall be held criminally responsible except for one's own deed." [ICJ's unofficial translation]); article 27(1) of the Italian Constitution: "La responsibilità penale è personale." ("Criminal responsibility is

to which punishment is personal and cannot be extended to any person other than the defender, is guaranteed in the American Convention on Human Rights, as a non-derogable right,[25] and by the African Charter on Human and Peoples' Rights,[26] among others. The European Convention on Human Rights (ECHR) does not spell it out, but the European Court of Human Rights (ECtHR) has held that, "it is a fundamental rule of criminal law that criminal liability does not survive the person who has committed the criminal act."[27] Moreover, the Grand Chamber of the ECtHR has held that article 7 of the ECHR, guaranteeing the principle that only the law can define a crime and prescribe a penalty, precludes the imposition of a criminal sanction on an individual without their personal criminal liability being established and declared beforehand, otherwise the presumption of innocence principle guaranteed by article 6(2) of the Convention would also bebreached.[28]

Accordingly, as the ICTY stated in the *Tadić* case:

> The basic assumption must be that in international law as much as in national systems, the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated *(nulla poena sine culpa*). In national legal systems this principle is laid down in Constitutions, [...] in laws, [...] or in judicial decisions. [...] In international criminal law the principle is laid down, *inter alia*, in Article 7(1) of the Statute of the International Tribunal which states that:
>
> > A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 5 of the present Statute, shall be *individually responsible* for the crime. [emphasis added]
>
> Article 7(1) of the ICTY Statute also sets out the parameters of personal criminal responsibility under the Statute. Any act falling under one of the five categories contained in the provision may entail the criminal responsibility of the perpetrator or whoever has participated in the crime in one of the ways specified in the same provision of the Statute.[29]

Under international criminal law, it is not solely direct perpetrators of a crime who may incur individual criminal responsibility, but also other individuals – pursuant to other modes of individual criminal liability – for example when they use others to commit a crime; commit a crime as part of a group with a common purpose; deliberately help others to do so; either order, induce or plan the commission of a crime; or fail to take sufficient measures to prevent or punish certain crimes when in a position of command. [30]
This is what the ICTR recalled in the *Kayishema and Ruzindana* case about direct perpetrators of crimes and others who may also be held individually criminally liable for their participation in or contribution to the said crimes:

> Article 6(1) of the Statute provides that a person who "planned, instigated, ordered,

personal." [ICJ's unofficial translation]); and paragraph 4 of the Austrian Strafgesetzbuch: "Strafbar ist nur, wer schuldhaft handelt." ("Only he who is culpable may be punished." [ICJ's unofficial translation]). See also *ICRC Customary IHL Database*, Study on Customary International Humanitarian Law conducted by the International Committee of the Red Cross, 2005, Rule 102 and relevant practice.

25. American Convention on Human Rights, art. 5(3).
26. African Charter on Human and Peoples' Rights, art. 7(2).
27. *A. P., M. P. and T. P. v. Switzerland*, ECtHR, Application No. 71/1996/690/882, Judgment of 29 August 1997, paras 47-48. The case arose from the imposition of criminal sanctions for tax evasion committed by a deceased person on his heirs. Among other things, the Court held that that it is a fundamental rule of criminal law that criminal liability does not survive the person who has committed the criminal act – as much is also required by the presumption of innocence enshrined in article 6(2) of the ECHR.
28. *G.I.E.M. S.R.L. and others v. Italy*, ECtHR (Grand Chamber) Applications No. 1828/06 34163/07 19029/11, Judgment (Merits) of 28 June 2018, para. 251.
29. ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999, para. 186. See also ICTY, *Prosecutor v. Kordić*, Case No. IT-95-14/2-T, Trial Chamber, Judgment, 26 February 2001, para. 373.
30. Culpability is a crucial pillar of international criminal law that reflects the degree of the person's blameworthiness while committing a crime. In light of the significant stigma attached to a criminal conviction for crimes under international law, it is of utmost importance to apply correct determinations of culpability at the level of an offence. See Iryna Marchuk, *The Fundamental Concept of Crime in International Criminal Law: A Comparative Analysis* (2014), pp. 161-162.

committed, or otherwise aided and abetted in the planning, preparation or execution of a crime … shall be individually responsible for the crime." This provision reflects the criminal law principle that criminal liability is not incurred solely by individuals who physically commit a crime, but may also extend to those who participate in and contribute to a crime in various ways, when such participation is sufficiently connected to the crime, following principles of accomplice liability. Article 6(1) may thus be regarded as intending to ensure that all those who either engage directly in the perpetration of a crime under the Statute, or otherwise contribute to its perpetration, are held accountable.[31]

Against this background, the remainder of this chapter addresses the legal bases for the SCC to apply international criminal law on modes of individual criminal liability. To that end, after setting out the definition and scope of application of various modes of liability under international criminal law, the chapter addresses the sources of those modes of individual criminal responsibility, including under treaty and customary international law, as well as in light of their elucidation by judicial interpretation, and discusses their applicability before the SCC, particularly in light of the principles of legality and non-retroactivity.

A. Definition and scope of application

Under international criminal law, the term "modes of liability" refers to the doctrines according to which a person may commit – or contribute in various ways to the commission of a crime – and be lawfully found individually criminally responsible and, as a result, be held liable for punishment for it.[32]

Crimes under international law comprise both material (*actus reus*)[33] and mental (*mens rea*) elements.[34] Accordingly, the mere engagement in prohibited conduct constituting the material element of a crime under international criminal law does not suffice alone to attribute individual criminal responsibility. A state of mind, the required mental element of the crime in question, must have accompanied the prohibited conduct for the perpetrator to be held individually criminally responsible and liable for punishment for that crime.

Furthermore, in addition to proof of the distinctive elements that qualify a certain conduct as a crime under international law, the attribution of individual criminal responsibility for crimes under international criminal law requires proof of both the material and mental elements under whichever mode of liability the crime in question is being charged and prosecuted at trial. As the ICTY set out in the *Milutinović et al* case:

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31. ICTR, *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-A, Appeals Chamber, Judgment, 1 June 2001, para. 185.
32. See e.g., ICTY Statute, art. 7(1); ICTR Statute, art. 6(1); ICC Statute, art. 25; SCSL Statute, art. 6(1); ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Chamber, Judgment, 2 September 1998, paras 480–485. See also CAT, art. 4; ICPPED, art. 6(1)(a); HRC, *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992, para. 13; CAT, *General Comment No. 2: Implementation of Article 2 by States Parties*, 24 January 2008, CAT/C/GC/2, available at: https://www.refworld.org/docid/47ac78ce2.html [accessed 5 September 2022], para. 26.
33. Generally, a recognizably criminal offence comprises the material element of the proscribed conduct in question as entailing a voluntary act or omission on the part of the person responsible, beyond mere thoughts and intentions.
34. The mental element (*mens rea*) of a recognizably criminal offence refers to the fact that to be held criminally responsible for that proscribed conduct the individual concerned must have committed the material element of the proscribed conduct in question with the required mental element. Bar offences of strict and absolute liability, the mental element is essential for the attribution of individual criminal responsibility. There are no general definitions of the various *mens rea* elements in international criminal law. Article 30 of the Rome Statute reads: "1. Unless 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. 2. For the purposes of this article, a person has intent where (a) In relation to conduct, that person means to engage in the conduct; (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. 3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly." It is important to note however that the Rome Statute has a limited purport as it sets out the mens rea only for the crimes within the jurisdiction of the ICC. Neither the ICTY Statute nor the ICTR Statute provides a general definition of the mental element of a crime, which has been left to judicial interpretation. See Iryna Marchuk, *The Fundamental Concept of Crime in International Criminal Law: A Comparative Analysis* (2014), pp. 112-113.

> In order for an individual to be convicted of a crime under the Statute, the Prosecution must prove three, or in some cases four, sets of elements beyond a reasonable doubt, namely the actus reus and mens rea of the underlying offence, any specific requirements of the underlying offence, the general requirements of the statutory crime, and the *physical and mental elements of the relevant form of responsibility*.[35]

The following diagram illustrates all the elements required to attribute individual criminal responsibility for a crime under international law, such as a crime against humanity.[36]

General requirements (chapeau elements) of crime(s) proven
+
Elements (mens rea and actus reus) of underlying offence(s) completed – but not necessarily by the accused
+
Specific requirement(s) of the underlying offence (if applicable)
+
Physical element (*actus reus*) of the relevant form of responsibility
+
Mental element (*mens rea*) of the relevant form of responsibility

As discussed in depth in Practical Guide 1, the "underlying offence" of a crime against humanity comprises its own *actus reus* and *mens rea* elements; further, some of them have additional "specific requirements", such as discriminatory intent;[37] moreover, a crime against humanity has additional general requirements – or so-called *chapeau* elements – namely, the existence of a widespread or systematic attack against a civilian population.[38]

As the above diagram shows, the first three elements are not sufficient to hold the accused individually criminally liable under international law. The accused may not be the physical perpetrator of the crime in question. For example, the accused may be a commander of a unit that belongs to the security forces of a particular State. If members of the commander's unit torture and rape civilians during a widespread and systematic attack carried out by the security forces against a civilian population of a certain region of the State, then the last two elements in the diagram above – namely, the physical element (*actus reus*) and the mental element (*mens rea*) of a particular form of individual criminal liability – will determine whether the commander incurs responsibility for the crimes committed.[39]

Inspired by a plethora of different modes of individual criminal liability recognized by penal law in domestic jurisdictions, international criminal law provides for a sophisticated range of modes of individual criminal liability. As detailed in the next three chapters of this Guide, under international criminal law, each mode of individual criminal liability features specific physical and mental elements.

Modes of individual criminal liability in international criminal law are only relevant to certain crimes under international law.[40] In this respect, the Statutes of a number of internationalized or so-called "hybrid" tribunals that have jurisdiction over both crimes under international and

35. ICTY, *Prosecutor v. Milutinović et al*, Case No. IT-05-87-T, Trial Chamber, Judgment, 26 February 2009, para. 65, *emphasis* added.
36. See International Bar Association (IBA), *International Criminal Law Manual*, 2010, p. 257 and pp. 256-260, available in English at https://www.ibanet.org/document?id=2010-International-Criminal-Law-Manual-HRI.
37. For example, this is the case of the crime against humanity of persecution. See art. 7(1)(h) of the ICC Statute and ICJ Practical Guide 1, pp. 89-90.
38. For example, murder as a crime against humanity requires (i) the objective element of murder (causing the death of another person) as well as a mental element (intent to bring about by one's action the death of another person); and (ii) contextual elements – or so-called chapeau elements – namely, the existence of a widespread or systematic attack against a civilian population, and a mental element, that is to say the awareness of the existence of such broader context. See art. 7 of the ICC Statute. See also ICJ Practical Guide 1, pp. 79-92.
39. International Bar Association (IBA), *International Criminal Law Manual*, 2010, p. 257. See also ICTY, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Trial Chamber, Judgment, 26 February 2009, paras 65-67.
40. For an analysis of crimes under international law and their applicability before the SCC, see ICJ, Practical Guide 1.

domestic law provide that domestic law on individual criminal liability shall apply to crimes under domestic law prosecuted before these tribunals.[41] Moreover, international jurisprudence has generally held that modes of liability under international criminal law, including customary international law, do not apply to crimes under domestic law or to non-international crimes.[42] Accordingly, this Guide only discusses the applicability of modes of individual criminal liability under customary international law to crimes under international law that are prosecuted and tried before the SCC.

In principle, all modes of liability described in this Guide apply to crimes against humanity. Furthermore, some of the modes of criminal liability outlined below are relevant to other crimes under international criminal law that fall within the SCC's jurisdiction, including torture and other cruel, inhuman or degrading treatment or punishment and enforced disappearance.[43]

B. Sources

In international criminal law, the various modes of individual criminal responsibility find their legal basis in multiple sources, including the Statutes of international courts and tribunals,[44] international treaties and customary international law.[45]

i. Statutes of international courts and tribunals

Article 6 of the IMT Statute provides an initial recognition of modes of individual criminal liability in international criminal law. According to this provision, the IMT exercised jurisdiction over crimes against peace, war crimes and crimes against humanity "for which there shall be individual responsibility", and:

> *Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit* any of [these] crimes are responsible for all acts performed by any persons in the execution of such plan.[46]

The Statute of the International Military Tribunal for the Far East (IMTFE) too effectively

41. Under art. 6(5) of the SCSL Statute, individual criminal responsibility for crimes under the law of Sierra Leone prosecuted at the SCSL is determined in accordance with domestic law. Similarly, art. 16(2) and (3) of the SCK Law provide that the laws of Kosovo pertaining to individual criminal responsibility shall apply for crimes under Kosovo Law. The STL Statute appears to stand as an exception in this regard (with the SPSC, albeit in specific circumstances), providing for international modes of individual criminal responsibility (art. 3) while having jurisdiction over domestic crimes (art. 2): see, in this regard, Marko Milanović, "An Odd Couple: Domestic Crimes and International Responsibility in the Special Tribunal for Lebanon", *Journal of International Criminal Justice*, Volume 5, Issue 5, November 2007, pp. 1139–1152, and the STL jurisprudence cited in fn. 42 below. See also Section b-i of this Chapter below.
42. See IRMCT, *Prosecutor v. Turinabo et al.*, MICT-18-116-PT, *Appeals Chamber*, Decision on Prosecution Appeal Against Decision on Challenges to Jurisdiction, 28 June 2019, paras 10, 15 with respect to the non-applicability of JCE to the offence of interference with the administration of justice; STL, *The Prosecutor v. Ayyash et a*l., STL-11-01/T/TC, Trial Chamber, Judgement, 18 August 2020, para. 6137, with respect to accessorial liability under customary international law and crimes under Lebanese law; ECCC, *Ieng*, Pre-Trial Chamber, Decision on Ieng Sari's Appeal Against the Closing Order, 002/19-09-2007-ECCC/OCIJ, 11 April 2011, paras 295-296, with respect to international modes of individual criminal liability, namely commission via a joint criminal enterprise, superior responsibility and instigation and crimes under Cambodian law.
43. See UNCAT, art. 4; ICPPED, art. 6(1)(a); HRC, *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment*), 10 March 1992, para. 13; CAT, *General Comment No. 2: Implementation of Article 2 by States Parties*, 24 January 2008, CAT/C/GC/2, available at: https://www.refworld.org/docid/47ac78ce2.html [accessed 5 September 2022], para. 26. See below section b-ii of this chapter.
44. The next section on these Statutes includes the Statutes of internationalized or so-called "hybrid" tribunals. These international and internationalized courts and tribunals are usually referred to as "International Tribunals" or "Tribunals" in this Guide.
45. This is by no means an exhaustive analysis of all the legal sources establishing modes of liability under international criminal law. For more details, see e.g., Jérôme de Hemptinne, Robert Roth, Elies van Sliedregt, Marjolein Cupido, Manuel J. Ventura and Lachezar Yanev (eds), *Modes of Liability in International Criminal Law* (2019); Robert Cryer, Darryl Robinson, and Sergey Vasiliev, *An Introduction to International Criminal Law and Procedure* (4th ed., 2019), pp. 341-379; and Kai Ambos, *Modes of criminal responsibility*, Max Planch Encyclopedia of Public International Law (2013).
46. IMT Statute, art. 6, *emphasis* added.

recognized those different modes of individual criminal liability through an analogous provision.[47]

Following the experiences of the Nuremberg and Far East Tribunals,[48] modes of individual criminal liability were subsequently codified first in the Statutes of the ICTY and the ICTR, then in those of the ICC, the SCSL, the SPSC and the ECCC, and most recently in the Statutes of the STL, the AEC and the KSC.

The Statutes of the ICTY, the ICTR, the SCSL, the ECCC, the AEC and the KSC feature almost identical provisions recognizing and codifying the principle of individual criminal responsibility and correlated modes of liability:

> *A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or executio*n of a crime […] shall be individually responsible for the crime.
>
> […]
>
> The fact that any of the acts […] was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the *superior failed to take the necessary and reasonable measures to prevent such acts or to punish* the perpetrators thereof.[49]

In comparison, the ICC Statute sets out a more elaborate individual criminal liability framework, comprising several novel modes of liability. It introduces new modes of liability and variations of previously established principles of individual criminal responsibility through its recognition of criminal responsibility for "indirect commission", "indirect co-perpetration", as well as liability of members of "a group acting with a common purpose". Pursuant to article 25(3) of the ICC Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(a) *Commits* such a crime, whether *as an individual, jointly with another or through another person*, regardless of whether that other person is criminally responsible;
(b) *Orders, solicits or induces the commission* of such a crime which in fact occurs or is attempted;
(c) For the purpose of facilitating the commission of such a crime, *aids, abets or otherwise assists in its commission or its attempted commission*, including providing the means for its commission;
(d) *In any other way contributes to the commission* or attempted commission of such a crime *by a group of persons acting with a common purpose*. Such contribution shall be intentional and shall either:
  (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
  (ii) Be made in the knowledge of the intention of the group to commit the crime;
(e) In respect of the crime of genocide, *directly and publicly incites others to commit* genocide;

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47. See IMTFE Statute, art. 5.
48. It should be noted that Nuremberg Principle VII stated that "complicity in the commission of a crime against peace, a war crime, or a crime against humanity […] is a crime under international law." The Nuremberg Principles however do not explicitly mention other modes of criminal responsibility such as planning, instigating, or ordering; nor do the Principles include responsibility by omission (so-called "command responsibility"), although the Statutes of the IMT and IMTFE provided for such modes of liability. The commentary of the ILC does not further elaborate what modes of responsibility "complicity" entailed at the time. See Commentary by Antonio Cassese, p. 4, available at https://legal.un.org/avl/pdf/ha/ga_95-I/ga_95-I_e.pdf. Article 2, paragraph 3, of the Draft Code of Offences against the Peace and Security of Mankind outlines several forms of individual criminal responsibility, and article 6 provides for superior responsibility.
49. *Emphasis* added. See ICTY Statute, art. 7(1) and (3); ICTR Statute, art. 6(1) and (3); SCSL Statute, art. 6(1) and (3); ECCC Law, art. 29; EAC Statute, art. 10(2) and (4); and SCK Law, art. 16(1)(a) and (c). Under article 6(5) of the SCSL Statute, individual criminal responsibility for crimes under the law of Sierra Leone prosecuted at the SCSL is determined in accordance with domestic law. Similarly, article 16(2) and (3) of the SCK Law provides that the laws of Kosovo pertaining to individual criminal responsibility shall apply for crimes under Kosovo Law.

(f) *Attempts to commit* such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.[50]

In addition to the above modes of individual criminal liability, article 28 of the ICC Statute provides for superior responsibility for commanders and other superiors who fail to prevent the commission of crimes by their subordinates, or to sanction them in the aftermath of the commission of the crime. However, article 28 differs from other international provisions on superior responsibility. Indeed, it makes an explicit distinction between superior responsibility of military commanders and non-military superiors, introducing a higher *mens rea* threshold for the latter category.[51] While the Statute of the SPSC features a similar provision to article 25(3) of the ICC Statute on individual criminal responsibility[52], its provision on superior responsibility is identical to the corresponding provisions in the Statutes of ICTY, ICTR, etc.[53]

Finally, article 3 of the Statute of the STL, which has jurisdiction over mostly domestic "terrorism-related" offences – distinct from serious violations of international human rights law – departs from the Statutes of ICTY, ICTR, etc,[54] and provides that a person shall be individually responsible for crimes within the jurisdiction of the Tribunal if that person:

(a) *Committed, participated as accomplice, organized or directed others to commit* the crime […]; or
(b) *Contributed in any other way to the commission* of the crime […] *by a group of persons acting with a common purpose*, where such contribution is intentional and is either made with the aim of furthering the general criminal activity or purpose of the group or in the knowledge of the intention of the group to commit the crime.

With respect to superior responsibility, the same article reproduces the Rome Statute's superior responsibility standard for non-military commanders, providing that:

[…] a *superior* shall be criminally responsible for any of the 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:

(a) The superior either knew, or consciously disregarded information that clearly indicated that the subordinates were committing or about to commit such crimes;
(b) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(c) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution. [55]

50. *Emphasis* added. See ICC Statute, art. 25(3). This provision is a multifaceted formulation of principal and accomplice forms of liability that derive from common law and continental law jurisdictions. Article 25(3)(a) covers different modes of principal liability, in particular direct commission, indirect commission and co-perpetration. Subparagraphs (b), (c) and (d) of article 25(3) deal with accomplice liability in its various expressions, including a rather peculiar form of common purpose complicity. The extreme gravity of the crime of genocide warrants the criminalization of "direct and public incitement to commit genocide" in article 25(3)(e) of the Statute. The very last subparagraph of article 25 deals with an inchoate crime of "attempt to commit a crime" within the jurisdiction of the Court.
51. ICC Statute, art. 28.
52. SPSC Regulation, section 14(3).
53. SPSC Regulation, section 16.
54. It instead mirrors the 1997 International Convention for the Suppression of Terrorist Bombings (UNGA, 15 December 1997, A/RES/52/164), and, for paragraph 2, the Rome Statute. See below Chapter 3, Section c, fn. 154.
55. STL Statute, art. 3. It should however be noted that article 2 of the STL Statute also mandated the application of Lebanese law to criminal participation, which has led the STL Appeals Chamber to decide to apply Lebanese Law, except if the application of the modes of criminal responsibility recognized in international criminal law would lead to a result more favourable to the rights of the accused. See STL, Case No. STL-11-01/I, Appeals

ii. International treaties

In principle, as an international treaty to which Tunisia is a party, the Rome Statute is an authoritative source of law, but only with respect to conduct committed after it has come into force, i.e., from the time of Tunisia's accession to it on 24 June 2011.[56]

The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), by which Tunisia has been bound, as a State party, since 24 September 1988, requires States Parties to expressly recognize in their domestic criminal law several, distinct modes of liability for the crime of torture, namely, commission, complicity and participation, for which perpetrators may be found individually criminally responsible in connection with acts of torture.[57] In this respect, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has interpreted complicity under the UNCAT in light of international criminal law jurisprudence on aiding and abetting.[58] While the UNCAT does not explicitly provide for superior responsibility, the UN Committee against Torture (CAT) has held: "those exercising superior authority - including public officials - cannot avoid accountability or escape criminal responsibility for torture or ill-treatment committed by subordinates where they knew or should have known that such impermissible conduct was occurring, or was likely to occur, and they failed to take reasonable and necessary preventive measures."[59] The CAT has further held that, while the UNCAT imposes obligations on States parties and not on individuals, it does not limit the international responsibility that individuals can incur for perpetrating torture and ill-treatment under customary international law and other treaties.[60]

The International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED), to which Tunisia has been a party since 29 June 2011, is more specific, stipulating that:

Each State Party shall take the necessary measures to hold criminally responsible at least:

(a) Any person who *commits, orders, solicits or induces the commission of, attempts to commit*, is an accomplice to or participates in an enforced disappearance;
(b) A superior who:
  (i) *Knew, or consciously disregarded information* which clearly indicated, that subordinates under his or her effective authority and control were committing or

Chamber, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011, para. 211. See also STL, *The Prosecutor v. Mehri and Oneissi*, Case No. STL-11-01/A-2/AC, Appeals Chamber, Appeal Judgment, 10 March 2022, paras 591, 601, holding that the STL was authorized to resort to this principle as a standard of construction when the STL's Statute or the Lebanese criminal code is unclear and when other rules of interpretation have not yielded satisfactory results". The STL Trial Chamber has followed a different reasoning but has reached a similar conclusion: see STL, *The Prosecutor v. Ayyash et al*., Case No. STL-11-01/T/TC, Trial Chamber, Judgment, 18 August 2020, paras 5896-6019, in particular 6005-6019, and 6145.

56. See also, with respect to non-States Parties, ICC, *The Prosecutor v. Abd-Al-Rahman*, Case No. ICC-02/05-01/20 OA8, Appeals Chamber, Judgment on the appeal of Mr Abd-Al-Rahman against the Pre-Trial Chamber II's "Decision on the Defence 'Exception d'incompétence' (ICC-02/05-01/20-302)", 1 November 2021, para. 86, where the Appeals Chamber found that in the case of referrals by the UN Security Council, "for conduct that takes place on the territory of a State that is not a Party to the Statute, it is not enough that the crimes charged can be found in the text of the Statute. In interpreting article 22(1) of the Statute [on the principle of legality] in a manner consistent with human rights law, a chamber must look beyond the Statute to the criminal laws applicable to the suspect or accused at the time the conduct took place and satisfy itself that a reasonable person could have expected, at that moment in time, to find him or herself faced with the crimes charged." [footnote omitted].
57. UNCAT, art. 4(1) "Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an *attempt to commit* torture and to an act by any person which constitutes *complicity* or *participation* in torture." [*Emphasis* added].
58. UN General Assembly, *Torture and other cruel, inhuman or degrading treatment or punishment: note by the Secretary-General*, 7 August 2015, A/70/303, available at: https://www.refworld.org/docid/55f292224.html [accessed 25 October 2022] (transmitting Interim report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Méndez, submitted in accordance with General Assembly resolution 68/156), para. 23, referring to ICTY jurisprudence and concluding that "individual responsibility for complicity in torture arises also in situations in which State agents do not themselves directly inflict torture or other ill-treatment but direct or allow others to do so, or acquiesce in it".
59. CAT, *General Comment No. 2: Implementation of Article 2 by States Parties*, 24 January 2008, CAT/C/GC/2, available at: https://www.refworld.org/docid/47ac78ce2.html [accessed 5 September 2022], para. 26.
60. Ibid., para. 15.

about to commit a crime of enforced disappearance;
(ii) *Exercised effective responsibility for and control over activities* which were concerned with the crime of enforced disappearance; and
(iii) *Failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission* of an enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution;
(c) Subparagraph (b) above is without prejudice to the higher standards of responsibility applicable under relevant international law to a military commander or to a person effectively acting as a military commander.[61]

iii. Customary international law

Many of the modes of individual criminal liability mentioned above find their legal basis also in customary international law. Both the ICTY and ICTR, through their respective jurisprudence, have held that the modes of liability provided for in their Statutes formed part of customary international law.

In the *Tadić* case, the ICTY has established that the distinct modes of individual criminal liability, including for assisting, aiding and abetting, or participating in a criminal act falling within the jurisdiction of the Tribunal, reflect customary international law.[62] Notably, while discussing modes of liability under article 7 of the Statute, the Tribunal has held that:

> The concept of direct individual criminal responsibility and personal culpability for assisting, aiding and abetting, or participating in, in contrast to the direct commission of, a criminal endeavour or act […] has a basis in customary international law.[63]

In subsequent cases, the ICTY, the ICTR and the ECCC have held that committing, aiding and abetting, planning, instigating, ordering, and superior responsibility, as defined in their respective Statutes, reflect customary international law.[64] The SCSL and the STL have also affirmed that modes of individual criminal liability established in their respective Statutes reflect customary international law. [65]

Similar conclusions have been reached with respect to the so-called Joint Criminal Enterprise (JCE) doctrine, a mode of individual criminal responsibility that was developed in international jurisprudence to capture cases where a plurality of individuals share a common criminal

61. ICPPED, art. 6, a-c, *emphasis* added.
62. ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-T, Trial Chamber, Judgment, 7 May 1997, para. 669.
63. ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-T, Trial Chamber, Judgment, 7 May 1997, para. 666, adding: "For example, Article 4(1) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment uses the phrase "complicity or participation in torture", and Article III of the International Convention on the Suppression and Punishment of the Crime of Apartheid cites as criminally culpable those who "participate in, directly incite, or conspire in [, or] . . . [d]irectly abet, encourage or cooperate in the commission of the crime." The prosecutions following the Second World War confirm this, revealing that participation in this way could entail culpability […]." [footnote omitted] See also paras 663-669.
64. See e.g., ICTY, *Prosecutor v. Šainović et al.*, Case No. IT-05-87-A, Appeals Chamber, Judgment, 23 January 2014, para. 1626 (stating that aiding and abetting are part of customary international law); ICTY, *Prosecutor v. Hadzihasanović et al.*, Case No. IT-01-47-AR72, Appeals Chamber, Decision on Interlocutory Appeals Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, para. 31 (stating that superior responsibility reflects customary international law). See also ECCC, *Kaing* alias *Duch*, Case No. 001/18-07-2007/ECCC/TC/E188, Trial Chamber, Judgment, 26 July 2010, para. 475; ECCC, *Khieu and Nuon*, Case No. 002/19-09-2007-ECCC/TC, Trial Chamber, Case 002/01 Judgment, 7 August 2014, paras 697-698 (stating that by 1975, planning was a form of individual criminal responsibility recognized in customary international law), paras 699-700 (stating that instigating was recognized as a form of individual criminal responsibility in customary international law by 1975), paras 701-702 (stating that by 1975, customary international law recognized ordering as a form of individual criminal responsibility), paras 703-704 (stating that customary international law recognized aiding and abetting as forms of individual criminal responsibility by 1975), para. 706 (stating that aiding and abetting by omission also constitute part of customary international law by 1975), paras 714-716 (stating that superior responsibility, applicable to both military and civilian superiors, was recognized in customary international law by 1975).
65. SCSL, *Prosecutor v. Sesay et al.* (RUF Case), Case No. SCSL-04-15-T, Trial Chamber, Judgment, 2 March 2009, para. 246; STL, Case No. STL-11-01/I, Appeals Chamber, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011, para. 206.

purpose and coordinate efforts to commit its underlying crime.[66] In particular, the first form of JCE (JCE I) – i.e., where all participants in the common criminal plan share the same intent to commit a crime – and the second form of JCE (JCE II) – i.e., where the common criminal plan is "institutionalized", meaning that it takes place in a system of ill-treatment – have both been recognized to have attained customary international law status.[67] However, there is less agreement on the third form of JCE (JCE III) – i.e., used to ascribe responsibility for incidental, excess crimes of a common criminal plan that, although not an agreed part of it, were a natural and foreseeable consequence of the plan's execution: indeed the ECCC have held that JCE III did not form part of customary international law in 1975.[68]

Given that the temporal jurisdiction of the SCC extends to serious violations of international human rights law that occurred as of 1 July 1955,[69] it should be underscored that the aforementioned ECCC jurisprudence justified its findings based in particular on post-World War II international instruments and jurisprudence. Accordingly, the SCC judges may consider that these findings extend to the status of customary international law as of 1955.

While it is generally accepted that modes of individual criminal liability as reflected in the ICTY, ICTR, SCSL, ECCC and STL's Statutes and jurisprudence form part of customary international law, the same conclusion may not be drawn with respect to each of the modes of individual criminal liability enshrined in the ICC Statute. Indeed, according to the jurisprudence of the ICTY, STL and SCSL,[70] while the ICC Statute may have a value in determining existing and developing customary international law, it does not reflect it systematically, particularly with respect to modes of liability.[71] The ICC itself has found, albeit only with respect to crimes –

66. See chapter 3, section c on JCE below.
67. See MICT, *Prosecutor v. Turinabo et al.*, Case No. MICT-18-116-PT, Appeals Chamber, Decision on Prosecution Appeal Against Decision on Challenges to Jurisdiction, 28 June 2019, para. 10; ICTY, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-A, Appeals Chamber, Judgment, 29 November 2017, para. 587; ICTY, *Prosecutor v. Tolimir*, Case No. IT-05-88/2-A, Appeals Chamber, Judgment, 8 April 2015, para. 281; ICTY, *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, Appeals Chamber, Judgment, 30 January 2015, para. 1672; ICTY, *Prosecutor v. Stakić*, Case No. IT-97-24-A, Appeals Chamber, Judgment, 22 March 2006, para. 62; ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999, para. 220; ICTR, *Prosecutor v. Ntakirutimana and Ntakirutimana*, Case No. ICTR-96-10-A and ICTR-96-17-A, Appeals Chamber, Judgment, 13 December 2004, para. 463; STL, Case No. STL-11-01/I, Appeals Chamber, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011, paras 236-249, and fn. 360; SCSL, *Prosecutor v. Sesay et al.* (RUF Case), Case No. SCSL-04-15-T, Trial Chamber, Judgment, 2 March 2009, paras. 251-255; ECCC, *Khieu and Nuon*, Case No. 002/19-09-2007-ECCC/TC, Trial Chamber, Case 002/02 Judgment, 16 November 2018, para. 3704; ECCC, *Khieu and Nuon*, Case No. 002/19-09-2007-ECCC/TC, Trial Chamber, Case 002/01 Judgment, 7 August 2014, para. 691; ECCC, Ieng et al., Case No. 002/19-09-2007-ECCC/OCIJ (PTC38), Pre-Trial Chamber, Decision on Appeals against the Co-Investigating Judges' Order on Joint Criminal Enterprise (JCE), 20 May 2010, paras 57-74.
68. The aforementioned jurisprudence of the ICTY, ICTR, SCSL, and the STL determined that JCE III was part of customary international law, although the STL determined that JCE III should not apply to special intent crimes like terrorism (paras 248-249). The ECCC, however, found that between 1975 and 1979, JCE III had not reached such status. See ECCC, *Khieu and Nuon*, Case No. 002/19-09-2007-ECCC/SC, Supreme Court Chamber, Appeal Judgment, 23 November 2016, para. 791; ECCC, *Khieu and Nuon*, Case No. 002/19-09-2007-ECCC/TC, Trial Chamber, Case 002/01 Judgment, 7 August 2014, para. 691; ECCC, *Ieng et al.*, Pre-Trial Chamber, Decision on Appeals against the Co-Investigating Judges' Order on Joint Criminal Enterprise (JCE), 20 May 2010, paras 75-89.
69. See Law No. 53-2013, art. 8 (referral of cases by the IVD to the SCC) read in conjunction with art. 17 (temporal jurisdiction of the IVD).
70. See e.g., ICTY, *Prosecutor v. Šainović et al.*, Case No. IT-05-87-A, Appeals Chamber, Judgment, 23 January 2014, para. 1648; ICTY, *Prosecutor v. Stakić*, Case No. IT-97-24-A, Appeals Chamber, Judgment, 22 March 2006, para. 62; ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999, para. 223; ICTY, *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Trial Chamber, Judgment, 10 December 1998, para. 227; STL, Case No. STL-11-01/I, Appeals Chamber, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011, paras 253-256; SCSL, *Prosecutor v. Taylor*, Case No. SCSL-03-01-A, Appeals Chamber, Judgment, 26 September 2013, paras 435, 451.
71. Indeed, article 25(3) of the ICC Statute partly departs from previous practice. For instance, relevant jurisprudence suggests that indirect co-perpetration and aiding and abetting pursuant to article 25(3)(a) and (c) of the ICC Statute, as well as superior liability under article 28 fall outside of customary international law. On indirect co-perpetration see STL, Case No. STL-11-01/I, Appeals Chamber, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011, para. 256. On aiding and abetting see STL, *The Prosecutor v. Ayyash et al.*, Case No. STL-11-01/T/TC, Trial Chamber, Judgment, 18 August 2020, para. 6128. On superior responsibility see SCSL, *Prosecutor v. Sesay et al*. (RUF Case), Case No. SCSL-04-15-T, Trial Chamber,

not modes of liability – that the Rome Statute endeavours to codify the developing state of international law, and was intended to be generally representative of the state of customary international law when the Statute was drafted.[72] Nonetheless, with respect to citizens of non-States Parties upon referral by the UN Security Council, the ICC found necessary to determine "whether and to what extent, at the time of their commission, the conducts charged against [the accused] were criminalised by either [the national law of their country] or as a matter of international customary law",[73] which suggests that the ICC considers that its Statute does not necessarily reflect customary international law.

C. Applicability before the SCC

Article 8 of the 2013 Law states that the SCC are entrusted with adjudicating "cases related to gross violations of human rights, as defined in international conventions ratified by Tunisia and in the provisions of the 2013 Law," committed between 1 July 1955 and the issuance of the Law.[74] Despite the ambiguous reference of article 7 of the 2013 Law to the legislation in force with respect to accountability principles,[75] the reference to international conventions is a clear indication that the SCC are required to apply international law together with domestic law. As described above under Section b-ii of this Chapter, these conventions provide for modes of individual criminal liability under which States Parties have a duty to investigate, prosecute, try and, if found guilty, punish those responsible for the said crimes under international law. Furthermore, as discussed below, SCC judges might rely upon other sources of international law, in particular customary international law, whenever necessary.

As discussed in depth in ICJ Practical Guide 1, in determining the accused's individual criminal liability for gross human rights violations that amount to crimes under international law, the SCC should interpret domestic law, to the extent possible, in a manner consistent with Tunisia's international treaty and customary international law obligations, including with respect to the applicable mode of individual criminal responsibility and the principle of legality.[76] In this regard, as mentioned above, the principle of legality applies to modes of liability, and mandates that the latter be established by either national law or international treaty or customary law, and be sufficiently foreseeable and accessible, at the time the conduct concerned occurred.[77] The principle of legality also requires that criminal law be narrowly construed and that, in case of ambiguity, criminal law be interpreted in favour of the defendant.[78]

As outlined earlier, this principle does not prohibit the gradual clarification of the rules of individual criminal liability through judicial interpretation, including with respect to various modes of individual criminal liability, as long as the developments to which such judicial interpretations may give rise are consistent with the core of the criminal offences concerned, and may have been reasonably foreseen, including in light of international law.[79] Nor does the principle of legality prohibit the retroactive application of national criminal law to conduct (whether by act or omission) that was not proscribed as an offence under national law at the time it was

Judgment, 2 March 2009, paras 48, 305.

72. See ICC, *The Prosecutor v. Abd-Al-Rahman*, Case No. ICC-02/05-01/20 OA8, Appeals Chamber, Judgment on the appeal of Mr Abd-Al-Rahman against the Pre-Trial Chamber II's "Decision on the Defence 'Exception d'incompétence' (ICC-02/05-01/20-302)", 1 November 2021, para. 89: noting "that the statutory crimes are a product of a concerted effort to codify the developing state of international law so as to provide the clarity that was lacking in the preceding international tribunals [and considering] that the crimes under the Statute were intended to be generally representative of the state of customary international law when the Statute was drafted." It should be noted that this finding seems to be limited to crimes, and does not necessarily extend to modes of individual criminal liability.
73. Ibid., paras 86-87.
74. See Law No. 53-2013, art. 8 (referral of cases by the IVD to the SCC) read in conjunction with art. 17 (temporal jurisdiction of the IVD).
75. As mentioned above, article 7 of the 2013 Law limits itself to referencing the legislation in force to be applied by the competent authorities, albeit it is unclear whether this refers to the principles of individual accountability or to the jurisdiction of the said authorities.
76. ICJ, Practical Guide 1, pp. 94, 96.
77. Ibid., pp. 17-25 and, in particular, pp. 26-28.
78. See e.g., Rome Statute, art. 22(2) on the principle of legality. The principle *in dubio pro reo* also stems from the principle of presumption of innocence.
79. Practical Guide 1, p. 26. See also fn. 10 above in Chapter 1.

committed, but was criminalized under international law at that time. Finally, as recalled earlier, the principle of legality is no bar to the application of international law to criminally sanction conduct even where national law did not at that time criminalize such conduct, or did not do so consistently with international law, provided that the requirements of accessibility and foreseeability would have been met at the time when the conduct concerned took place.[80]

Where Tunisian criminal law does not explicitly recognize and codify certain international modes of liability for crimes under international law within the SCC's jurisdiction, and where such gap would be inconsistent with Tunisia's obligations under international treaty or customary law, the SCC will need to decide whether Tunisian law provides authority for the SCC to directly apply definitions of modes of liability set out in treaties or customary international law. In this regard, as discussed in depth in ICJ Practical Guide 1, there was nothing in the 2014 Constitution,[81] nor is there anything at present in the 2022 Constitution, that would preclude domestic courts, including the SCC, from applying such international treaties as well as relevant customary international law directly.[82]

In this context, the fact that customary international law recognized a specific mode of individual criminal responsibility at the time when the relevant crime took place is of special importance. This is the case because: first, as examined in chapter 6 of this Guide, while Tunisia is a party to several international treaties,[83] its domestic legislation does not explicitly, or at all, recognize all the modes of liability in a manner consistent with the way in which international criminal law caters for them; second, unlike treaties, which are binding exclusively on State parties, customary international law is binding on all States, including Tunisia.

In light of the above, and given that Tunisia signed the ICC Statute only in June 2011, whereas the SCC's temporal jurisdiction encompasses crimes that occurred prior to that date,[84] the following chapters focus on definitions of modes of individual criminal liability as recognized in customary international law. Accordingly, particular attention is given to ICTY, ICTR, ECCC, SCSL and STL holdings on modes of individual criminal liability, while reference to ICC decisions on elements of modes of liability is made only where they are consistent with customary international law.[85]

80. Ibid., pp. 18-24. See also pp. 24-26 on the requirements of foreseeability and accessibility, highlighting that a State practice of impunity for crimes did not in itself mean an accused who is eventually prosecuted could not have foreseen that possibility.
81. See 2014 Constitution, art. 20 (now abrogated); 2022 Constitution, art. 74.
82. Practical Guide 1, pp. 10-17, 94.
83. Tunisia is a party to, among others, the UNCAT and the ICPPED. In June 2011, Tunisia also acceded to the ICC Statute. See above Section b-ii of this Chapter.
84. See 2013 Law, art. 8 read in conjunction with arts 17 and 42. Also, according to the information available to the ICJ, the cases which the IVD referred to the SCC include crimes that occurred prior to that date.
85. The authors of this Guide have considered whether provisions on modes of liability of the Rome Statute that are more favourable to the accused than "similar" modes of liability under customary international law should be applied retroactively. They took the view that this would not be possible because the Rome Statute provides modes of liability that are distinct from those that form part of customary international law, and only apply to the crimes under the Statute, and that complement each other to criminalize different forms of participation in a crime under the Statute. Accordingly, while a provision regarding a specific mode of liability may appear more lenient than its supposed "equivalent" in customary international law, it does not mean that the conduct of the accused would not otherwise give rise to criminal liability under another mode of liability under the Statute that does not form part of customary international law. This, in the opinion of the authors, is an impediment to the determination in isolation of whether a specific mode of liability under the ICC Statute is more favourable than a "similar" mode of liability under customary international law.

III. Commission

Commission is a well-established mode of individual criminal liability in international criminal law.

The term "commission" has been interpreted to primarily refer to "direct" and "personal" involvement in a crime. In 1968, in a case against a US Marine accused of rape and murder during the Vietnam War, the US Navy Board of Review stated that a person is liable for individual commission if the evidence indicates that this person directly committed the elements of the crimes for which he/she was convicted.[86] Three decades later, in the *Tadić* case, the ICTY stated that "commission" first and foremost refers to "the physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law".[87]

That said, multiple forms of commission exist under international criminal law, some of which do not necessarily require that the perpetrator commit a physical offence directly, meaning by themselves, personally. The interpretation of the notion of "commission" as encompassing various forms of participation in a crime is directly linked to the specific nature of crimes under international law, as the ICTY explained in the *Tadić* case:

> Most of the times these crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design […] It follows that the moral gravity of such participation is no less – or indeed no different – from that of those actually carrying out the acts in question.[88]

Accordingly, while the ICTY and ICTR Statutes have held a person who "committed" a crime falling within their jurisdiction as criminally liable individually,[89] they have interpreted the term "commission" to encompass also various other forms of participation in a crime,[90] including "direct commission",[91] "commission by omission"[92] and "joint commission".[93]
In light of the above, and given the scope of this Guide,[94] this Chapter focuses on three forms of "commission" as a mode of individual criminal liability under international law, namely, "direct commission", "commission by omission" and "joint criminal enterprise" (JCE – i.e., a form of "joint commission").

A. Direct commission

Direct commission (or perpetration)[95] is a well-established mode of individual criminal liability

86. US Navy Board of Review, *United States v. Potter*, 5 June 1968, cited in Jérôme de Hemptinne, Robert Roth, Elies van Sliedregt, Marjolein Cupido, Manuel J. Ventura and Lachezar Yanev (eds), Modes of Liability in International Criminal Law (2019), p. 20.
87. ICTY, Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999, para. 188. See also ICTY, *Prosecutor v. Delalić et al.* (Čelebići case), Case No. IT-96-21-A, Appeals Chamber, Judgment, 20 February 2001, para. 342.
88. ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999, para. 191.
89. See ICTY Statute, art. 7(1); and ICTR Statute, art. 6(1).
90. ICTY, *Prosecutor v. Tadić,* Case No. IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999, paras 187 -193; ICTR, *Prosecutor v. Gacumbitsi*, Case No. ICTR-01-64-A, Appeals Chamber, Judgment, 7 July 2006, para. 60; ICTR, *Prosecutor v. Seromba*, Case No. ICTR_01-66-A, 12 March 2008, Appeals Chamber, Judgment, para. 171.
91. See Section a of this Chapter.
92. See Section b of this Chapter.
93. See Section c of this Chapter.
94. See Introduction in Chapter 1 and Chapter 2, Section c of this Guide.
95. It is generally agreed that the term "commission" is synonymous with "perpetration". See B.A. Garner (ed.), *Black's Law Dictionary* (3rd pocket ed, 2006) p. 115; W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010), p. 427. The Oxford Law Dictionary does not provide a definition of either word but does define the word "principal" as "the person who actually carries out the crime", see J. Law (ed.), Oxford Dictionary of Law (9th ed, 2018), available at: https://www.oxfordreference.com/view/10.1093/acref/9780198802525.001.0001/acref-9780198802525-e-3015?rskey=fH6t0I&result=1.

in international law,[96] codified as such by the statutes of international criminal tribunals,[97] and considered to reflect customary international law.[98]

Direct commission was among the first recognized mode of liability under international law, alongside complicity and conspiracy.[99] As mentioned above, while the ICTY and the ICTR Statutes codify the term "commission" only,[100] both tribunals have held that such mode of individual criminal responsibility refers primarily to the "direct commission" of a crime.[101] The SCSL,[102] the ECCC[103] and the STL have held as much.[104]

i. Constitutive elements of direct commission

Under international criminal law, direct commission as a mode of individual criminal liability requires two elements. First, the conduct of the individual must cover the material elements of the underlying crime – i.e., the individual has physically acted in a way that fullfilled these elements in person; second, the person must have had the required intent and/or knowledge to commit the crime, unless the specific crime requires a different mental element.[105]

a) Material element (actus reus)

Direct commission concerns primarily physical, individual and "hands-on" perpetration.[106] Accordingly, under the ICTY, ICTR, ECCC and STL jurisprudence, this element entails that:

i. the individual has to be personally and physically involved in the material elements of the crime;[107] or

96. See Jérôme de Hemptinne, Robert Roth, Elies van Sliedregt, Marjolein Cupido, Manuel J. Ventura and Lachezar Yanev (eds), *Modes of Liability in International Criminal Law* (2019), pp. 17-29.
97. ICTY Statute, art. 7(1); ICTR Statute, art. 6(1); SCSL Statute, art. 6(1); STL Statute, art. 3(1)(a); ICC Statute, art. 25(3)(a).
98. See e.g., ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-T, Trial Chamber, Judgment, 7 May 1997, paras 663-669, in particular para. 669; ICTY, *Prosecutor v. Delalić et al.* (Čelebići case), Case No. IT-96-21-T, Trial Chamber, Judgment, 16 November 1998, paras 319-321; ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Chamber Judgment, 2 September 1998, paras 471-474; ICTR, *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Trial Chamber, Judgment, 21 May 1999, para. 195; SCSL, *Prosecutor v. Brima et al.* (AFRC case), Case No. SCSL-2004-16-T, Trial Chamber, Judgment, 20 June 2007, paras 761-762. See also Antonio Cassese, Guido Acquaviva, Mary Fan and Alex A. Whiting, *International Criminal Law: Cases and Commentary* (2011) para. 524.
99. Elies van Sliedregt, *Individual Criminal Responsibility in International Criminal Law* (2012), p. 63.
100. ICTY Statute, art. 7(1); ICTR Statute, art. 6(1).
101. See e.g., ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999, para. 188; ICTY, *Prosecutor v. Stakić*, Case No. IT-97-24-T, 31 July 2003, paras 438-439; ICTY, *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Trial Chamber, Judgment, 30 November 2005, para. 509; ICTY, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84bis-T, Trial Chamber, Retrial Judgment, 29 November 2012, para. 615; ICTR, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Trial Chamber, Judgment, 1 December 2003, para. 764; ICTR, *Prosecutor v. Gacumbitsi*, Case No. ICTR-01-64-A, Appeals Chamber, Judgment, 7 July 2006, para. 60; ICTR, *Prosecutor v. Renzaho*, Case No. ICTR-97-31-T, Trial Chamber, Judgment, 14 July 2009, para. 739.
102. See e.g., SCSL, *Prosecutor v. Sesay et al.* (RUF case), Case No. SCSL-04-15-T, Trial Chamber, Judgment, 2 March 2009, para. 249.
103. See e.g., ECCC, *Kaing* alias *Duch*, Case No. 001/18-07-2007/ECCC/TC, Trial Chamber, Judgment, 26 July 2010, paras 479-480.
104. STL, Appeals Chamber, Case No. STL-11-01/1/I/AC/R176bis, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy Homicide, Perpetration, Cumulative Charging, 16 February 2011, para. 216.
105. See Jérôme de Hemptinne, Robert Roth, Elies van Sliedregt, Marjolein Cupido, Manuel J. Ventura and Lachezar Yanev (eds), *Modes of Liability in International Criminal Law* (2019), pp. 23-25. See also e.g., ICTY, *Prosecutor v. Krstić*, Case No. IT-98-33-T, Trial Chamber, Judgment, 2 August 2001, para. 601; ICTY, *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Trial Chamber, Judgment, 30 November 2005, para. 509; STL, Case No. STL-11-01/1/I/AC/R176bis, Appeals Chamber, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy Homicide, Perpetration, Cumulative Charging, 16 February 2011, para. 216; ECCC, *Kaing* alias *Duch*, Case No. 001/18-07-2007/ECCC/TC, Trial Chamber, Judgment, 26 July 2010, paras 479-482
106. ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999, para. 188; ICTR, *Prosecutor v. Seromba*, Case No. ICTR-01-66-A, Appeals Chamber, Judgment, 12 March 2008, para. 161; STL, Case No. STL-11-01/1/I/AC/R176bis, Appeals Chamber, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy Homicide, Perpetration, Cumulative Charging, 16 February 2011, para. 216.
107. ICTY, *Prosecutor v. Kordić*, Case No. IT-95-14/2-T, Trial Chamber, Judgment, 26 February 2001, para. 376; ICTY, *Prosecutor v. Krstić*, Case No. IT-98-33-T, Trial Chamber, Judgment, 2 August 2001, para. 601; ICTY, *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Trial Chamber, Judgment, 30 November 2005, para. 509; ECCC, *Kaing* alias

ii. the direct perpetrator is physically performing the criminal conduct.[108]

The ICTY jurisprudence did not specify whether direct commission requires the fulfillment of all the elements of the crime.[109] For example, in the *Limaj* case, the ICTY convicted the accused as the direct perpetrator who committed the crime of murder, regardless of whether he or she personally physically fired the fatal bullet in each case.[110] Similarly, in the *Gacumbitsi* case, the ICTR held that "direct and physical perpetration need not mean physical killing; other acts can constitute direct participation in the *actus reus* of the crime.[111]

This approach was however challenged in the *Seromba* case, where the ICTR noted that this requirement applies to the general notion of "commission", and not to "direct perpetration" specifically.[112] Accordingly, in that specific case, the Appeals Chamber stated that an individual can be held responsible as a principal perpetrator even he/she is not the direct perpetrator. [113]

b) Mental element (mens rea)

International criminal law generally requires intent and/or knowledge as the mental element for direct commission.[114]

The ICTY and the ICTR have held that the mental element required for direct commission is that the accused acted with intent to commit the crime, or possessed the awareness of the substantial likelihood that the crime would occur as a consequence of his/her conduct.[115] The same standard has been confirmed by the SCSL[116] and the ECCC jurisprudence.[117]

B. Omission

Omission (or commission by omission)[118] is a long-established mode of individual criminal responsibility in international criminal law,[119] albeit some academics would debate its status

Duch, Case No. 001/18-07-2007/ECCC/TC, Trial Chamber, Judgment, 26 July 2010, para. 480.

108. ICTY, *Prosecutor v. Lukić and Lukić,* Case No. IT-98-32/1-T, Trial Chamber, Judgment, 20 July 2009, para. 899; STL, Case No. STL-11-01/1/I/AC/R176bis, Appeals Chamber, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy Homicide, Perpetration, Cumulative Charging, 16 February 2011, para. 216.
109. ICTY, *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-T, Trial Chamber, Judgment, 20 July 2009, para. 899; ICTY, *Prosecutor v. Lukić and Lukić*, Appeals Chamber, Judgment, Case No. IT-98-32/1-A, 4 December 2012, para. 162.
110. ICTY, *Prosecutor v. Limaj et al.*, Case No. IT-03-66-A, Appeals Chamber, Judgment, 27 September 2007, paras 47–50.
111. ICTR, *Prosecutor v. Gacumbitsi*, Case No. ICTR-01-64-A, Appeals Chamber, Judgment, 7 July 2006, para. 60.
112. ICTR, *Prosecutor v. Seromba*, Case No. ICTR-01-66-A, Appeals Chamber, Judgment, 12 March 2008, para. 161.
113. Ibid. Hence, this interpretation seems to entail that direct commission under article 6(1) of the ICTR Statute requires the perpetrator to fulfil all the elements of the crime, as required by article 25(3) of the ICC Statute, while there are other forms of commission for those who do not meet such requirement. See Jérôme de Hemptinne, Robert Roth, Elies van Sliedregt, Marjolein Cupido, Manuel J. Ventura and Lachezar Yanev (eds), *Modes of Liability in International Criminal Law* (2019), p. 26.
114. See Jérôme de Hemptinne, Robert Roth, Elies van Sliedregt, Marjolein Cupido, Manuel J. Ventura and Lachezar Yanev (eds), *Modes of Liability in International Criminal Law* (2019), p. 25.
115. ICTY, *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Trial Chamber, Judgment, 30 November 2005, para. 509; ICTY, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-T, Trial Chamber, Judgment, 26 February 2001, para. 375; *ICTY, Prosecutor v. Tolimir*, Case No. IT-05-88/02-T, Trial Chamber, Judgment, 12 December 2012, para. 884; ICTR, *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-A, Appeals Chamber, Judgment, 1 June 2001, para. 187.
116. SCSL, *Prosecutor v. Sesay et al.* (RUF case), Case No. SCSL-04-15-T, Trial Chamber, Judgment, 2 March 2009, para. 250.
117. ECCC, *Kaing* alias *Duch*, Case No. 001/18-07-2007/ECCC/TC, Trial Chamber, Judgment, 26 July 2010, para. 481.
118. See e.g., ICTY, *Prosecutor v. Stakić*, Case No. IT-97-24-T, Trial Chamber, Judgment, 31 July 2003, para. 439, where the Tribunal identified "commission by omission" as a distinct mode of individual criminal responsibility, as follows: "The Trial Chamber prefers to define "committing" as meaning that the accused participated, physically or otherwise directly or indirectly, in the material elements of the crime charged through positive acts or, *based on a duty to act, omissions*, whether individually or jointly with others." [*emphasis* added].
119. See Jérôme de Hemptinne, Robert Roth, Elies van Sliedregt, Marjolein Cupido, Manuel J. Ventura and Lachezar Yanev (eds), *Modes of Liability in International Criminal Law* (2019), pp. 59-60.

under customary international law.[120] Several convictions in the aftermath of the Second World War were based on the accused's failure to act. While in some cases, the legal bases of this mode of individual criminal liability were broadly cast,[121] and indictment and judgments did not clearly distinguish between action and omission,[122] in other cases the guilty verdict was based solely on breaches of a duty to act.[123] These decisions relied generally on duties derived from laws of war applicable at the time[124] or on relevant domestic law.[125] Commission by omission has subsequently been upheld by the ICTY and the ICTR, despite their Statutes not explicitly providing a legal basis for it. [126]

Under international criminal law, omission is generally defined as a mode of individual criminal responsibility based on a failure to perform a legal duty[127] (as opposed to a moral duty) when the perpetrator had the ability to act according to this legal duty. A genuine or "proper omission" exists when a legal provision based in criminal law explicitly imposes a duty on the accused to act in a concrete situation and they fail to do so.[128]

120. Some scholars, based on the tribunals' jurisprudence, have argued in the affirmative. See R. Cryer, "General Principles of Liability" in D. McGoldrick, P. Rowe and E. Donnelly (eds.), *The Permanent International Criminal Court: Legal and Policy Issues* (Oxford: Hart, 2004), p. 240; and A. Pellet, "Applicable Law" in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), Vol.II, p. 1057; Jérôme de Hemptinne, Robert Roth, Elies van Sliedregt, Marjolein Cupido, Manuel J. Ventura and Lachezar Yanev (eds), *Modes of Liability in International Criminal Law* (2019), p. 79. Others have argued the opposite. See F. Jeßberger, "Omission", in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009), p. 446; K. Ambos, *Treaties on International Criminal Law – Volume I: Foundations and General Part* (Oxford: Oxford University Press, 2013), pp. 193–194. For a discussion on the status of omission under international law, see also: Michael Duttwiler, "Liability for Omission in International Criminal Law", 6 *International Criminal Law Review* (2006).
121. See M.S. Grimminger, *Die Allgemaine Unterlassungshaftung im Völkerstrafrecht* (Frankfurt/M: Peter Lang, 2009), at 134–136. Article II(2)(c) of Control Council Law No. 10, which was adopted to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the Nuremberg International Military Tribunal, presented a special form of omission liability: the notion of 'taking a consenting part in' the commission of a crime. See Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, December 20, 1945, 3 *Official Gazette Control Council for Germany* 50-55 (1946). This term 'specifically includes persons who have taken a consenting part in war crimes, as, for example, a superior officer who has failed to take action to prevent a war crime when he had knowledge of its contemplated commission and was in a position to prevent it' (Draft Directive to the US (UK) (USSR) Commander in Chief, Apprehension and Detention of War Criminals, 21 October 1944, Art. 3(b)), cited in Jérôme de Hemptinne, Robert Roth, Elies van Sliedregt, Marjolein Cupido, Manuel J. Ventura and Lachezar Yanev (eds), *Modes of Liability in International Criminal Law* (2019), p. 59.
122. See M.S. Grimminger, *Die Allgemaine Unterlassungshaftung im Völkerstrafrecht* (Frankfurt/M: Peter Lang, 2009), at 132–162; and M. Duttwiler, "Liability for Omission in International Criminal Law", 6 *International Criminal Law Review* (2006), pp.17-25.
123. See Jérôme de Hemptinne, Robert Roth, Elies van Sliedregt, Marjolein Cupido, Manuel J. Ventura and Lachezar Yanev (eds), *Modes of Liability in International Criminal Law* (2019), p. 59.
124. On the duties incumbent to the detaining power, see Trial of Erich Heyer and Six Others ('The Essen Lynching Case'), British Military Court (Essen), 22 December 1945, in United Nations War Crimes Commission (UNWCC), Law Reports of Trials of War Criminals (London: HMSO, 1947–1949), Vol. I, at 88, cited by M. Duttwiler, "Liability for Omission in International Criminal Law", *6 International Criminal Law Review* (2006), pp. 21–22; or the laws on maritime warfare, see United Kingdom, Military Court in Hamburg, Trial of Helmuth von Ruchteschell, 1947, 13 Annual Digest and Reports of Public International Law Cases 247, cited by M. Duttwiler, "Liability for Omission in International Criminal Law", 6 *International Criminal Law Review* (2006), p. 22.
125. See Sch. et al., Supreme Court of the British Zone in Criminal Matters, 20 April 1949, in Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Strafsachen, Vol. II (Leipzig: Walter de Gruyter, 1949), p. 11; cited by M. Duttwiler, "Liability for Omission in International Criminal Law", 6 *International Criminal Law Review* (2006), p. 22.
126. ICTY, art. 6(1), ICTR, art. 7(1). See also ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999, para. 188; ICTY, *Prosecutor v. Blaskić*, Case No. IT-95-14-A, Appeals Chamber, Judgment, 29 July 2004, para. 663; ICTY, *Prosecutor v. Galić*, Case No. IT-98-29-A, Appeals Chamber, Judgment, 30 November 2006, para. 169; ICTR, *Prosecutor v. Ntagerura et al* (Cyangugu), Case No. ICTR-99-46-A, Appeals Chamber, Judgment, 7 July 2006, para. 334.
127. See e.g., ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999, para. 188; ICTY, *Prosecutor v. Galić*, Case No. IT-98-29-A, Appeals Chamber, Judgment, 30 November 2006, para. 169; ICTR, *Prosecutor v. Ntagerura et al* (Cyangugu), Case No. ICTR-99-46-A, Appeals Chamber, Judgment, para. 334. See also Jérôme de Hemptinne, Robert Roth, Elies van Sliedregt, Marjolein Cupido, Manuel J. Ventura and Lachezar Yanev (eds), *Modes of Liability in International Criminal Law* (2019), pp. 58-82.
128. The first part of art. 8(2)(b)(xxv) of the ICC Statute (starvation of civilians) and art. 118(4)(b) of Geneva

In international criminal law, only a few underlying offences can be said to be "proper omissions".[129] Examples of "proper omissions" include individual criminal responsibility in the context of war crimes such as "starvation", under article 8(2)(b)(xxv) of the ICC Statute, or "wilfully depriving a protected person of the right to a fair trial", under article 8(2)(a)(vi) of the ICC Statute, since the criminal conduct seems to clearly presume a form of inaction. [130]

While it is evident that under international criminal law only a few crimes may be perpetrated by omission properly so-called, individual criminal responsibility for commission by omission is applicable to other crimes under international law, including to certain crimes against humanity. This has been confirmed in international jurisprudence. For instance, the ICTY and the ICTR referred to omission as a form of individual criminal responsibility in the context of the underlying offences of murder,[131] imprisonment,[132] torture[133] and inhuman act.[134]

i. Constitutive elements of omission

a) Material element (actus reus)

The ICTY and the ICTR have both held that in order to find an accused criminally responsible for commission by omission:

i. the accused must have had a duty to act mandated by criminal law;
ii. the accused must have had the ability to act;
iii. the accused failed to act intending the criminally sanctioned consequences or with awareness and consent that the consequences would occur; and
iv. the failure to act resulted in the commission of the crime.[135]

Convention III (unjustifiable delay in the repatriation of prisoners of war) are the most agreed-upon examples of proper omissions. See Jérôme de Hemptinne, Robert Roth, Elies van Sliedregt, Marjolein Cupido, Manuel J. Ventura and Lachezar Yanev (eds), *Modes of Liability in International Criminal Law* (2019), pp. 61-62; Michael Duttwiler, "Liability for Omission in International Criminal Law", 6 *International Criminal Law Review* (2006), p. 4.

129. Michael Duttwiler, "Liability for Omission in International Criminal Law", 6 *International Criminal Law Review* (2006), p. 8.
130. Michael Duttwiler, "Liability for Omission in International Criminal Law", 6 *International Criminal Law Review* (2006), pp. 9-11.
131. See e.g., ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Chamber, Judgment, 2 September 1998, para. 589; ICTR, *Prosecutor v. Kayeshema et al.*, Case No. ICTR-95-I-T, Trial Chamber, Judgment, 21 May 1999, para. 140; ICTR, *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Trial Chamber, Judgment, 6 December 1999, para. 80; ICTY, *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, Trial Chamber, Judgment, 14 January 2000, para. 560; ICTY, *Prosecutor v. Kordić and Cerkez*, Case No. IT-95-14/2-T, Trial Chamber, Judgment, 26 February 2001, para. 236; ICTY, *Prosecutor v. Krstić*, Case No. IT-98-33-T, Trial Chamber, Judgment, 2 August 2001, para. 485; ICTY, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-T, Trial Chamber, Judgment, 2 November 2001, para. 132; ICTY, *Prosecutor v. Krnojelac* (Foča case), Case No. IT-97-25-T, Trial Chamber, Judgment, 15 March 2002, para. 324; ICTY, *Prosecutor v. Vasiljević*, Case No. IT-98-32-T, Trial Chamber, Judgment, 29 November 2002, para. 205; ICTY, *Prosecutor v. Galić*, Case No. IT-98-29-T, Trial Chamber, Judgment, 5 December 2003, para. 150; ICTY, *Prosecutor v. Nikolić*, Case No. IT-94-2-S, Trial Chamber, Sentencing Judgment, 18 December 2003, para. 112.
132. See e.g., ICTY, *Prosecutor v. Krnojelac* (Foča case), Case No. IT-97-25-T, Trial Chamber, Judgment, 15 March 2002, para. 115; ICTY, *Prosecutor v. Simić et al.*, Case No. IT-95-9-T, Trial Chamber, Judgment, 17 October 2003, para. 64.
133. ICTY, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-T, Trial Chamber, Judgment, 2 November 2001, para. 141; ICTY, *Prosecutor v. Krnojelac* (Foča case), Case No. IT-97-25-T, Trial Chamber, Judgment, 15 March 2002, para. 179; ICTY, *Prosecutor v. Stakić*, Case No. IT-97-24-T, Trial Chamber, Judgment, 31 July 2003, para. 750; ICTY, *Prosecutor v. Simić*, Case No. IT-95-9/2-S, Trial Chamber, Sentencing Judgment, 17 October 2002, para. 34; ICTY, *Prosecutor v. Simić et al.*, Case No. IT-95-9-T, Trial Chamber, Judgment, 17 October 2003, para. 79; ICTY, *Prosecutor v. Nikolić*, Case No. IT-94-2-S, Trial Chamber, Sentencing Judgment, 18 December 2003, para. 114.
134. ICTR, *Prosecutor v. Kayeshema et al.*, Case No. ICTR-95-I-T, Trial Chamber, Judgment, 21 May 1999, para. 151; ICTR, *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Trial Chamber, Judgment, 27 January 2000, para. 232; ICTY, *Prosecutor v. Blaskić*, Case No. IT-95-14-T, Trial Chamber, Judgment, 3 March 2000, para. 240; ICTY, *Prosecutor v. Krnojelac* (Foča case), Case No. IT-97-25-T, Trial Chamber, Judgment, 15 March 2002, para. 130; ICTY, *Prosecutor v. Vasiljević*, Case No. IT-98-32-T, Trial Chamber, Judgment, 29 November 2002, para. 234; ICTY, *Prosecutor v. Galić*, Case No. IT-98-29-T, Trial Chamber, Judgment, 5 December 2003, para. 152.
135. ICTR, *Prosecutor v. Ntagerura et al.*, Case No. ICTR-99-46-T, Trial Chamber, Judgment, 25 February 2004, para. 659. See also ICTR, *Prosecutor v. Zigiranyirazo*, Case No. ICTR-01-73-T, Trial Chamber, Judgment, 18

While both the ICTY and the ICTR have held that the duty to act must stem from a rule of criminal law, subsequent cases before both Tribunals have partly challenged this holding.[136] For instance, in the *Mrkšić* case, the ICTY adopted a broader approach (in respect to aiding and abetting by omission), ascribing the duty to act to the laws and customs of war, noting that the breach of a duty to act imposed by the laws and customs of war gave rise to individual criminal responsibility, and holding that it was therefore unnecessary to consider whether such a duty "must stem from a rule of criminal law".[137] Moreover, in the *Niyiramasuhuko et al* case, the ICTR left the question open as to whether the legal duty to act must necessarily be prescribed by a criminal law provision, by stating that "[t]he question whether the legal duty to act must derive from a rule entailing individual criminal responsibility has never been examined in the jurisprudence of the Tribunal and the ICTY."[138] In this regard, there are also some precedents affirming that, in omission cases, the legal duty to act may stem from other sources than criminal law. For example, in the *Roechling* case in 1948, the General Tribunal of the Military Government of the French Occupation Zone in Germany relied on obligations under private law to assert the existence of a legal duty on the accused to act.[139]

International jurisprudence has also held that the second requirement – i.e., that the accused must have had the "ability to act" – means that there must be a concrete possibility for such individual to influence the course of the events. Indeed, numerous post-World War II judgments confirmed this understanding.[140] In this respect, in the *Aleksovski* case, the ICTY partially acquitted the accused as he had not "deliberately ordered or allowed these poor detention conditions to arise",[141] and even if the accused had reported the situation to the judicial authorities or had resigned, the situation would not have changed "or would have worsened for the detainees themselves."[142]

December 2008, para. 386, fn. 740, referring to *inter alia*, ICTY jurisprudence.

136. This issue was left open in ICTR, *Prosecutor v. Ntagerura et al.*, Appeals Chamber, Judgment, ICTR-99-46-A, 7 July 2006, paras 334–335; ICTY, *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeals Chamber, Judgment, 29 July 2004, para. 663. See also Jérôme de Hemptinne, Robert Roth, Elies van Sliedregt, Marjolein Cupido, Manuel J. Ventura and Lachezar Yanev (eds), *Modes of Liability in International Criminal Law* (2019), pp. 70-71.
137. ICTY, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-T, Trial Chamber, Judgment, 27 September 2007, para. 668; ICTY, *Prosecutor v. Mrkšić and Šljivančan*, Case No. IT-95-13/1-A, Appeals Chamber, Judgment, 5 May 2009, para. 151: "The Appeals Chamber recalls that it has previously recognised that the breach of a duty to act imposed by the laws and customs of war gives rise to individual criminal responsibility. The Appeals Chamber further recalls that Šljivančanin's duty to protect the prisoners of war was imposed by the laws and customs of war. Thus, the Appeals Chamber considers that Šljivančanin's breach of such duty gives rise to his individual criminal responsibility. Therefore, it is not necessary for the Appeals Chamber to further address whether the duty to act, which forms part of the basis of aiding and abetting by omission, must stem from a rule of criminal law." See also ICTY, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Trial Chamber, Judgment, 26 February 2009, Vol. 1, para. 90, fn. 113.
138. ICTR, *Prosecutor v. Nyiramasuhuko et al*, Case No. ICTR-98-42-A, Appeals Chamber, Judgment, 14 December 2015, para. 2194. The Chamber further stated that "[n]onetheless, the Appeals Chamber finds it unnecessary to make a determination on this issue in the present case as the Trial Chamber found that Nsabimana's duty to act stemmed notably from Rwandan criminal law". Notably, in the same case, the Trial Chamber had previously held that the legal duty to act by a person in a position of authority may arise not only from criminal law, but from the general obligations flowing from the Geneva Conventions, see ICTR, *Prosecutor v. Nyiramasuhuko et al*, Case No. ICTR-98-42-T, Trial Chamber, Judgment and Sentence, 24 June 2011, para. 5899. The ICTR however declined to consider *proprio motu* the correctness of this legal statement in light of the Trial Chamber's reliance on the Rwandan Penal Code at the appeals stage, see ICTR, *Prosecutor v. Nyiramasuhuko et al*, Case No. ICTR-98-42-A, Appeals Chamber, Judgment, 14 December 2015, para. 2194, footnote 5102.
139. See e.g., *Case v. Hermann Roechling and others*, General Tribunal of the Military Government of the French Occupation Zone in Germany, 30 June 1948, in TWC (Blue Series), Vol. XIV, at 1075–1143, where the Tribunal relied on a contractual obligation to protect the well-being of workers employed in the accused's plants. See also Jérôme de Hemptinne, Robert Roth, Elies van Sliedregt, Marjolein Cupido, Manuel J. Ventura and Lachezar Yanev (eds), *Modes of Liability in International Criminal Law* (2019), p. 72; and F. Noto, Secondary Liability in International Criminal Law (Zurich/St Gallen: Dike, 2013), p. 196 and fn. 1095.
140. See e.g., *United States of America v. Pohl et al.* ('The Pohl Case'), Case No. 4, Military Tribunal II (Nuremberg), 3 November 1947, TWC (Green Series), Vol. V, p. 1002; *United States of America v. Milch* ('The Milch Case'), Case No. 2, Military Tribunal II (Nuremberg), 16 April 1947, TWC (Green Series), Vol. II, pp. 774 ss; *United States of America v. Flick* ('The Flick Case'), Case No. 5, Military Tribunal IV (Nuremberg), 22 December 1947, TWC (Green Series), Vol. VI, pp. 1196 ss.
141. ICTY, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-T, Trial Chamber, Judgment, 25 June 1999, paras 215, 221.
142. ICTY, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-T, Trial Chamber, Judgment, 25 June 1999, para. 216;

b) Mental element (mens rea)

With regard to the mental element, commission by omission requires the same element as direct commission. Accordingly, the required mental element solely depends on the specific crime the person is accused of. [143]

C. Joint criminal enterprise (joint commission)

Joint criminal enterprise (JCE) is a form of joint commission that applies in cases where a plurality of individuals share a common criminal purpose and coordinate efforts to commit its underlying crime.[144] Under this mode of individual criminal liability, the commission of the underlying concerted crime is required for the accused to be held responsible.[145]

The origins of JCE in international criminal law can be traced back to World War II. The Yalta Memorandum – one of the earliest documents describing a form of individual criminal responsibility akin to the modern JCE *doctrine* – proposed, *inter alia*, the notion of "joint participation in a broad criminal enterprise", and defined it as follows:

> firmly founded upon the rule of liability, common to all penal systems and included in the general doctrines of the laws of war, that those who participate in the formulation and execution of a criminal plan involving multiple crimes are jointly liable for each of the offenses committed and jointly responsible for the acts of each other.[146]

Liability of persons "participating in the formulation or execution of a common plan" was also included in the Charters of both the Nuremberg[147] and the Tokyo[148] Tribunals. Similarly,

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ICTY, *Prosecutor v. Strugar*, Case No. IT-01-42-T, Trial Chamber, Judgment, 31 January 2005, para. 355. See also Jérôme de Hemptinne, Robert Roth, Elies van Sliedregt, Marjolein Cupido, Manuel J. Ventura and Lachezar Yanev (eds), *Modes of Liability in International Criminal Law* (2019), p. 77, where the author draws a parallel with the case law on which Judge Cassese elaborated in his dissenting opinion in ICTY, *Prosecutor v. Erdemović*, Case No. IT-96-22-A, Appeals Chamber, Judgment, 7 October 1997, at para. 35: in the Masetti case, an Italian court held that: '[T]he possible sacrifice [of their lives] by Masetti [the accused] and his men [the members of the execution platoon] would have been in any case to no avail and without any effect... in that it would have had no impact whatsoever on the plight of the [two] persons to be shot, who would have been executed anyway even without him [the accused]' (original square brackets; emphasis omitted). Translation by Judge Cassese of the Decision of the Court of Assize of L'Aquila of 15 June 1948 (unpublished).

143. See Jérôme de Hemptinne, Robert Roth, Elies van Sliedregt, Marjolein Cupido, Manuel J. Ventura and Lachezar Yanev (eds), *Modes of Liability in International Criminal Law* (2019), p. 69.
144. See ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999, paras 187–188; ICTY, *Prosecutor v. Milutinović et al.*, Case No. IT-99-37-AR72, Appeals Chamber, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003, paras 20, 31; ICTY, *Prosecutor v. Tolimir*, Case No. IT-05-88/2-A, Appeals Chamber, Judgment, 8 April 2015, para. 281; ICTR, *Prosecutor v. Munyakazi*, Case No. ICTR-97-36A-A, Appeals Chamber, Judgment, 28 September 2011, para. 163; ICTR, *Prosecutor v. Gatete,* Case No. ICTR-00- 61-A, Appeals Chamber, Judgment, 9 October 2012, para. 263. See also Jérôme de Hemptinne, Robert Roth, Elies van Sliedregt, Marjolein Cupido, Manuel J. Ventura and Lachezar Yanev (eds), *Modes of Liability in International Criminal Law* (2019), pp. 121-170.
145. ICTY, *Prosecutor v. Milutinović et al.*, Case No. IT-99-37-AR72, Appeals Chamber, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003, para. 23; ICTR, *Prosecutor v. Gatete,* Case No. ICTR-00-61-A, Appeals Chamber, Judgment, 9 October 2012, para. 239; ICTY, *Prosecutor v. Tolimir,* Case No. IT-05-88/2-A, Appeals Chamber, Judgment, 8 April 2015, para. 590.
146. The Yalta Memorandum, also known as the Crimean proposal, was prepared by the US Attorney General and the Secretaries of State and War, and was sent to President Roosevelt, recommending a strategy to be proposed to the European Allies for prosecuting Nazi war criminals. See *Memorandum for the President, Subject: Trial and Punishment of Nazi War Criminals,* 22 January 1945, reprinted in B. Smith, *The American Road to Nuremberg: The Documentary Record,* 1944–1945 (Stanford, CA: Hoover Institution, 1982), p. 120. This form of liability was also reproduced in a subsequent memorandum distributed at the Allies' conference in San Francisco, a few months before the London negotiations on the Nuremberg Charter. See, Memorandum of Proposals for the Prosecution and Punishment of Certain War Criminals and Other Offenders, 25–30 April 1945, also reprinted in B. Smith, *The American Road to Nuremberg: The Documentary Record,* 1944–1945 (Stanford, CA: Hoover Institution, 1982), pp. 165–166.
147. IMT Statute, art. 6. See also ICTR, *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44-AR72.4, Appeals Chamber, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, 22 October 2004, para. 23; ECCC, *Ieng*, et al., Case No. 002/19-09-2007-ECCC/OCIJ, Pre-Trial Chamber, Decision on the Appeals against the Co-investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, para. 57.
148. See IMTFE Statute, art. 5.

Control Council Law No. 10, which was adopted to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the IMT, established individual criminal responsibility of persons "connected with plans or enterprises" that involved the commission of an international crime.[149] The Nuremberg Tribunal further recognized the notion of "responsibility of persons participating in a common plan" as a separate mode of individual criminal liability distinct from the crime of conspiracy to commit crimes against peace.[150] This finding was afterward reiterated by the US Military Tribunals in Nuremberg[151] and the Tokyo[152] Tribunal in many cases. Further, the concept of "common criminal plan" was included in the Nuremberg Principles, which were subsequently drafted by the International Law Commission to codify the legal principles underlying the Nazi trials.[153]

Notwithstanding its notable presence in post-World War II legal documents and jurisprudence, the so-called "common plan/purpose/design" liability was not expressly included in the Statutes of the ICTY, the ICTR or of other Tribunals. While the ICC Statute includes a form of common purpose liability, the ICC has found that it was distinct from the JCE doctrine.[154]

The modern JCE doctrine of individual criminal liability was first formulated by the ICTY.[155] In the *Tadić* case, JCE was introduced as a theory of co-perpetration, pursuant to an interpretation of the Statute drawn from customary international law, that applies when:

> several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons. 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.[156]

Since then, both the ICTY and the ICTR have consistently held that "[t]he word "committed" referred to in article 7(1) [ICTY Statute/article 6(1) ICTR Statute] also includes a form of co-perpetration called Joint Criminal Enterprise".[157] Accordingly, JCE has been widely applied in

149. Control Council Law No. 10, op. cit., art. II(2)(d). See also ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36-A, Appeals Chamber, Judgment, 3 April 2007, paras 393–395; ICTR, *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44-AR72.4, Appeals Chamber, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, 22 October 2004, paras 18–20; ECCC, Ieng et al., Case No. 002/19-09-2007-ECCC/OCIJ, Pre-Trial Chamber, Decision on the Appeals against the Co-investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, para. 57.

150. IMT, *United States of America et al. v. Göring et al*., 1 October 1946, TWC (Blue Series), Vol. I, p. 226. See also ICTY, *Prosecutor v. Đorđević*, Case No. IT-05-87/1-A, Appeals Chamber, Judgment, 27 January 2014, para. 34.

151. *United States of America v. Brandt et al.* ('The Medical Case'), Case No. 1, Military Tribunal I (Nuremberg), 19 August 1947, TWC (Green Series), Vol. II, p. 122; *United States of America v. Altstötter et al.* ('The Justice Case'), Case No. 3, Military Tribunal III (Nuremberg), 3–4 December 1947, TWC (Green Series), Vol. III, p. 955; *United States of America v. Pohl et al.* ('The Pohl Case'), Case No. 4, Military Tribunal II (Nuremberg), 3 November 1947, TWC (Green Series), Vol. V, p. 961.

152. IMTFE, *United States of America et al. v. Araki et al.*, 4 November 1948.

153. ILC, Report of the International Law Commission Covering Its Second Session, 5 June–29 July 1950, UN Doc.A/1316, Yearbook of the International Law Commission (1950), Vol. II, pp. 377–378, paras 125–126.

154. See article 25(3)(d) of the ICC Statute, which establishes criminal responsibility for those who contribute to "a group of persons acting with a common purpose". A similar concept is listed in article 2(3)(c) of the International Convention for the Suppression of Terrorist Bombings of 15 December 1997 (UNGA, A/RES/52/164), which served as a model for article 25(3)(d) of the Rome Statute although the two provisions are not identical. However, article 25(3)(d) of the ICC Statute should be interpreted as providing for a mode of liability distinct from JCE. See ICC, *Prosecutor v. Katanga,* Case No. ICC-01/04-01/07-3436-tENG, Trial Chamber II, Judgment, 7 March 2014, para. 1619; ICC, *Prosecutor v. Mbarushimana*, Case No. ICC-01/04-01/10-465-Red, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 16 December 2011, para. 282.

155. ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999, paras 185–229.

156. ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999, para. 190. As such, JCE has been defined as *a suis generis* form of individual criminal responsibility that mixes elements from various common purpose doctrines pertaining to either the common and civil law traditions, although the major legal systems in the world do not take the same approach to this notion. See ibid., paras 224-225. See Jérôme de Hemptinne, Robert Roth, Elies van Sliedregt, Marjolein Cupido, Manuel J. Ventura and Lachezar Yanev (eds), *Modes of Liability in International Criminal Law* (2019), p. 127.

157. ICTY, *Prosecutor v. Tolimir*, Case No. IT-05-88/2-T, Trial Chamber, Judgment, 12 December 2012, para. 885. See also, *Prosecutor v. Milutinović et al.*, Case No. IT-99-37-AR72, Appeals Chamber, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003, para. 20; ICTY,

the case law of both the ICTY[158] and the ICTR,[159] and it was subsequently also adopted by the SCSL,[160] the ECCC,[161] and the STL.[162]

The case-law applying the JCE doctrine has spawned three categories, commonly known as the "basic" (JCE I), the "systemic" (JCE II) and the "extended" (JCE III) form of JCE.[163] The "basic" variant of JCE (JCE I) concerns instances where all participants in the common criminal plan share the same intent to commit the underlying crime.[164] The second form of JCE, the "systemic" JCE (JCE II) concerns cases where the common criminal plan is 'institutionalized', meaning that it takes place in "a system of ill-treatment" (e.g., a concentration camp, or a detention facility).[165] In contrast to the first two forms of JCE, the third, "extended" JCE (JCE III), is used to ascribe criminal liability for incidental, excess crimes of a common criminal plan that, although not an agreed part of it, were a natural and foreseeable consequence of the plan'sexecution.[166]

As mentioned above, the first and second forms of JCE are generally considered to reflect

Prosecutor v. Vasiljević, Case No. IT-98-32-A, Appeals Chamber, Judgment, 25 February 2004, para. 102; ICTY, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Appeals Chamber, Judgment, 28 February 2005, paras 79–80; ICTR, *Prosecutor v. Ntakirutimana and Ntakirutimana*, Case No. ICTR-96-10-A and ICTR-96-17-A, Appeals Chamber, Judgment, 13 December 2004, para. 462; ICTR, *Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-A, Appeals Chamber, Judgment, 7 July 2006, para. 158; ICTR, *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Trial Chamber, Judgment, 30 September 2011, para. 1906; ICTR, *Prosecutor v. Karemera and Ngirumpatse*, Case No. ICTR-98-44-T, Trial Chamber, Judgment, 2 February 2012, para. 1433.

158. See e.g., ICTY, *Prosecutor v. Kvočka et al*., Case No. IT-98-30/1-A, Appeals Chamber, Judgment, 28 February 2005, paras 79–119; ICTY, *Prosecutor v. Stakić*, Case No. IT-97-24-A, Appeals Chamber, Judgment, 22 March 2006, paras 58–65; ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36-A, Appeals Chamber, Judgment, 3 April 2007, paras 357–432; ICTY, *Prosecutor v. Đorđević*, Case No. IT-05-87/1-A, Appeals Chamber, Judgment, 27 January 2014, paras 25–58; ICTY, *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, Appeals Chamber, Judgment, 30 January 2015, para. 806 et seq.; ICTY, *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-A, Appeals Chamber, Judgment, 9 December 2015, paras 77–90.
159. ICTR, *Prosecutor v. Simba*, Case No. ICTR-01-76-A, Appeals Chamber, Judgment, 27 November 2007, paras 243–255; ICTR, *Prosecutor v. Munyakazi*, Case No. ICTR-97-36A-A, Appeals Chamber, Judgment, 28 September 2011, paras 156–164; ICTR, *Prosecutor v. Karemera and Ngirumpatse,* Case No. ICTR-98-44-A, Appeals Chamber, Judgment, 29 September 2014, paras 623–634; ICTR, *Prosecutor v. Ngirabatware,* Case No. MICT-12-29-A, Appeals Chamber, Judgment, 18 December 2014, paras 242–252
160. SCSL, *Prosecutor v. Brima et al.* (AFRC case), Case No. SCSL-2004-16-A, Appeals Chamber, Judgment, 22 February 2008, paras 72–75; SCSL, *Prosecutor v. Sesay et al.* (RUF case), Case No. SCSL-04-15-A, Appeals Chamber, Judgment, 26 October 2009, paras 474–475.
161. ECCC, *Kaing* alias *Duch*, Case No. 001/18-07-2007/ECCC/TC, Trial Chamber, Judgment, 26 July 2010, paras 504–517; ECCC, *Nuon* and *Khieu*, Case No. 002/19-09-2007/ECCC/TC, Trial Chamber, Case 002/01 Judgment, 7 August 2014, paras 690–691.
162. STL, Case No. STL-11-01/I/AC/R176bis, Appeals Chamber, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011, paras 236–249.
163. ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999, paras 220, 228; ICTY, *Prosecutor v. Stakić*, Case No. IT-97-24-A, Appeals Chamber, Judgment, 22 March 2006, para. 65; ICTY, *Prosecutor v. Martić*, Case No. IT-95-11-A, Appeals Chamber, Judgment, 8 October 2008, paras 171–172; ICTY, *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, Appeals Chamber, Judgment, 30 January 2015, para. 1050; ICTY, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Trial Chamber, Judgment, 24 March 2016, para. 560; ICTR, *Prosecutor v. Ntakirutimana and Ntakirutimana*, Case No. ICTR-96-10-A and ICTR-96-17-A, Appeals Chamber, Judgment, 13 December 2004, para. 463; ICTR, *Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-A, Appeals Chamber, Judgment, 7 July 2006, para. 158; ICTR, *Prosecutor v. Karemera and Ngirumpatse*, Case No. ICTR-98-44-T, Trial Chamber, Judgment, 2 February 2012, para. 1434.
164. ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999, paras 196, 220; ICTR, *Prosecutor v. Gatete*, Case No. ICTR-00-61-A, Appeals Chamber, Judgment, 9 October 2012, para. 239; ICTY, *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, Trial Chamber, Judgment, 30 May 2013, Vol. II, para. 1255; ICTY, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Trial Chamber, Judgment, 24 March 2016, para. 560.
165. ICTY, *Prosecutor v. Tadić,* Case No. IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999, paras 202, 220; ICTY, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Appeals Chamber, Judgment, 28 February 2005, para. 182; ICTY, *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, Trial Chamber, Judgment, 30 May 2013, Vol. II, para. 1256; ICTY, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Trial Chamber, Judgment, 24 March 2016, para. 560.
166. ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999, paras 204, 220; ICTY, *Prosecutor v. Vasiljević*, Case No. IT-98-32-A, Appeals Chamber, Judgment, 25 February 2004, para. 99; ICTY, *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, Trial Chamber, Judgment, 30 May 2013, Vol. II, para. 1257; ICTY, *Prosecutor v. Karadžić,* Case No. IT-95-5/18-T, Trial Chamber, Judgment, 24 March 2016, para. 560.

customary international law. This conclusion was consistently upheld in the ICTY's jurisprudence[167] and was also adopted in the case law of the ICTR,[168] the STL,[169] the SCSL[170] and the ECCC at least as of 1975.[171] Conversely, as mentioned earlier, the assertion that the third form of JCE, "extended" JCE (JCE III), is established in customary international law is contested and not confirmed in international jurisprudence. Indeed, while the ICTY, ICTR, SCSL and the STL determined that JCE III is part of customary international law, the ECCC, instead, found that between 1975 and 1979, JCE III had not attained customary international law status.[172] Accordingly, JCE III is not addressed in this Guide.

i. Constitutive elements of JCE

a) Material element (actus reus)

International jurisprudence has established that the material elements of JCE are:

i. a plurality of individuals;
ii. a common plan, design or purpose, which amounts to or involved the commission of crimes; and
iii. the accused's personal contribution to the said plan.[173]

167. See e.g., ICTY, *Prosecutor v. Tadić,* Case No. IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999, para. 220. See also paras 197–213, 221-22 where the Tribunal assessed six Nuremberg-era cases and several international treaties to conclude that JCE is enshrined in customary international law. See also ICTY, *Prosecutor v. Vasiljević*, Case No. IT-98-32-A, 25 February 2004, Appeals Chamber, Judgment, paras 94–95; ICTY, *Prosecutor v. Stakić*, Case No. IT-97-24-A, Appeals Chamber, Judgment, 22 March 2006, para. 62; ICTY, *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, Appeals Chamber, Judgment, 17 March 2009, paras 657–666; ICTY, *Prosecutor v. Đorđević*, Case No. IT-05-87/1-A, Appeals Chamber, Judgment, 27 January 2014, paras 32–53; and ICTY, *Prosecutor v. Tolimir*, Case No. IT-05-88/2-A, Appeals Chamber, Judgment, 8 April 2015, para. 281.
168. ICTR, *Prosecutor v. Ntakirutimana and Ntakirutimana*, Case No. ICTR-96-10-A and ICTR-96-17-A, Appeals Chamber, Judgment, 13 December 2004, paras 461–463, 468; ICTR, *Rwamakuba v. Prosecutor*, Case No. ICTR-98-44-AR72.4, Appeals Chamber, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, 22 October 2004, paras 13–31; ICTR, *Prosecutor v. Karemera et al.,* Case No. ICTR-98-44-AR72.5, ICTR-98-44-AR72.6, Appeals Chamber, Decision on Jurisdictional Appeals: Joint Criminal Enterprise, 12 April 2006, paras 12, 16; ICTR, *Prosecutor v. Karemera and Ngirumpatse*, Case No. ICTR-98-44-A, Appeals Chamber, Judgment, 29 September 2014, para. 145.
169. STL, Case No. STL-11-01/I/AC/R176bis, Appeals Chamber, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011, para. 236, with the caveat that JCE III should not apply to crimes featuring a special intent, like terrorism (paras 248-249).
170. SCSL, *Prosecutor v. Sesay et al.* (RUF case), Case No. SCSL-04-15-A, Appeals Chamber, Judgment, 26 October 2009, paras 398-400; SCSL, *Prosecutor v. Brima et al.* (AFRC case), Case No. SCSL-04-16-T, Trial Chamber, Judgment, 20 June 2007, para. 61; SCSL, *Prosecutor v. Taylor*, Case No. SCSL-03-01-T, 18 May 2012, Trial Chamber, Judgment, para. 458.
171. ECCC, *Khieu* and *Nuon*, Case No. 002/19-09-2007-ECCC/TC, Trial Chamber, Case 002/02 Judgment, 16 November 2018, para. 3704; ECCC, *Kaing* alias *Duch*, Case No. 001/18-07-2007/ECCC/TC, Trial Chamber, Judgment, 26 July 2010, paras 504-510; ECCC, *Nuon* and *Khieu*, Case No. 002/19-09-2007/ECCC/TC, Trial Chamber, Case 002/01 Judgment, 7 August 2014, paras 690-691; ECCC, *Ieng et al.*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC38), Pre-Trial Chamber, Decision on Appeals against the Co-Investigating Judges' Order on Joint Criminal Enterprise (JCE), 20 May 2010, paras 57-74.
172. See ECCC, *Khieu* and *Nuon*, Case No. 002/19-09-2007-ECCC/SC, Supreme Court Chamber, Appeal Judgment, 23 November 2016, para. 791; ECCC, *Khieu* and *Nuon*, Case 002/19-09-2007-ECCC/TC, Trial Chamber, Case 002/01 Judgment, 7 August 2014, para. 691; ECCC, Ieng et al., Case No. 002/19-09-2007-ECCC/OCIJ (PTC38), Pre-Trial Chamber, Decision on Appeals against the Co-Investigating Judges' Order on Joint Criminal Enterprise (JCE), 20 May 2010, paras 75-89. See also Jérôme de Hemptinne, Robert Roth, Elies van Sliedregt, Marjolein Cupido, Manuel J. Ventura and Lachezar Yanev (eds), *Modes of Liability in International Criminal Law* (2019), pp. 160-166.
173. ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999, para. 227; ICTY, *Prosecutor v. Vasiljević*, Case No. IT-98-32-A, Appeals Chamber, Judgment, 25 February 2004, para. 100; ICTR, *Prosecutor v. Ntakirutimana and Ntakirutimana,* Case No. ICTR-96-10-A and ICTR-96-17-A, Appeals Chamber, Judgment, 13 December 2004, para. 466; ICTY, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Appeals Chamber, Judgment, 28 February 2005, para. 96; ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36-A, Appeals Chamber, Judgment, 3 April 2007, para. 364; ICTR, *Prosecutor v. Munyakazi*, Case No. ICTR-97-36A-A, Appeals Chamber, Judgment, 28 September 2011, para. 160; ICTR, *Prosecutor v. Gatete,* Case No. ICTR-00-61-A, Appeals Chamber, Judgment, 9 October 2012, para. 239; ICTY, *Prosecutor v. Gotovina and Markać*, Case No. IT-06-90-A, Appeals Chamber, Judgment, 16 November 2012, para. 89; ICTR, *Prosecutor v. Ndahimana*, Case No. ICTR-01-68-A, Appeals Chamber, Judgment, 16 December 2013, para. 198; ICTR, *Prosecutor v. Karemera and Ngirumpatse*, Case No. ICTR-98-44-A, Appeals Chamber,

The first material element of JCE is the existence of a plurality of persons.[174] International Tribunals have consistently affirmed the following characteristics of this element:

i. the said group of persons does not have to be organized in a military, political or administrative structure;[175]
ii. the "plurality" requirement means that the common criminal plan must be shared by "two or more persons", and there is no upper limit to the number of persons who can share such a plan;[176] and
iii. there is no requirement to individually name each participant in a JCE but, at the very least, the participants must be identified by reference to the categories or groups to which they belonged.[177]

In this regard, to find the direct perpetrators individually criminally liable of the underlying crime(s) under the JCE doctrine, International Tribunals have also considered whether they have to be members of the group of persons who share a common criminal plan and, if not, what must then be the nature of their relationship with the JCE members.[178] While the jurisprudence was ambivalent on this matter for a certain period of time,[179] this issue was ultimately resolved

Judgment, 29 September 2014, para. 145; ICTY, *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-A, Appeals Chamber, Judgment, 9 December 2015, para. 77.

174. ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999, para. 227; ICTY, *Prosecutor v. Vasiljević*, Case No. IT-98-32-A, Appeals Chamber, Judgment, 25 February 2004, para. 100; ICTR, *Prosecutor v. Ntakirutimana and Ntakirutimana,* Case No. ICTR-96-10-A and ICTR-96-17-A, Appeals Chamber, Judgment, 13 December 2004, para. 466; ICTY, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Appeals Chamber, Judgment, 28 February 2005, para. 96; ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36-A, Appeals Chamber, Judgment, 3 April 2007, para. 364; ICTR, *Prosecutor v. Munyakazi*, Case No. ICTR-97-36A-A, Appeals Chamber, Judgment, 28 September 2011, para. 160; ICTR, Prosecutor v. Gatete, Case No. ICTR-00-61-A, Appeals Chamber, Judgment, 9 October 2012, para. 239; ICTY, *Prosecutor v. Gotovina and Markać,* Case No. IT-06-90-A, Appeals Chamber, Judgment, 16 November 2012, para. 89; ICTR, *Prosecutor v. Ndahimana*, Case No. ICTR-01-68-A, Appeals Chamber, Judgment, 16 December 2013, para. 198; ICTR, *Prosecutor v. Karemera and Ngirumpatse*, Case No. ICTR-98-44-A, Appeals Chamber, Judgment, 29 September 2014, para. 145; ICTY, *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-A, Appeals Chamber, Judgment, 9 December 2015, para. 77.

175. ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999, para. 227; ICTY, *Prosecutor v. Vasiljević*, Case No. IT-98-32-A, Appeals Chamber, Judgment, 25 February 2004, para. 100; ICTY, *Prosecutor v. Stakić*, Case No. IT-97-24-A, Appeals Chamber, Judgment, 22 March 2006, para. 64; ICTY, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84bis-T, Trial Chamber, Judgment, 29 November 2012, para. 617; ICTY, *Prosecutor v. Tolimir*, Case No. IT-05-88/2-T, Trial Chamber, Judgment, 12 December 2012, para. 889; ICTY, *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, Trial Chamber, Judgment, 30 May 2013, Vol. II, para. 1258; ICTY, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Trial Chamber, Judgment, 24 March 2016, para. 562; ICTR, *Prosecutor v. Ntakirutimana and Ntakirutimana*, Case No. ICTR-96-10-A and ICTR-96-17-A, Appeals Chamber, Judgment, 13 December 2004, para. 466; ICTR, Case No. ICTR-98-44-T, *Prosecutor v. Karemera and Ngirumpatse*, Trial Chamber, Judgment, 2 February 2012, para. 1436; ECCC, *Prosecutor v. Kaing alias Duch*, Case No. 001/18-07-2007/ECCC/TC, Trial Chamber, Judgment, 26 July 2010, para. 508; SCSL, *Prosecutor v. Brima et al.* (AFRC case), Case No. SCSL-04-16-T, Trial Chamber, Judgment, 20 June 2007, para. 63; SCSL, *Prosecutor v. Taylor*, Case No. SCSL-03-01-T, Trial Chamber, Judgment, 18 May 2012, para. 459.

176. ICTY, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Trial Chamber, Judgment, 24 March 2016, para. 561 (footnote 1783). See also ICTY, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-T, Trial Chamber, Judgment, 2 November 2001, para. 307; ICTY, *Prosecutor v. Stakić*, Case No. IT-97-24-T, Trial Chamber, Judgment, 31 July 2003, para. 66; ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Trial Chamber, Judgment, 1 September 2004, para. 262; ICTY, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Trial Chamber, Judgment, 26 February 2009, Vol. I, para. 98; ICTR, *Prosecutor v. Mpambara*, Case No. ICTR-01-65-T, Trial Chamber, Judgment, 11 September 2006, para. 13; SCSL, *Prosecutor v. Brima et al.* (AFRC case), Case No. SCSL-04-16-T, Trial Chamber, Judgment, 20 June 2007, para. 69.

177. ICTY, *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, Appeals Chamber, Judgment, 17 March 2009, para. 156; ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36-A, Appeals Chamber, Judgment, 3 April 2007, para. 430; ICTY, *Prosecutor v. Tolimir*, Case No. IT-05-88/2-T, Trial Chamber, Judgment, 12 December 2012, para. 889; ICTY, *Prosecutor v. Đorđević*, Case No. IT-05-87/1-A, Appeals Chamber, Judgment, 27 January 2014, para. 141; ICTY, *Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-T, Trial Chamber, Judgment, 27 March 2013, Vol. I, para. 101; ICTY, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Trial Chamber, Judgment, 24 March 2016, para. 562; ICTR, *Prosecutor v. Simba*, Case No. ICTR-01-76-A, Appeals Chamber, Judgment, 27 November 2007, paras 63, 69–75; ICTR, *Prosecutor v. Munyakazi*, Case No. ICTR-97-36A-A, Appeals Chamber, Judgment, 28 September 2011, para. 161; ECCC, *Prosecutor v. Nuon and Khieu*, Case No. 002/19-09-2007/ECCC/TC, Trial Chamber, Case 002/01 Judgment, 7 August 2014, para. 692.

178. Jérôme de Hemptinne, Robert Roth, Elies van Sliedregt, Marjolein Cupido, Manuel J. Ventura and Lachezar Yanev (eds), *Modes of Liability in International Criminal Law* (2019), p. 145.

179. The issue was not addressed by the ICTY in the Tadić case: see ICTY, *Prosecutor v. Milutinović et al.*,

in the *Brđanin* case, where the ICTY Appeals Chamber held that it is not required for the physical perpetrators to share with the JCE members their common purpose and concluded that:

> to hold a member of a JCE responsible for crimes committed by non-members of the enterprise, it has to be shown that the crime can be imputed to one member of the joint criminal enterprise, and that this member – when using a principal perpetrator – acted in accordance with the common plan. The existence of this link is a matter to be assessed on a case-by-case basis.[180]

While this holding has been consistently confirmed in subsequent case law by both the ICTY and the ICTR,[181] no standard seems yet to have been established defining the link that must exist between the JCE members and the non-member direct perpetrators of the JCE crimes through which the crime can be imputed. Indeed, the Tribunals have simply maintained that, JCE being a form of "commission" liability,[182] a link of imputation must be established on a case-by-case basis, taking into consideration various factors, such as whether the physical perpetrators were "procured" by one (or more) of the JCE members,[183] whether their crimes "were part of [the] common criminal purpose",[184] and whether a JCE member "explicitly or implicitly requested the non-JCE member to commit such a crime or instigated, ordered, encouraged or otherwise availed himself of the non-JCE member to commit the crime". [185]

The second material element of JCE is "[t]he existence of a common plan, design or purpose which amounts to or involves the commission of a crime".[186] For this element, international jurisprudence has confirmed that:

i. the terms "purpose", "design" and "plan" do not have a different legal meaning: they are synonymous and have been used interchangeably.[187] Also, these terms have been

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Case No. IT-05-87-PT, Trial Chamber, Decision on Ojdanić's Motion Challenging Jurisdiction: Indirect Co-perpetration, 22 March 2006, Separate Opinion of Judge Bonomy, paras 5–6; ICTY, *Prosecutor v. Brđanin,* Case No. IT-99-36-A, Appeals Chamber, Judgment, 3 April 2007, para. 406. Some judgments concluded that the physical perpetrators must be part of the plurality of persons that share the common plan: see ICTY, *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, Trial Chamber, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, paras 26, 44; ICTY, *Prosecutor v. Krnojelac* (Foča case), Case No. IT-97-25-A, Appeals Chamber, Judgment, 17 September 2003, paras 83–84; ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Trial Chamber, Judgment, 1 September 2004, paras 264, 347. Other judgments rejected this requirement: ICTY, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-PT, Trial Chamber, Decision on Ojdanić's Motion Challenging Jurisdiction: Indirect Co-perpetration, 22 March 2006, Separate Opinion of Judge Bonomy, paras 8, 13; ICTY, *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, Trial Chamber, Judgment, 27 September 2006, para. 883.

180. ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36-A, Appeals Chamber, Judgment, 3 April 2007, para. 410.
181. ICTY, *Prosecutor v. Martić*, Case No. IT-95-11-A, Appeals Chamber, Judgment, 8 October 2008, para. 171; ICTY, *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, Appeals Chamber, Judgment, 17 March 2009, paras 235, 714; ICTY, *Prosecutor v. Gotovina and Markać*, Case No. IT-06-90-A, Appeals Chamber, Judgment, 16 November 2012, para. 89; ICTY, *Prosecutor v. Šainović et al.*, Case No. IT-05-87-A, Appeals Chamber, Judgment, 23 January 2014, para. 1256; ICTY, *Prosecutor v. Đorđević*, Case No. IT-05-87/1-A, Appeals Chamber, Judgment, 27 January 2014, paras 56, 165; ICTY, *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, Appeals Chamber, Judgment, 30 January 2015, para. 1050; ICTR, *Prosecutor v. Karemera and Ngirumpatse*, Case No. ICTR-98-44-T, Trial Chamber, Judgment, 2 February 2012, para. 1440; ICTR, *Prosecutor v. Nizeyimana*, Case No. ICTR-2000-55C-T, Trial Chamber, Judgment, 19 June 2012, para. 1456; ICTR, *Prosecutor v. Nizeyimana*, Case No. ICTR-00-55C-A, Appeals Chamber, Judgment, 29 September 2014, para. 325.
182. ICTY, *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, 17 March 2009, Appeals Chamber, Judgment, paras 663–666.
183. ICTY, *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, 17 March 2009, Appeals Chamber, Judgment, paras 235-236.
184. ICTY, *Prosecutor v. Martić*, Case No. IT-95-11-A, Appeals Chamber, Judgment, 8 October 2008, para. 171; *Prosecutor v. Đorđević*, Case No. IT-05-87/1-A, Appeals Chamber, Judgment, 27 January 2014, para. 1868.
185. ICTY, *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, 17 March 2009, Appeals Chamber, Judgment, para. 236.
186. ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999, para. 227. See also ICTY, *Prosecutor v. Đorđević*, Case No. IT-05-87/1-A, Appeals Chamber, Judgment, 27 January 2014, paras 116, 120; ICTY, *Prosecutor v. Šainović et al.*, Case No. IT-05-87-A, Appeals Chamber, Judgment, 23 January 2014, para. 609; ICTR, *Prosecutor v. Munyakazi*, Case No. ICTR-97-36A-A, Appeals Chamber, Judgment, 28 September 2011, para. 160.
187. ICTY, *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, Trial Chamber, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, para. 24; ICTY, *Prosecutor v. Vasiljević*, Case No. IT-98-32-A, Appeals Chamber, Judgment, 25 February 2004, para. 100 (at footnote 175); SCSL, *Prosecutor v. Taylor*, Case No. SCSL-2003-1-T, Appeals Chamber, Decision on 'Defence Notice

further defined to mean that the JCE members must have concluded an "arrangement or understanding amounting to an agreement . . . that a particular crime will be committed";[188]

ii. the common plan, design or purpose need not be previously arranged among the JCE members, but it may also materialize extemporaneously;[189]

iii. the existence of a common plan, design or purpose may be "inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise"[190] or generally from "the totality of the circumstances surrounding the commission of a crime or underlying offence";[191]

iv. the common plan element means that JCE may be relevant both in cases where the plan's ultimate objective is the commission of a crime, and in cases where the plan has a non-criminal objective which, however, is to be achieved through the commission of a crime;[192] and

v. the scope of the common plan can "range anywhere along a continuum from two persons conspiring to rob a bank to the systemic slaughter of millions during a vast criminal regime comprising thousands of participants".[193]

While examining the "common plan" element, International Tribunals have also addressed the question of whether the agreed plan must be specifically directed at the commission of a crime.

The ICTY and ICTR have consistently held that the JCE doctrine requires a common plan that "amounts to or involves the commission of a crime",[194] meaning that the JCE participants have to agree "that a particular crime will be committed"[195] either as the end goal of their enterprise, or as the necessary means to achieve an otherwise non-criminal objective.[196] However, the SCSL and the ECCC have deviated from this interpretation, and have held that the common plan

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of Appeal and Submissions Regarding the Majority Decision Concerning the Pleading of JCE in the Second Amended Indictment', 1 May 2009, para. 19.

188. ICTY, *Prosecutor v. Vasiljević*, Case No. IT-98-32-T, Trial Chamber, Judgment, 29 November 2002, para. 66; ICTY, *Prosecutor v. Stakić*, Case No. IT-97-24-T, Trial Chamber, Judgment, 31 July 2003, para. 435; ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Trial Chamber, Judgment, 1 September 2004, para. 341; SCSL, *Prosecutor v. Brima et al.* (AFRC case), Case No. SCSL-04-16-T, Trial Chamber, Judgment, 20 June 2007, para. 69.

189. ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999, para. 227. See also ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36-A, Appeals Chamber, Judgment, 3 April 2007, para. 418; ICTR, *Prosecutor v. Gatete*, Appeals Chamber, Judgment, ICTR-00-61-A, 9 October 2012, para. 241; ICTY, *Prosecutor v. Šainović et al.*, Case No. IT-05-87-A, Appeals Chamber, Judgment, 23 January 2014, para. 609; ICTY, *Prosecutor v. Đorđević,* Case No. IT-05-87/1-A, Appeals Chamber, Judgment, 27 January 2014, para. 138; ICTR, *Prosecutor v. Nizeyimana*, Case No. ICTR-00-55C-A, Appeals Chamber, Judgment, 29 September 2014, para. 327.

190. ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999, para. 227. See also ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36-A, Appeals Chamber, Judgment, 3 April 2007, para. 418; ICTR, *Prosecutor v. Gatete*, Appeals Chamber, Judgment, ICTR-00-61-A, 9 October 2012, para. 241; ICTY, *Prosecutor v. Šainović et al.*, Case No. IT-05-87-A, Appeals Chamber, Judgment, 23 January 2014, para. 609; ICTY, *Prosecutor v. Đorđević*, Case No. IT-05-87/1-A, Appeals Chamber, Judgment, 27 January 2014, para. 138; ICTR, *Prosecutor v. Nizeyimana*, Case No. ICTR-00-55C-A, Appeals Chamber, Judgment, 29 September 2014, para. 327.

191. ICTY, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Trial Chamber, Judgment, 26 February 2009, Vol. I, para. 102. See also ICTY, *Prosecutor v. Simić et al.*, Case No. IT-95-9-T, Trial Chamber, Judgment, 17 October 2003, para. 158; ICTY, *Prosecutor v. Đorđević*, Case No. IT-05-87/1-T, Trial Chamber, Judgment, 23 February 2011, Vol. I, para. 1862.

192. ICTY, Prosecutor v. *Milutinović et al.*, Case No. IT-05-87-T, Trial Chamber, Judgment, 26 February 2009, Vol. III, paras 95–96; ICTY, *Prosecutor v. Karadžić,* Case No. IT-95-5/18-T, Trial Chamber, Judgment, 24 March 2016, paras 3434–3447.

193. ICTY, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-T, Trial Chamber, Judgment, 2 November 2001, para. 307.

194. ICTY, *Prosecutor v. Tadić,* Case No. IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999, para. 227; ICTY, *Prosecutor v. Đorđević*, Case No. IT-05-87/1-A, Appeals Chamber, Judgment, 27 January 2014, paras 116, 120; ICTY, *Prosecutor v. Šainović et al.*, Case No. IT-05-87-A, Appeals Chamber, Judgment, 23 January 2014, para. 609; ICTR, *Prosecutor v. Munyakazi,* Case No. ICTR-97-36A-A, Appeals Chamber, Judgment, 28 September 2011, para. 160.

195. ICTY, *Prosecutor v. Vasiljević*, Case No. IT-98-32-T, Trial Chamber, Judgment, 29 November 2002, para. 66; ICTY, *Prosecutor v. Stakić*, Case No. IT-97-24-T, Trial Chamber, Judgment, 31 July 2003, para. 435; *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Trial Chamber, Judgment, 1 September 2004, para. 262.

196. ICTY, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Trial Chamber, Judgment, 26 February 2009, Vol. III, paras 95–96; ICTY, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Trial Chamber, Judgment, 24 March 2016, paras 3434–3447.

"must either have as its objective a crime, or *contemplate* the crimes as the means of achieving this objective."[197] Notably, the latter position has been criticized in a SCSL dissenting opinion as it raises doubts as to its foundation in customary international law.[198]

The third material element of JCE requires "the participation of the accused in furthering the common design or purpose". According to the Tribunals' jurisprudence, this means that:

i. the accused's participation in a JCE may consist of physically committing one or more of the concerted crimes, but it may also "take the form of assistance in, or contribution to, the execution of the common plan or purpose".[199] Consequently, "[t]he accused does not have to be present at the time and place of perpetration of the crime in order to be held responsible for it";[200]
ii. an accused's contribution to a JCE "should at least be a *significant contribution* to the crimes for which the accused is to be found responsible" [emphasis added];[201] and
iii. it is not required that the accused's contribution to a JCE be a positive act since it could also take the form of an omission;[202] importantly, however, not all failures to act can satisfy the contribution requirement: the accused's omission may lead to JCE liability only if they were under 'a legal duty to act' when failing to do so.[203]

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197. ECCC, *Nuon et al.*, Case No. 002/19-09-2007-ECCC/TC, Trial Chamber, Decision on the Applicability of Joint Criminal Enterprise, 12 September 2011, para. 17, emphasis added; ECCC, *Nuon* and *Khieu*, Case No. 002/19-09-2007/ECCC/TC, Trial Chamber, Judgment, 7 August 2014, para. 696; SCSL, *Prosecutor v. Brima et al.* (AFRC case), Case No. SCSL-2004-16-A, Appeals Chamber, Judgment, 22 February 2008, para. 80; SCSL, *Prosecutor v. Sesay et al.* (RUF case), Case No. SCSL-04-15-A, Appeals Chamber, Judgment, 26 October 2009, para. 475.
198. SCSL, *Prosecutor v. Sesay et al.* (RUF case), Case No. SCSL-04-15-A, Appeals Chamber, Judgment, 26 October 2009, Partially Dissenting and Concurring Opinion of Justice Shireen Avis Fisher, paras 19–20. See also Jérôme de Hemptinne, Robert Roth, Elies van Sliedregt, Marjolein Cupido, Manuel J. Ventura and Lachezar Yanev (eds), *Modes of Liability in International Criminal Law* (2019), pp. 152-155.
199. ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999, para. 227; ICTY, *Prosecutor v. Vasiljević*, Case No. IT-98-32-A, Appeals Chamber, Judgment, 25 February 2004, para. 100; ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36-A, Appeals Chamber, Judgment, 3 April 2007, para. 424; ICTY, *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, Appeals Chamber, Judgment, 17 March 2009, para. 215; ICTY, *Prosecutor v. Šainović et al.*, Case No. IT-05-87-A, Appeals Chamber, Judgment, 23 January 2014, para. 987; ICTY, *Prosecutor v. Popović et al.,* Case No. IT-05-88-A, Appeals Chamber, Judgment, 30 January 2015, para. 1378; ICTR, *Prosecutor v. Ntakirutimana and Ntakirutimana*, Case No. ICTR-96-10-A and ICTR-96-17-A, Appeals Chamber, Judgment, 13 December 2004, para. 466; ICTR, *Prosecutor v. Ndahimana*, Case No. ICTR-01-68-A, Appeals Chamber, Judgment, 16 December 2013, para. 198.
200. ICTY, *Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-T, Trial Chamber, Judgment, 27 March 2013, Vol. I, para. 103. See also ICTY, *Prosecutor v. Krnojelac* (Foča case), Case No. IT-97-25-A, Appeals Chamber, Judgment, 17 September 2003, para. 81; ICTY, *Prosecutor v. Kvočka et al.,* Case No. IT-98-30/1-A, Appeals Chamber, Judgment, 28 February 2005, para. 112; ICTR, *Prosecutor v. Simba*, Case No. ICTR-01-76-A, Appeals Chamber, Judgment, 27 November 2007, para. 296.
201. ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36-A, Appeals Chamber, Judgment, 3 April 2007, para. 430. See also ICTY, *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, Appeals Chamber, Judgment, 30 January 2015, para. 1378; ICTY, *Prosecutor v. Stanišić and Simatović,* Appeals Chamber, Judgment, IT-03-69-A, 9 December 2015, paras 45, 83 ICTY, *Prosecutor v. Gotovina and Markać*, Case No. IT-06-90-A, Appeals Chamber, Judgment, 16 November 2012, paras 89, 149; ICTY, *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, Appeals Chamber, Judgment, 17 March 2009, paras 215, 662, 675, 695–696. See Jérôme de Hemptinne, Robert Roth, Elies van Sliedregt, Marjolein Cupido, Manuel J. Ventura and Lachezar Yanev (eds), *Modes of Liability in International Criminal Law* (2019), pp. 140-141: "The significance of a defendant's contribution to a JCE is assessed on a case-by-case basis and some factors that can be taken into account when making this determination include: the size of the criminal enterprise, the functions performed, the position of the accused, the amount of time spent participating after acquiring knowledge of the criminality of the system, efforts made to prevent criminal activity or to impede the efficient functioning of the system, the seriousness and scope of the crimes committed and the efficiency, zealousness or gratuitous cruelty exhibited in performing the actor's function. The threshold for finding a "significant contribution" to a JCE is lower than the "substantial contribution" required to enter a conviction for aiding and abetting."
202. ICTY, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Appeals Chamber, Judgment, 28 February 2005, paras 187, 421; ICTY, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Trial Chamber, Judgment, 24 March 2016, para. 566; ICTY, *Prosecutor v. Tolimir,* Case No. IT-05-88/2-T, Trial Chamber, Judgment, 12 December 2012, para. 894; ICTY, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84bis-T, Trial Chamber, Judgment, 29 November 2012, para. 619; ICTR, *Prosecutor v. Ndahimana*, Case No. ICTR-01-68-T, Trial Chamber, Judgment, 30 December 2011, para. 810.
203. ICTY, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Trial Chamber, Judgment, 24 March 2016, para. 566; ICTY, *Prosecutor v. Galić*, Case No. ICTR-98-29-A, Appeals Chamber, Judgment, 30 November 2006, para. 175; ICTR, *Prosecutor v. Ntagerura et al.*, Case No. ICTR-99-46-A, Appeals Chamber, Judgment, 7 July

International case law has also addressed the issue of whether the accused's contribution must take place at the execution stage of the common plan or if it could also be made solely at the preparatory stage of the enterprise. The ICTR was the first to expressly address this matter in the *Kanyarukiga* case,[204] where the trial chamber was called to adjudicate on the JCE liability of an accused whose contribution to the common purpose was limited just to its planning phase. The judges acquitted the accused of the charge after holding that:

> in order for an accused to be convicted of 'committing' pursuant to a theory of JCE, it must be established that he or she *participated* in the execution of the common plan or purpose of the enterprise. While the Trial Chamber has found that Kanyarukiga participated in the planning of the destruction of the Nyange Church ... it does not find any credible evidence to suggest that the Accused ordered, instigated, encouraged or provided material assistance to the attackers in this case. [*emphasis* added][205]

Notably, pursuant to a subsequent request to clarify the law on this matter, the ICTR Appeals Chamber refused to be drawn on it.[206] Indeed, in a separate opinion, Judge Pocar observed that in 2012, at the time of the judgment, "the jurisprudence does not specify what form the participation of an accused in the common purpose of a joint criminal enterprise must take".[207]

b) Mental element (mens rea)

(1) JCE I

The mental element of the 'basic' variant of JCE (JCE I) requires that "the accused and the other participants in the joint criminal enterprise intended that the crime at issue be committed".[208] Some ICTY and ICTR judgments provide a slightly different, more elaborate formulation of JCE I's mental element noting that the accused must also share the intent in relation to their participation in the common plan, namely that:

> The accused must share both the intent to commit the crimes that form part of the common purpose of the JCE and *the intent to participate in a common plan aimed at their*

2006, para. 334; ICTY, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Trial Chamber, Judgment, 26 February 2009, Vol. I, para. 103; ICTY, *Prosecutor v. Đorđević*, Case No. IT-05-87/1-T, Trial Chamber, Judgment, 23 February 2011, Vol. I, para. 1863; ICTY, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84bis-T, Trial Chamber, Judgment, 29 November 2012, para. 619 ICTY, *Prosecutor v. Tolimir*, Case No. IT-05-88/2-T, Trial Chamber, Judgment, 12 December 2012, para. 894. For a contrary finding that the requisite contribution to JCE may be based on an act of omission – irrespective of whether the accused was under a legal duty to act – see ICTY, *Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-A, Appeals Chamber, Judgment, 30 June 2016, para. 110.

204. ICTR, *Prosecutor v. Kanyarukiga*, Case No. ICTR-02-78-T, Trial Chamber, Judgment and Sentence, 1 November 2010. In other cases, the ICTY found that the accused had significantly participated in a JCE through proving contributions both at the preparatory/planning and execution stage of the common plan. See, for instance, ICTY, *Prosecutor v. Stakić*, Case No. IT-97-24-A, Appeals Chamber, Judgment, 22 March 2006, paras 74–78; ICTY, *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, Appeals Chamber, Judgment, 17 March 2009, paras 216–218; ICTY, *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, Trial Chamber, Judgment, 15 April 2011, Vol. II, para. 2370.
205. ICTR, Case No. ICTR-02-78-T, *Prosecutor v. Kanyarukiga*, Trial Chamber, Judgment and Sentence, 1 November 2010, para. 643.
206. ICTR, *Prosecutor v. Kanyarukiga*, Case No. ICTR-02-78-A, Appeals Chamber, Judgment, 8 May 2012, para. 267.
207. ICTR, *Prosecutor v. Kanyarukiga*, Case No. ICTR-02-78-A, Appeals Chamber, Judgment, 8 May 2012, Separate Opinion of Judge Pocar, para. 4.
208. ICTY, *Prosecutor v. Stakić*, Case No. IT-97-24-A, Appeals Chamber, Judgment, 22 March 2006, para. 65. See also, ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999, para. 228; ICTY, *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, Appeals Chamber, Judgment, 17 March 2009, para. 200; ICTY, *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-A, Appeals Chamber, Judgment, 9 December 2015, para. 77; ICTR, *Prosecutor v. Ntakirutimana and Ntakirutimana*, Case No. ICTR-96-10-A and ICTR-96-17-A, Appeals Chamber, Judgment, 13 December 2004, para. 467; ICTR, *Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-A, Appeals Chamber, Judgment, 7 July 2006, para. 158; ICTR, *Prosecutor v. Simba*, Case No. ICTR-01-76-A, Appeals Chamber, Judgment, 27 November 2007, paras 77–78; STL, Case No. STL-11-01/I/AC/R176bis, Appeals Chamber, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011, para. 237; SCSL, *Prosecutor v. Taylor*, Case No. SCSL-03-01-T, Trial Chamber, Judgment, 18 May 2012, para. 465.

commission.[209]

International Tribunals also consistently affirmed that:

i. In the context of the 'basic' JCE, the participant must "inten[d] to perpetrate a certain crime",[210] and "intend this result".[211] Accordingly, the mental element of JCE I requires that the JCE participants share a *dolus directus* in the first degree (direct intent/purpose) to commit the core crimes of the enterprise.[212]
ii. When a JCE includes the commission of a specific intent crime – e.g. torture – the 'basic' JCE form also requires that the participants share the requisite *dolus specialis* for the said crime.[213]
iii. The requisite direct intent for JCE I liability can be inferred from the accused's knowledge of the enterprise's crimes and their continued participation therein.[214] However, such an inference "must be the only reasonable inference available on the evidence", and any benefit of the doubt must be given to the accused.[215]

(2) JCE II

The mental element of the "systemic" JCE (JCE II) requires that the accused had knowledge of the nature of the said "system of ill-treatment", and intended to further its criminal purpose.[216] The following aspects of JCE II's mental element have been commonly affirmed in the Tribunals' jurisprudence:

i. An accused's knowledge of the criminal nature of a "system of ill-treatment" can be inferred from their position of authority in the said institution;[217]

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209. ICTY, *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, Appeals Chamber, Judgment, 30 January 2015, para. 1369, emphasis added. See also ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36-A, Appeals Chamber, Judgment, 3 April 2007, para. 365; ICTY, *Prosecutor v. Kvočka et al*., Case No. IT-98-30/1-A, Appeals Chamber, Judgment, 28 February 2005, para. 82; ICTR, *Prosecutor v. Munyakazi*, Case No. ICTR-97-36A-A, Appeals Chamber, Judgment, 28 September 2011, para. 160.
210. ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999, para. 228.
211. ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999, para. 196; ICTY, *Prosecutor v. Vasiljević*, Case No. IT-98-32-A, Appeals Chamber, Judgment, 25 February 2004, para. 199; ICTY, *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, Appeals Chamber, Judgment, 30 January 2015, para. 988.
212. See Jérôme de Hemptinne, Robert Roth, Elies van Sliedregt, Marjolein Cupido, Manuel J. Ventura and Lachezar Yanev (eds), *Modes of Liability in International Criminal Law* (2019), p. 142.
213. ICTY, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Appeals Chamber, Judgment, 28 February 2005, para. 110; ICTY, *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, Appeals Chamber, Judgment, 30 January 2015, para. 711; ICTY, *Prosecutor v. Đorđević*, Case No. IT-05-87/1-A, Appeals Chamber, Judgment, 27 January 2014, para. 470; ICTY, *Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-T, Trial Chamber, Judgment, 27 March 2013, Vol. I, para. 105; ICTR, P*rosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, Trial Chamber, Judgment, 30 September 2011, para. 1908; ICTR, *Prosecutor v. Nizeyimana*, Case No. ICTR-2000-55C-T, Trial Chamber, Judgment, 19 June 2012, para. 1455.
214. ICTY, *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, Appeals Chamber, Judgment, 17 March 2009, para. 697; ICTY, *Prosecutor v. Tolimir*, Case No. IT-05-88/2-T, 12 December 2012, Trial Chamber, Judgment, para. 895; ICTY, *Prosecutor v. Đorđević*, Case No. IT-05-87/1-A, Appeals Chamber, Judgment, 27 January 2014, para. 512; ICTY, *Prosecutor v. Popović et al*., Case No. IT-05-88-A, Appeals Chamber, Judgment, 30 January 2015, para. 1369; ICTY, *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-A, Appeals Chamber, Judgment, 9 December 2015, para. 81; ICTR, *Prosecutor v. Simba,* Case No. ICTR-01-76-A, Appeals Chamber, Judgment, 27 November 2007, paras 264–266.
215. ICTY, *Prosecutor v. Krstić*, Case No. IT-98-33-A, Appeals Chamber, Judgment, 19 April 2004, para. 41; ICTY, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Appeals Chamber, Judgment, 28 February 2005, para. 237; ICTY, *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, Appeals Chamber, Judgment, 30 January 2015, para. 1369; ICTR, *Prosecutor v. Nizeyimana,* Case No. ICTR-2000-55C-T, Trial Chamber, Judgment, 19 June 2012, para. 330.
216. ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999, paras 203, 220, 228; ICTY, *Prosecutor v. Vasiljević*, Case No. IT-98-32-A, Appeals Chamber, Judgment, 25 February 2004, para. 101; ICTY, *Prosecutor v. Krnojelac* (Foča case), Case No. IT-97-25-A, Appeals Chamber, Judgment, 17 September 2003, para. 32; ICTY, *Prosecutor v. Kvočka et al.,* Case No. IT-98-30/1-A, Appeals Chamber, Judgment, 28 February 2005, para. 82; ICTR, *Prosecutor v. Ntakirutimana and Ntakirutimana*, Case No. ICTR-96-10-A and ICTR-96-17-A, Appeals Chamber, Judgment, 13 December 2004, para. 467; ICTY, *Prosecutor v. Đorđević*, Case No. IT-05-87/1-T, Trial Chamber, Judgment, 23 February 2011, Vol. I, para. 1864.
217. ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999, paras 203, 228; ICTY, *Prosecutor v. Krnojelac* (Foča case), Case No. IT-97-25-A, Appeals Chamber, Judgment, 17 September

ii. In cases where the accused is charged with a special/ulterior intent crime, JCE II requires that the accused possesses the requisite *dolus specialis* for the crime in question.[218]

2003, para. 32; ICTY, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Appeals Chamber, Judgment, 28 February 2005, para. 101.

218. ICTY, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Appeals Chamber, Judgment, 28 February 2005, para. 110; ICTY, *Prosecutor v. Krnojelac* (Foča case), Case No. IT-97-25-A, Appeals Chamber, Judgment, 17 September 2003, para. 111.

IV. Participation

Under international criminal law, individuals can be held individually criminally liable for various forms of "participation" in the commission of a crime, including those described in the following sections: aiding and abetting, instigating, ordering and planning.

A. Aiding and abetting

Aiding and abetting is an accessorial mode of individual criminal liability, meaning that the accused facilitated the commission, or the attempted commission, of a crime by others.[219] Indeed, the term "aiding" refers to the provision of practical or material assistance to the commission of a crime; and "abetting" denotes the provision of "encouragement" or "moral support" to the commission of a crime.[220]

Individual criminal liability for aiding and abetting is well established in international criminal law.[221] While the Charter of the Nuremberg Tribunal and the Charter of the Tokyo Tribunal did not expressly include aiding and abetting as a distinct form of individual criminal liability, Control Council Law No. 10 provided for invidual criminal liability of anyone who "was an *accessory* to the commission of any […] crime or ordered or *abetted* the same".[222] Aiding and abetting was subsequently recognized as a form of individual criminal liability in the ILC Draft Code of Offences against the Peace and Security of Mankind.[223]

Today, aiding and abetting is enshrined in the Statutes of the ICTY, ICTR, the SCSL and of many other tribunals and court as a mode of individual criminal liability,[224] and is also considered to reflect customary international law. [225]

i. Constitutive elements of aiding and abetting

To establish liability under this mode, the ICTY identified a three-step test: "(i) on the side of the principal perpetrator, there must be proof of the conduct which is punishable under the Statute, (ii) from the side of the participant, the commission of the principal crime(s) must [be] aided or abetted, and (iii) with regard to the participant's state of mind, the acts of participation must be performed with the awareness that they will assist the principal perpetrator in the commission of the crime." [226]

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219. See Jérôme de Hemptinne, Robert Roth, Elies van Sliedregt, Marjolein Cupido, Manuel J. Ventura and Lachezar Yanev (eds), *Modes of Liability in International Criminal Law* (2019), pp. 173-256.
220. ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Chamber, Judgment, 2 September 1998, para. 484; ICTY, *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Trial Chamber, Judgment, 3 March 2000, para. 284, fn. 510; ICTY, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-T, Trial Chamber, Judgment, 2 November 2001, para. 254; ICTR, *Prosecutor v. Kamuhanda*, Case No. ICTR-99-54A-T, Trial Chamber, Judgment, 22 January 2003, para. 596; ICTR, *Prosecutor v. Ntakirutimana and Ntakirutimana*, Case No. ICTR-96-10 & ICTR-96-17-T, Trial Chamber, Judgment, 21 February 2003, para. 787; ICTY, *Prosecutor v. Milutinovićet al.,* Case No. IT-05-87-T, Trial Chamber, Judgment, 26 February 2009, Vol. I, para. 89, fn. 107; ECCC, *Kaing* alias *Duch*, Case No. 001/18-07-2007/ECCC/TC/E188, Trial Chamber, Judgment, 26 July 2010, para. 533; SCSL, *Prosecutor v. Taylor*, Case No. SCSL-03-01-T, Trial Chamber, Judgment, 18 May 2012, para. 482, fn. 1136; ICC, *Prosecutor v. Bemba et al.*, Case No. ICC-01/05-01/13-1989-Red, Trial Chamber VII, Judgment, 19 October 2016, paras 88–89.
221. See, for example, the Zyklon B. Case, Trial of Bruno Tesch and Two Others, British Military Court, Hamburg, 1-8 March 1946, in which two German industrialists were convicted for aiding a war crime by supplying poison gas for use in concentration camp killings.
222. See Control Council Law No. 10, op. cit., art. II(2)(b), *emphasis* added.
223. See 1954 ILC Draft Code of Crimes, art. 2(13)(iii).
224. ICTY Statute, art. 7(1); ICTR Statute, art. 6(1); SCSL Statute, art. 6(1); and ECCC Law, art. 29. See also SPSC Regulation, section 14.3(c); EAC Statute, art. 10(2); and KSC Law, art. 16(1)(a).
225. ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-T, Trial Chamber, Judgment, 7 May 1997, para. 666; ICTY, *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Trial Chamber, Judgment, 10 December 1998, paras 191–249; ICTY, *Prosecutor v. Milutinovic et al*, Case No. IT-99-37-AR72, Appeals Chamber, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction—Joint Criminal Enterprise, 21 May 2003, para. 21; ICTY, *Prosecutor v. Šainović et al.*, Case No. IT-05-87-A, Appeals Chamber, Judgment, 23 January 2014, para. 1626; ECCC, *Kaing* alias *Duch*, Case No. 001/18-07-2007/ECCC/TC/E188, Trial Chamber, Judgment, 26 July 2010, para. 475; and ECCC, *Khieu* and *Nuon*, Case No. 002/19-09-2007-ECCC/TC, Trial Chamber, Case 002/01 Judgment, 7 August 2014, paras 703-704, 706.
226. ICTY, *Prosecutor v. Orić*, Case No. IT-03-68-T, Trial Chamber, Judgment, 30 June 2006, para. 269 (also applicable in respect to instigating).

a) Material element (actus reus)

Generally, the material element (*actus reus*) of aiding and abetting may encompass any conduct as long as such conduct has an effect on the commission of the underlying crime – i.e., the assistance provided must not be merely coincidental to the commission of the relevant crime.[227]

The ICTY has held that the material element for aiding and abetting may consist of acts that assist, encourage or lend moral support to the perpetration of the underlying crimes.[228] Accordingly, the accused does not have to manifest "independent initiative, power or discretion".[229] As for the causal link between the accused's conduct and the crime, the ICTY has required a particular threshold, meaning that the acts must have had a substantial effect on, or substantially contributed to, the commission of the crime.[230]

In examining individual criminal liability for aiding and abetting, international jurisprudence has established that: [231]

i. the underlying crime must be fully executed/completed for aiding and abetting liability to arise; [232]
ii. the material element of aiding and abetting may occur before, during, or after the principal crime has been perpetrated;[233]
iii. the location at which the material element takes place may be removed from the location of the principal crime;[234]

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227. ICTY, *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-A, Appeals Chamber, Judgment, 9 May 2007, para. 189; ICTY, *Prosecutor v. Vasiljević*, Case No. IT-98-32-A, Appeals Chamber, Judgment, 25 February 2004, para. 102 (i); ICTY, *Prosecutor v. Aleksovski,* Case No. IT-95-14/1-A, Appeals Chamber, Judgment, 24 March 2000, para. 163 (ii); SCSL, *Prosecutor v. Fofana and Kondewa,* Case No. SCSL-04-14-T, Trial Chamber, Judgment, 2 August 2007, para. 209. See also ICC, *The Prosecutor v. Bemba et al.*, Case No. ICC-01/05-01/13-749, Pre-Trial Chamber II, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute, 11 November 2014, para. 35; ICC, *The Prosecutor v. Bemba et al.*, Case No. ICC-01/05-01/13, Trial Chamber VII, Judgment, 19 October 2016, para. 90.
228. ICTY, *Prosecutor v. Delalić et al.* (Čelebići case), Case No. IT-96-21-T, Trial Chamber, Judgment, 16 November 1998, para. 327; ICTY, *Prosecutor v. Blagojević and Jokić,* Case No. IT-02-60-T, Trial Chamber, Judgement, 17 January 2005, para. 726; ICTY, *Prosecutor v. Limaj et al,* Case No. IT-03-66-T, Trial Chamber, Judgment, 30 November 2005, para. 517; ICTY, *Prosecutor v. Popovic et al,* Case No. IT-05-88-A, Appeals Chamber, Judgment, 30 January 2015, para. 1732; MICT, *Prosecutor v. Šešelj*, Case No. MICT-16-99-A, Appeals Chamber, Judgment, 11 April 2018, fn. 594.
229. ICTY, *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-A, Appeals Chamber, Judgment, 9 May 2007, para. 195.
230. ICTY, *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, Appeals Chamber, Judgment, 30 January 2015, para. 1732; MICT, *Prosecutor v. Šešelj*, Case No. MICT-16-99-A, Appeals Chamber, Judgment, 11 April 2018, fn. 594
231. See Jérôme de Hemptinne, Robert Roth, Elies van Sliedregt, Marjolein Cupido, Manuel J. Ventura and Lachezar Yanev (eds), *Modes of Liability in International Criminal Law* (2019), pp. 184-186.
232. ICTY, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Appeals Chamber, Judgment, 24 March 2000, para. 165; ICTY, *Prosecutor v. Orić*, Case No. IT-03-68-T, Trial Chamber, Judgment, 30 June 2006, para. 282; ICTY, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Trial Chamber, Judgment, 26 February 2009, Vol. I, para. 92; ICTY, *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Trial Chamber, Judgment, 10 June 2010, para. 1015; SCSL, *Prosecutor v. Brima et al.* (AFRC case), Case No. SCSL-04-16-T, 20 June 2007, Trial Chamber, Judgment, para. 775; ECCC, *Kaing* alias *Duch*, Case No. 001/18-07-2007/ECCC/TC/E188, Trial Chamber, Judgment, 26 July 2010, para. 534; ECCC, *Nuon* and *Khieu*, Case No. 002/19-09-2007/ECCC/TC/E313, Trial Chamber, Case 002/01 Judgment, 7 August 2014 para. 704.
233. ICTY, *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeals Chamber, Judgment, 29 July 2004, para. 48; ICTY, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-A, Appeals Chamber, Judgment, 5 May 2009, para. 81; ICTY, *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-A, Appeals Chamber, Judgment, 9 May 2007, para. 127; ICTR, *Prosecutor v. Nahimana et al.* (Media Case), Case No. ICTR-99-52-A, Appeals Chamber, Judgment, 28 November 2007, para. 482; ICTR, *Prosecutor v. Gacumbitsi,* Case No. ICTR-2001-64-A, Appeals Chamber, Judgment, 7 July 2006, para. 140; ICTR, *Kalimanzira v. Prosecutor*, Case No. ICTR-05-88-A, Appeals Chamber, Judgment, 20 October 2010, para. 87, fn. 238; ICTR, *Prosecutor v. Niyiramasuhuko et al.*, Case No. ICTR-98-42-A, Appeals Chamber, Judgment, 14 December 2015, para. 3332; SCSL, *Prosecutor v. Taylor*, Case No. SCSL-03-01-A, Appeals Chamber, Judgment, 26 September 2013, para. 367; ECCC, *Nuon* and *Khieu*, Case No. 002/19-09-2007/ECCC/TC/E313, Trial Chamber, Case 002/01 Judgment, 7 August 2014, para. 712; ICC, *The Prosecutor v. Bemba et al.*, Case No. ICC-01/05-01/13, Trial Chamber VII, Judgment, 19 October 2016, para. 96. See also Schonfeld et al., Case No. 66, British Military Court (Essen), 11–26 June 1946, in LRTWC, Vol. XI, p. 70.
234. ICTY, *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeals Chamber, Judgment, 29 July 2004, para. 48;

iv. liability can arise from providing assistance to the planning, preparation or execution of a plan, policy, programme or strategy when crimes, particularly organized and large-scale crimes, are committed in furtherance of such a plan, policy, programme or strategy;[235]
v. the material element need not be specifically directed to practically assist, encourage or lend moral support to the commission of crimes;[236] and

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ICTY, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-A, Appeals Chamber, Judgment, 5 May 2009, para. 81; ICTR, *Prosecutor v. Ntagerura et al.*, Case No. ICTR-99-46-A, Appeals Chamber, Judgment, 7 July 2006, para. 372; ICTR, *Prosecutor v. Kalimanzira*, Case No. ICTR-05-88-A, Appeals Chamber, Judgment, 20 October 2010, fn. 238; ICTR, *Prosecutor v. Niyiramasuhuko et al*, Case No. ICTR-98-42-A, Appeals Chamber, Judgment, 14 December 2015, para. 3332; SCSL, *Prosecutor v. Taylor*, Case No. SCSL-03-01-A, Appeals Chamber, Judgment, 26 September 2013, para. 370; SCSL, *Prosecutor v. Fofana and Kondewa*, Case No. SCSL-04-14-A, Appeals Chamber, Judgment, 28 May 2008, paras 71-72; ICC, *The Prosecutor v. Bemba et al.*, Case No. ICC-01/05-01/13, Trial Chamber VII, Judgment, 19 October 2016, para. 96.

235. ICTY, *Prosecutor v. Krstić*, Case No. IT-98-33-A, Appeals Chamber, Judgment, 19 April 2004, para. 137; SCSL, *Prosecutor v. Taylor*, Case No. SCSL-03-01-A, Appeals Chamber, Judgment, 26 September 2013, paras 378 and 383-385; MICT, *Prosecutor v. Šešelj*, Case No. MICT-16-99-A, Appeals Chamber, Judgment, para. 172, fn. 600. See also *United States of America v. Altstötter et al.* ('The Justice Case'), Case No. 3, Military Tribunal III (Nuremberg),3–4 December 1947, in TWC (Green Series), Vol. III, at 1055–1056, 1118, 1132; *United States of America v. Brandt et al.* ('The Medical Case'), Case No. 1, Military Tribunal I(Nuremberg), 19 August 1947, in TWC (Green Series), Vol. II, p. 198; *United States of America v. Pohl et al.* ('The Pohl Case'), Case No. 4, Military Tribunal II(Nuremberg), 11 August 1948, in TWC (Green Series), Vol. V, at 1174; *United States of America v. von Weizsäcker et al.* ('The Ministries Case'), Case No. 11, Military Tribunal IV (Nuremberg), 11–13 April 1949, in TWC (Green Series), Vol. XIV, at 478.

236. ICTY, *Prosecutor v. Mrkšić et al,* Case No. IT-95-13/1-A, Appeals Chamber, Judgment, 5 May 2009, para. 159; ICTY, *Prosecutor v. Popović et al*, Case No. IT-05-88-A, Appeals Chamber, Judgment, 30 January 2015, para. 1764; ICTY, *Prosecutor v. Stanišić and Simatović*, Appeals Chamber, Judgment, Case No. IT-03-69-A, 9 December 2015, paras 104–108; SCSL, *Prosecutor v. Taylor,* Case No. SCSL-03-01-A, Appeals Chamber, Judgment, 26 September 2013, paras 466–481; ECCC, *Nuon* and *Khieu*, Case No. 002/19-09-2007/ECCC/TC/E313, Trial Chamber, Case 002/01 Judgment, 7 August 2014, paras 708–710. However, the issue of whether the material element of aiding and abetting entails "specific direction" as a requirement has attracted some controversy in international jurisprudence. Starting with the Blagojević and Jokić case (see ICTY, *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-A, Appeals Chamber, Judgment, 9 May 2007, paras 185-188) the matter has been dealt with in a number of cases by the ICTY, ICTR and the SCSL, with divergent positions being taken. For cases affirming this requirement see, e.g., ICTY, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Appeals Chamber, Judgment, 24 March 2000, para. 163; ICTY, Prosecutor v. Vasiljević, Case No. IT-98-32-A, Appeals Chamber, Judgment, 25 February 2004, paras 102(i) and 134–135; ICTR, *Prosecutor v. Ntakirutimana and Ntakirutimana*, Case No. ICTR-96-10-A & ICTR-96-17-A, Appeals Chamber, Judgment, 13 December 2004, para. 530; ICTR, *Prosecutor v. Muhimana*, Case No. ICTR-95-1B-A, Appeals Chamber, Judgment, 21 May 2007, para. 189. For alternative formulations, see ICTR, *Prosecutor v. Ntagerura et al.*, Case No. ICTR-99-46-A, Appeals Chamber, Judgment, 7 July 2006, para. 370 ('specifically aimed'); ICTY, *Prosecutor v. Simić*, Case No. IT-95-9-A, Appeals Chamber, Judgment, 28 November 2006, para. 85 ('directed to'); ICTR, *Prosecutor v. Nahimana et al.* (Media case), Case No. ICTR-99-52-A, Appeals Chamber, Judgment, 28 November 2007, para. 482 ('aimed specifically') (but see contra para. 672); ICTR, *Prosecutor v. Rukundo*, Case No. ICTR-2001-70-A, Appeals Chamber, Judgment, 20 October 2010, para. 52 ('specifically aimed'). At the same time, in other cases the Tribunals did not include the "specific direction" requirement in their description of the actus reus of aiding and abetting. See, e.g., ICTY, *Prosecutor v. Delalić et al.* (Čelebići case), Case No. IT-96-21-A, Appeals Chamber, Judgment, 20 February 2001, para. 352 (see also para. 345); ICTY, *Prosecutor v. Krnojelac* (Foča case), Case No. IT-97-25-A, Appeals Chamber, Judgment, 17 September 2003, para. 37 (but see contra para. 33); ICTY, *Prosecutor v. Krstić*, Case No. IT-98-33-A, Appeals Chamber, Judgment, 19 April 2004, para. 137; ICTR, *Prosecutor v. Karera*, Case No. ICTR-01-74-A, Appeals Chamber, Judgment, 2 February 2009, para. 321; ICTY, *Prosecutor v. Gotovina and Markač*, Case No. IT-06-90-A, Appeals Chamber, Judgment, 16 November 2012, para. 127. See also ICTY, *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Trial Chamber, Judgment, 10 December 1998, paras 234–235 and 249 (articulating the actus reus of aiding and abetting without specific direction after an analysis of customary international law). Notably, the view that "specific direction" is one of the material requirements for aiding and abetting was prominently adopted in the Perišić case, where the ICTY overturned the accused's convictions and acquitted him of all aiding and abetting charges on that basis (see ICTY, *Prosecutor v. Perišić*, Case No. IT-04-81-A, Appeals Chamber, Judgment, 28 February 2013, paras 26-34). In this case, the ICTY went on to note that specific direction had originated from the Tadić Appeal Judgment and had been repeated in the jurisprudence ever since, though a number of appeal judgments had not explicitly done so (but had either used equivalent formulations or had cited cases that did include specific direction). The findings of the ICTY Appeals Chamber were however not unanimous. See Partially Dissenting Opinion of Judge Liu, paras 2–9; and Separate Opinion of Judge Ramaroson, paras 2–10. The specific direction issue was subsequently addressed by the SCSL in the Taylor case. In this case, the SCSL Appeals Chamber, after a detailed analysis of international and domestic practice starting from World War II, concluded that there was no specific direction requirement under customary international law: see SCSL, Prosecutor v. Taylor, Case No. SCSL-03-01-A, Appeals Chamber, Judgment, 26 September 2013, paras 417-437, 446-451, 456-465, 474-475. The Taylor Appeal Judgment pointed out that the Perišić Appeal Judgment did not in fact hold that specific direction was a requisite element under customary international law. Further, it criticized the Perišić Appeal Judgment's methodology: see paras 476-479. The matter eventually returned to the ICTY Appeals Chamber in the Šainović et al. case, which ultimately rejected the approach adopted

vi. encouragement or support shown need not be explicit: therefore, under certain circumstances, even the act of being present at the crime scene (or in its vicinity) as a "silent spectator" can be considered as tacit approval or encouragement of the crime, especially if the accused possesses a degree of authority, which entails "a clear signal of official tolerance".[237]

With regard to the requirement of a substantial contribution to/effects on the crime – i.e., the causal link between the aider and abettor and the crime – international case law has held that:[238]

i. the assessment of whether the accused's acts meet the substantial contribution/effect threshold requires a fact-based inquiry in light of all the evidence as a whole;[239]
ii. the material element may involve multiple acts that, cumulatively, make a substantial contribution to the crime;[240]
iii. the fact that the accused provided more limited assistance to the commission of the crime than others does not preclude the accused's assistance from having made a substantial contribution to the crime;[241]
iv. the aider and abettor needs not possess a certain level of authority/power or have an ability to exercise independent initiative in order to make a substantial contribution to the crimes;[242] and
v. it is not necessary to establish that the aider and abettor's contribution served as a precondition to the crime or that the crime would not have occurred but for the aider and abettor's contribution.[243]

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in the Perišić Appeal Judgment as "it [wa]s in direct and material conflict with the prevailing jurisprudence on the actus reus of aiding and abetting and with customary international law in this regard" (see ICTY, *Prosecutor v. Šainović et al.*, Case No. IT-05-87-A, Appeals Chamber, Judgment, 23 January 2014, para. 1650; see also paras 1621, 1623-1648. See however Dissenting Opinion of Judge Tuzmukhamedov, paras 40–48.) Meanwhile, specific direction had, in part, resulted in the acquittals of other accused at the ICTY in another case, which attracted even more attention to the controversy on the issue: see ICTY, *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, Trial Chamber, Judgment, 30 May 2013, para. 2360.

237. ICTY, *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Trial Chamber, Judgment, 10 December 1998, paras 207 and 232; ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36-A, Appeals Chamber, Judgment, 3 April 2007, para. 277; ICTR, *Prosecutor v. Niyiramasuhuko et al*, Case No. ICTR-98-42-A, Appeals Chamber, Judgment, 14 December 2015, para. 2092; SCSL, *Prosecutor v. Taylor*, Case No. SCSL-03-01-A, Appeals Chamber, Judgment, 26 September 2013, para. 370; ICC, *The Prosecutor v. Bemba et al.*, Case No. ICC-01/05-01/13, Trial Chamber VII, Judgment, 19 October 2016, para. 89.
238. See Jérôme de Hemptinne, Robert Roth, Elies van Sliedregt, Marjolein Cupido, Manuel J. Ventura and Lachezar Yanev (eds), *Modes of Liability in International Criminal Law* (2019), pp. 186-187.
239. ICTY, *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-A, Appeals Chamber, Judgment, 9 May 2007, para. 134, 197–199; ICTY, *Prosecutor v. Mrkšić and Šljivančanin*, Case No. IT-95-13/1-A, Appeals Chamber, Judgment, 5 May 2009, para. 200; ICTY, *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-A, Appeals Chamber, Judgment, 4 December 2012, para. 438; ICTR, *Prosecutor v. Muvunyi*, Case No. ICTR-2000-55A-A, Appeals Chamber, Judgment, 29 August 2008, para. 80; ICTR, *Prosecutor v. Kalimanzira*, Case No. ICTR-05-88-A, Appeals Chamber, Judgment, 20 October 2010, para. 86; ICTR, *Prosecutor v. Rukundo*, Case No. ICTR-2001-70-A, Appeals Chamber, Judgment, 20 October 2010, para. 52; ICTR, *Prosecutor v. Ntawukulilyayo*, Case No. ICTR-05-82-A, Appeals Chamber, Judgment, 14 December 2011, para. 214; SCSL, *Prosecutor v. Taylor*, Case No. SCSL-03-01-A, Appeals Chamber, Judgment, 26 September 2013, para. 370.
240. ICTY, *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-A, Appeals Chamber, Judgment, 9 May 2007, para. 284; SCSL, *Prosecutor v. Taylor*, Case No. SCSL-03-01-A, Appeals Chamber, Judgment, 26 September 2013, fn. 1128; ICTR, *Prosecutor v. Kamuhanda*, Case No. ICTR-99-54A-A, Appeals Chamber, Judgment, 19 September 2005, paras 71–72; ICTR, *Prosecutor v. Renzaho*, Case No. ICTR-97-31-A, Appeals Chamber, Judgment, 1 April 2011, paras 336–337.
241. ICTY, *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-A, Appeals Chamber, Judgment, 9 May 2007, para. 134; ICTY, *Prosecutor v. Mrkšić and Šljivančanin,* Case No. IT-95-13/1-A, Appeals Chamber, Judgment, 5 May 2009, para. 200.
242. ICTY, *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-A, Appeals Chamber, Judgment, 9 May 2007, para. 195.
243. ICTY, *Prosecutor v. Aleksovski,* Case No. IT-95-14/1-A, Appeals Chamber, Judgment, 24 March 2000, para. 164; ICTR, *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-A, Appeals Chamber, Judgment, 1 June 2001, para. 201; ICTY, *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeals Chamber, Judgment, 29 July 2004, para. 48; ICTY, *Prosecutor v. Simić*, Case No. IT-95-9-A, Appeals Chamber, Judgment, 28 November 2006, para. 85; ICTY, *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-A, Appeals Chamber, Judgment, 9 May 2007, paras 127 and 134; ICTY, *Prosecutor v. Mrkšić and Šljivančani*n, Case No. IT-95-13/1-A, Appeals Chamber, Judgment, 5 May 2009, para. 81; ICTR, *Prosecutor v. Kalimanzira*, Case No. ICTR-05-88-A, Appeals Chamber, Judgment, 20 October 2010, para. 86; ICTR, *Prosecutor v. Rukundo*, Case No. ICTR-2001-70-A, Appeals Chamber, Judgment, 20 October 2010, para. 52; ICTR, *Prosecutor v.*

Notably, while International Tribunals addressed extensively the issue of substantial contribution/effect in aiding and abetting jurisprudence, international practice does not seem yet to have set clear criteria as to what "substantial contribution" actually involves.[244] Indeed, this matter was first discussed by the ICTY in the *Tadić* case, albeit in the context of article 7(1) of the ICTY Statute as a whole (which includes aiding and abetting among other modes of liability).[245] In Tadić, the Trial Chamber first articulated the "substantial effect" requirement on the basis of an analysis of World War II-era case law (not all concerned with aiding and abetting) and of the ILC Draft Code of Crimes.[246] The issue was subsequently explored by the ICTY in the *Furundžija* case.[247] In that case, through an analysis of World War II-era cases[248] and other sources, the ICTY held that "marginal participation" is insufficient to give rise to aiding and abetting liability and, while recognizing and accepting a substantial threshold, ruled that "the relationship between the acts of the accomplice and of the principal must be such that the acts of the accomplice make a significant difference to the commission of the criminal act by the principal".[249] Similarly, subsequent ICTY[250] and SCSL[251] case law has required a substantial degree of participation for aiding and abetting. However, they have all reached this conclusion merely based on an assessment of facts and/or evidence, and they did not provide a clear definition of the substantial contribution/effect requirement, thereby confirming that the causal link between the accused's acts and the commission of the crime is to be assessed on a case-by-case basis,[252] as mentioned above.

Additionally, in relation to the principal perpetrator, international jurisprudence has concluded that :[253]

Ntawukulilyayo, Case No. ICTR-05-82-A, Appeals Chamber, Judgment, 14 December 2011, para. 214; ICC, *The Prosecutor v. Bemba et al.*, Case No. ICC-01/05-01/13, Trial Chamber VII, Judgment, 19 October 2016, para. 94; SCSL, *Prosecutor v. Taylor*, Case No. SCSL-03-01-T, Trial Chamber, Judgment, 18 May 2012, para. 485.

244. See Jérôme de Hemptinne, Robert Roth, Elies van Sliedregt, Marjolein Cupido, Manuel J. Ventura and Lachezar Yanev (eds), *Modes of Liability in International Criminal Law* (2019), pp. 201-208.
245. ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-T, Trial Chamber, Judgment, 7 May 1997, para. 681.
246. ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-T, Trial Chamber, Judgment, 7 May 1997, para. 688.
247. ICTY, *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Trial Chamber, Judgment, 10 December 1998.
248. The ICTY noted that in the Ohlendorf et al. case, some of the accused had been of low rank and unable to control, prevent or modify the criminal activities concerned or to protest against illegal actions, leading to their acquittal. The Trial Chamber contrasted these persons to others who were convicted for having located, evaluated and turned over lists of communists knowing that they would be executed and a high-ranking military officer who knew of executions and the summary process behind them but did nothing. See ICTY, *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Trial Chamber, Judgment, 10 December 1998, paras 217–221 (referring to the Ohlendorf et al case (Einsatzgruppen case)). In Tesch et al., one of the accused acquitted had not been in a position to either influence the transfer of poison gas to Auschwitz or to prevent it, as opposed to the owner and second in charge at the relevant firm who were both convicted. See ICTY, *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Trial Chamber, Judgment, 10 December 1998, paras 222–223 (referring to the World War II case of Tesch et al. (Zyklon B case).
249. ICTY, *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Trial Chamber, Judgment, 10 December 1998, para. 231.
250. See e.g., ICTY, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-T, Trial Chamber Judgment, 2 November 2001, para. 312; ICTY, *Prosecutor v. Šainović et al.*, Case No. IT-05-87-A, Appeals Chamber, Judgment, 23 January 2014, para. 1647.
251. SCSL, *Prosecutor v. Taylor,* Case No. SCSL-03-01-A, Appeals Chamber, Judgment, 26 September 2013, paras 368 and 370–371, 391. In analysing precedent cases, the SCSL held that the relevant actus rei had substantially contributed to crimes because they had "supported and sustained the organised commission of crimes" (Ibid, para. 372, referring to the SCSL's Brima et al. case); "made...civilians more vulnerable and less able to defend themselves [,] ...provided a pretext for attacks...and sustained the functioning of the organised commission of crimes" (Ibid., paras 373, 374, referring to the ICTY's Brđanin case); "supported and enhanced the capacity' of the principals to commit crimes (Ibid., para. 375, referring to the ICTY's Blagojević and Jokić and Krstić cases); "supported and sustained the system of arrests and detention" (Ibid., para. 376, referring to the ICTY's Simić case); "contribut[ed] to and ma[de] possible [the victims'] deportation" (Ibid., fn. 1194, referring to the World War II case of Becker et al.); and "permitted the continued existence and further development of th[e] inhuman situation" (Ibid., para. 378, referring to the World War II case of Roechling).
252. See Jérôme de Hemptinne, Robert Roth, Elies van Sliedregt, Marjolein Cupido, Manuel J. Ventura and Lachezar Yanev (eds), *Modes of Liability in International Criminal Law* (2019), p. 206.
253. See Jérôme de Hemptinne, Robert Roth, Elies van Sliedregt, Marjolein Cupido, Manuel J. Ventura and Lachezar Yanev (eds), *Modes of Liability in International Criminal Law* (2019), pp. 187-188.

i. no evidence of a plan or agreement between the aider and abettor and the principal perpetrator is required; [254]
ii. with the exception of aiding and abetting as a "silent spectator", it is not necessary for the accused to have had authority or control over the principal perpetrator;[255]
iii. with the exception of *ex post facto* aiding and abetting,[256] it is not necessary for the principal perpetrator to know of the existence of the aider and abettor or of their assistance/contribution;[257]
iv. the accused's acts and conduct must have contributed substantially to the commission of the crime rather than to the specific acts of the principal perpetrator;[258]
v. where encouragement or moral support is given to the principal perpetrator directly, it can only form a substantial contribution to a crime when the principal perpetrator is aware of it;[259] and
vi. the principal perpetrator need not have been identified, tried or convicted, even when the underlying crime requires *dolus specialis* (specific intent), but the crimes for which the accused stands to be convicted as an aider and abettor must be established.[260]

International jurisprudence has also affirmed that the material element of aiding and abetting may be perpetrated through an omission.[261] To give rise to liability for aiding and abetting by

254. ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999, para. 229(ii); ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36-A, Appeals Chamber, Judgment, 3 April 2007, para. 263; SCSL, *Prosecutor v. Taylor*, Case No. SCSL-03-01-T, Trial Chamber, Judgment, 18 May 2012, para. 484; ECCC, *Kaing* alias *Duch*, Case No. 001/18-07-2007/ECCC/TC/E188, Trial Chamber, Judgment, 26 July 2010, para. 534; ECCC, *Nuon* and *Khieu*, Case No. 002/19-09-2007/ECCC/TC/E313, Trial Chamber, Case 002/01 Judgment, 7 August 2014, para. 704.

255. ICTY, *Prosecutor v. Simić*, Case No. IT-95-9-A, Appeals Chamber, Judgment, 28 November 2006, para. 103; ICTY, *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-A, Appeals Chamber, Judgment, 9 May 2007, para. 195; ICTR, *Prosecutor v. Muhimana*, Case No. ICTR-95-1B-A, 21 May 2007, Appeals Chamber, Judgment, para. 189; ICTR, *Prosecutor v. Nahimana et al.* (Media case), Case No. ICTR-99-52-A, Appeals Chamber, Judgment, 28 November 2007, paras 672 and 966; SCSL, *Prosecutor v. Sesay et al.* (RUF case), Case No. SCSL-04-15-A, Appeals Chamber, Judgment, 26 October 2009, para. 541; SCSL, *Prosecutor v. Taylor,* Case No. SCSL-03-01-A, Appeals Chamber, Judgment, 26 September 2013, para. 370.

256. See ECCC, *Nuon* and *Khieu*, Case No. 002/19-09-2007/ECCC/TC/E313, Trial Chamber, Case 002/01 Judgment, 7 August 2014, para. 712: ex post facto aiding and abetting "reflects an understanding that an offer made before or during the commission of a crime, of assistance to be provided after the fact, may encourage or morally support the perpetrator and thereby have a substantial effect on the commission of a crime". See also ICC, *Prosecutor v. Bemba et al.*, Case No. ICC-01/05-01/13-2275-Red, Appeals Chamber, Judgment, 8 March 2018, paras 20, 1399, denoting "a prior offer of assistance or an agreement between the principal perpetrator and the accessory" in an ex post facto aiding and abetting context.

257. ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36-A, Appeals Chamber, Judgment, 3 April 2007, para. 349; ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999, para. 229 (ii); ICTR, *Prosecutor v. Niyiramasuhuko et al*, Case No. ICTR-98-42-A, Appeals Chamber, Judgment, 14 December 2015, para. 3332; ICTR, *Prosecutor v. Kalimanzira*, Case No. ICTR-05-88-A, Appeals Chamber, Judgment, 20 October 2010, para. 87; STL, Case No. STL-11-01/I/AC/R176bis/F0936, Appeals Chamber, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011, para. 227; SCSL, *Prosecutor v. Taylor*, Case No. SCSL-03-01-A, Appeals Chamber, Judgment, 26 September 2013, para. 370.

258. SCSL, *Prosecutor v. Taylor*, Case No. SCSL-03-01-A, Appeals Chamber, Judgment, 26 September 2013, paras 367–368 and 401; ICC, *Prosecutor v. Bemba et al.*, Case No. ICC-01/05-01/13-2275-Red, Appeals Chamber, Judgment, 8 March 2018, paras 19, 1329.

259. ICTR, *Prosecutor v. Ntagerura et al.*, Case No. ICTR-99-46-A, Appeals Chamber, Judgment, 7 July 2006, para. 374; ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36-A, Appeals Chamber, Judgment, 3 April 2007, paras 273, 277; ICTY, *Prosecutor v. Simić*, Case No. IT-95-9-A, Appeals Chamber, Judgment, 28 November 2006, para. 130; ICTR, *Prosecutor v. Niyiramasuhuko et al*, Case No. ICTR-98-42-A, Appeals Chamber, Judgment, 14 December 2015, paras 2087-2089; ICC, *Prosecutor v. Bemba et al.*, Case No. ICC-01/05-01/13-2275-Red, Appeals Chamber, Judgment, 8 March 2018, para. 1330.

260. ICC, *The Prosecutor v. Bemba et al.*, Case No. ICC-01/05-01/13, Trial Chamber VII, Judgment, 19 October 2016, para. 84; ICTY, ICTY, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Appeals Chamber, Judgment, 24 March 2000, para. 165; ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36-A, Appeals Chamber, Judgment, 3 April 2007, para. 355; ECCC, *Kaing* alias *Duch*, Case No. 001/18-07-2007/ECCC/TC/E188, Trial Chamber, Judgment, 26 July 2010, para. 534; SCSL, *Prosecutor v. Taylor,* Case No. SCSL-03-01-A, Appeals Chamber, Judgment, 26 September 2013, para. 370; MICT, *Prosecutor v. Ngirabatware*, Case No. MICT-12-29-A, Appeals Chamber, Judgment, 18 December 2014, para. 149; ICC, *The Prosecutor v. Bemba et al.*, Case No. ICC-01/05-01/13-A, Appeals Chamber, Judgment, 8 March 2018, 1329.

261. ICTY, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-A, Appeals Chamber, Judgment, 5 May 2009, para. 134; ICTY, *Prosecutor v. Orić*, Case No. IT-03-68-A, Appeals Chamber, Judgment, 3 July 2008, para. 43; ICTR, *Prosecutor v. Ntagerura et al*, Case No. ICTR-99-46-A, Appeals Chamber, Judgment, 7 July 2006, paras

omission, tribunals have required that:

i. the accused must have been under a legal duty to act in the circumstances and failed to do so; [262]
ii. means must have been available to the accused to fulfil their duty to act;[263] and
iii. the material element is satisfied if the perpetration of the crimes would have been less likely if the accused had acted pursuant to their legal duty.[264]

Furthermore, the Tribunals have held that, when the accused is in a position of authority and was at or near the scene of the crimes, but did not intervene, they are not, strictly speaking, responsible for aiding and abetting by omission; in such cases individual criminal liability arises not on the grounds of a legal duty to act but, rather, on the encouragement, moral support or tacit approval that is afforded to the principal perpetrators.[265]

b) Mental element (mens rea)

With regard to the mental element, International Tribunals have held that the aider and abettor must "know" that their acts would assist in the commission of the underlying crime,[266] and must be aware of the "essential elements" of the underlying crime ultimately committed, including the state of mind of the physical perpetrator.[267] Acceptance by the accused that practical assistance, encouragement or moral support to the commission of crimes would be a possible and foreseeable consequence of their conduct (i.e., their recklessness), instead, has

334, 370; ICTR, *Prosecutor v. Nahimana et al.* (Media case), Case No. ICTR-99-52-A, Appeals Chamber, Judgment, 28 November 2007, para. 482.

262. ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36-A, Appeals Chamber, Judgment, 3 April 2007, para. 274; ICTY, *Prosecutor v. Orić*, Case No. IT-03-68-A, Appeals Chamber, Judgment, 3 July 2008, para. 43; ICTY, *Prosecutor v. Mrkšić et al*, Case No. IT-95-13/1-A, Appeals Chamber, Judgment, 5 May 2009, para. 49; ICTY, *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, Appeals Chamber, Judgment, 30 January 2015, para. 1740; ICTR, *Prosecutor v. Ntagerura et al*, Case No. ICTR-99-46-A, Appeals Chamber, Judgment, 7 July 2006, para. 334; ECCC, *Nuon* and *Khieu*, Case No. 002/19-09-2007/ECCC/TC/E313, Trial Chamber, Case 002/01 Judgment, 7 August 2014, fn. 2159. As mentioned already in Chapter 3, Section b of this Guide, international jurisprudence has not clearly set whether aiding and abetting by omission requires the accused to violate a duty based on criminal law. Indeed, World War II case law and domestic legislation suggest that a criminal law-based duty is not required for omissions to arise as a mode of individual criminal responsibility. See Michael Duttwiler, "Liability for Omission in International Criminal Law", 6 *International Criminal Law Review* (2006), pp. 17-25, 30-45, and 60.

263. ICTY, *Prosecutor v. Mrkšić et al*, Case No. IT-95-13/1-A, Appeals Chamber, Judgment, 5 May 2009, paras 49, 82 and 154; ICTY, *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, Appeals Chamber, Judgment, 30 January 2015, para. 1740. ICTR, *Prosecutor v. Ntagerura et al*, Case No. ICTR-99-46-A, Appeals Chamber, Judgment, 7 July 2006, para. 335; ICTR, *Prosecutor v. Niyiramasuhuko et al*, Case No. ICTR-98-42-A, Appeals Chamber, Judgment, 14 December 2015, para. 2205.

264. ICTY, *Prosecutor v. Mrkšić and Šljivančanin*, Case No. IT-95-13/1-A, Appeals Chamber, Judgment, 5 May 2009, paras 97 and 100; ICTY, *Prosecutor v. Šainović et al.*, Case No. IT-05-87-A, Appeals Chamber, Judgment, 23 January 2014, paras 1679 and 1682, fn. 5510; ICTY, *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, Appeals Chamber, Judgment, 30 January 2015, paras 1741 and 1744.

265. ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36-A, Appeals Chamber, Judgment, 3 April 2007, para. 273; ICTY, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-T, Trial Chamber, Judgment, 25 June 1999, para. 87; ICTR, *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-A, Appeals Chamber, Judgment, 1 June 2001, paras 201–202.

266. ICTY, *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeals Chamber, Judgment, 29 July 2004, para. 49; ICTY, *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-A, Appeals Chamber, Judgment, 9 May 2007, paras 127, 219 221; ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36-A, Appeals Chamber, Judgment, 3 April 2007, para. 484.

267. ICTY, *Prosecutor v. Orić*, Case No. IT-03-68-A, Appeals Chamber, Judgment, 3 July 2008, para. 43; ICTY, *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-A, Appeals Chamber, Judgment, 9 May 2007, paras 127, 221; ICTY, *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, Appeals Chamber, Judgment, 30 January 2015, para. 1732; ICTR, *Prosecutor v. Seromba*, Case No. ICTR-2001-66-A, Appeals Chamber, Judgment, 12 March 2008, paras 56, 65; ICTR, *Prosecutor v. Nahimana et al.* (Media case), Case No. ICTR-99-52-A, Appeals Chamber, Judgment, 28 November 2007, para. 482; ICTR, *Prosecutor v. Karera*, Case No. ICTR-01-74-A, Appeals Chamber, Judgment, 2 February 2009, para. 321; ECCC, *Nuon* and *Khieu*, Case No. 002/19-09-2007/ECCC/TC/E313, Trial Chamber, Case 002/01 Judgment, 7 August 2014, para. 704; SCSL, *Prosecutor v. Brima et al.* (AFRC case), Case No. SCSL-2004-16-A, Appeals Chamber, Judgment, 22 February 2008, para. 244; ICC, *The Prosecutor v. Bemba et al.*, Case No. ICC-01/05-01/13, Trial Chamber VII, Judgment, 19 October 2016, para. 98; ICC, *The Prosecutor v. Bemba et al.*, Case No. ICC-01/05-01/13-A, Appeals Chamber, Judgment, 8 March 2018, paras 21, 1400

been deemed insufficient.[268]

In examining the mental element for aiding and abetting,[269] the ICTY, the ICTR, the SCSL and the ECCC have also ruled that the accused need not know the particular identities of the perpetrators,[270] nor share the perpetrators' own intent to commit the underlying crime.[271] Thus, in relation to multiple crimes, tribunals have held that it is sufficient for the aider and abettor to be aware/know that one of a number of crimes would probably be committed,[272] and that one of those crimes was in fact committed. On the other hand, in relation to crimes for which a specific intent is required – e.g., torture as a crime against humanity – international jurisprudence underlined that the accused need not to share the intent of the perpetrator to commit the underlying crime, but they must know or be aware of the principal's specific intent to commit the crime. [273]

B. Instigation

Instigation is another form of accessorial criminal liability – i.e., a mode of participation in another person's crime.[274] Like other modes of individual criminal liability addressed in this Guide, instigation is well established in international criminal law. As such, it was first included as one of the conducts giving rise to individual criminal responsibility in the Statute of the Nuremberg Tribunal. As mentioned above, the IMT did not distinguish between different modes of liability in different articles, but provided generally that:

268. ICTY, *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeals Chamber, Judgment, 29 July 2004, para. 49; ICTY, *Prosecutor v. Mrkšić et al*, Case No. IT-95-13/1-A, Appeals Chamber, Judgment, 5 May 2009, para. 159. See however SCSL SCSL, *Prosecutor v. Brima et al.* (AFRC case), Case No. SCSL-2004-16-A, Appeals Chamber, Judgment, 22 February 2008, paras 242–243; SCSL, *Prosecutor v. Fofana and Kondewa*, Case No. SCSL-04-14-A, Appeals Chamber, Judgment, 28 May 2008, para. 366; SCSL, *Prosecutor v. Taylor*, Case No. SCSL-03-01-A, Appeals Chamber, Judgment, 26 September 2013, paras 414, 438 and 533, fns 1284 and 1363–1364.

269. See Jérôme de Hemptinne, Robert Roth, Elies van Sliedregt, Marjolein Cupido, Manuel J. Ventura and Lachezar Yanev (eds), *Modes of Liability in International Criminal Law* (2019), pp. 177-178, 189-190.

270. ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36-A, Appeals Chamber, Judgment, 3 April 2007, para. 355.

271. ICTY, *Prosecutor v. Simić et al.*, Case No. IT-95-9-A, Appeals Chamber, Judgment, 28 November 2006, para. 86; ICTY, *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-A, Appeals Chamber, Judgment, 9 May 2007, para. 221; ICTR, *Prosecutor v. Seromba*, Case No. ICTR-2001-66-A, Appeals Chamber, Judgment, 12 March 2008, para. 56; ICTR, *Prosecutor v. Ntawukulilyayo*, Case No. ICTR-05-82-A, Appeals Chamber Judgment, 14 December 2011, para. 222; SCSL, *Prosecutor v. Fofana and Kondewa*, Case No. SCSL-04-14-A Appeals Chamber, Judgment, 28 May 2008, para. 58; ECCC, *Nuon* and *Khieu*, ,Case No. 002/19-09-2007/ECCC/TC/E313, Trial Chamber, Case 002/01 Judgment, 7 August 2014, para. 704; ECCC, *Kaing* alias *Duch*, Case No. 001/18-07-2007/ECCC/TC/E188, Trial Chamber, Judgment, 26 July 2010, para. 535; STL, Case No. STL-11-01/I/AC/R176bis/F0936, Appeals Chamber, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011, para. 225.

272. ICTY, Prosecutor v. Blaškić, Case No. IT-95-14-A, Appeals Chamber, Judgment, 29 July 2004, para. 50; ICTY, Prosecutor v. Blagojević and Jokić, Case No. IT-02-60-A, Appeals Chamber, Judgment, 9 May 2007, para. 222; ICTY, Prosecutor v. Mrkšić et al., Case No. IT-95-13/1-A, Appeals Chamber, Judgment, 5 May 2009, para. 159; MICT, Prosecutor v. Ngirabatware, Case No. MICT-12-29-A, Appeals Chamber, Judgment, 18 December 2014, para. 158; ICTR, Prosecutor v. Karera, Case No. ICTR-01-74-A, Appeals Chamber, Judgment, 2 February 2009, para. 321.

273. ICTY, *Prosecutor v. Simić et al*, Case No. IT-95-9-A, Appeals Chamber, Judgment, 28 November 2006, para. 86; ICTY, *Prosecutor v. Krnojelac* (Foča case), Case No. IT-97-25-A, Appeals Chamber, Judgment, 17 September 2003, para. 52; ICTY, *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-A, Appeals Chamber, Judgment, 9 May 2007, para. 127; ICTR, *Prosecutor v. Ntakirutimana and Ntakirutimana*, Case No. ICTR-96-10-A & ICTR-96-17-A, Appeals Chamber, Judgment, 13 December 2004, paras 500–501; ICTR, *Prosecutor v. Seromba*, Case No. ICTR-2001-66-A, Appeals Chamber, Judgment, 12 March 2008, para. 56; SCSL, *Prosecutor v. Fofana and Kondewa*, Case No. SCSL-04-14-A Appeals Chamber, Judgment, 28 May 2008, para. 367; ECCC, *Kaing* alias *Duch*, Case No. 001/18-07-2007/ECCC/TC/E188, Trial Chamber, Judgment, 26 July 2010, para. 535; STL, Case No. STL-11-01/I/AC/R176bis/F0936, Appeals Chamber, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011, para. 222.

274. See ICTY, *Prosecutor v. Popović et al.*, Case No. IT-05-88, Trial Chamber, Judgment, 10 June 2010, para. 1009; ICTY, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Trial Chamber, Judgment, 24 March 2016, para. 572; ICTY, *Prosecutor v. Orić*, Case No. IT-03-68, Trial Chamber, Judgment, 30 June 2006, para. 269, fn. 732; ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36, Trial Chamber, Judgment, 1 September 2004, para. 267; ICTY, *Prosecutor v. Galić,* Case No. IT-98-29, Trial Chamber, Judgment, 5 December 2003, para. 168; ICTR, *Prosecutor v. Mpambara*, Case No. ICTR-01-65, Trial Chamber, Judgment, 12 September 2006, para. 18; ICTR, *Prosecutor v. Kalimanzira*, Case No. ICTR-05-88, Trial Chamber, Judgment, 22 June 2009, para. 512. See also Jérôme de Hemptinne, Robert Roth, Elies van Sliedregt, Marjolein Cupido, Manuel J. Ventura and Lachezar Yanev (eds), *Modes of Liability in International Criminal Law* (2019), pp. 257-283.

> leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the [relevant] crimes are responsible for all acts performed by any persons in execution of such plan [emphasis added].[275]

Subsequently, instigation has featured in the Statutes of modern Tribunals. The Statutes of the ICTY, ICTR and SCSL all provide individual criminal liability of anyone "who planned, *instigated*, ordered, committed or otherwise aided and abetted in the planning, preparation or execution" of a crime under the relevant tribunal's jurisdiction.[276]

The ICTY and ICTR have described "instigation" as the act of prompting, by action or omission,[277] another person to perpetrate a crime falling within their jurisdiction.[278]

i. Constitutive elements of instigation

a) Material element (actus reus)

As stated above, instigation refers to the act of prompting,[279] encouraging or urging[280] another person to commit a crime. Under ICTY and ICTR jurisprudence, instigation may entail either

275. IMT Statute, art. 6. See also IMTFE Statute, art. 5.

276. ICTY Statute, art. 7(1); ICTR Statute, art. 6(1); SCSL Statute, art. 6(1). See also KSC Law, art. 16(1)(a); and ECCC Law, art. 29. In a similar vein, instigation features in the ICC Statute, albeit with a different terminology, as article 25(3)(b) provides individual criminal liability for anyone who "orders, *solicits* or *induces* the commission of […] a crime which in fact occurs or is attempted".

277. ICTY, *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Trial Chamber, Judgment, 3 March 2000, paras 220, 389; ICTY, *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-T, Trial Chamber, Judgment, 31 March 2003, para. 60; ICTY, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Trial Chamber, Judgment, 26 February 2009, para. 83; ICTY, *Prosecutor v. Đorđević*, Case No. IT-05-87/1-T, Trial Chamber, Judgment, 23 February 2011, para. 1870; ICTY, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Trial Chamber, Judgment, 24 March 2016, para. 572; ICTR, *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Trial Chamber, Judgment, 2 February 2012, para. 1427; SCSL, *Prosecutor v. Taylor*, Case No. SCSL-03-01-T, Trial Chamber, Judgment, 18 May 2012, para. 472.

278. ICTY, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Appeals Chamber, Judgment, 17 December 2004, para. 27; ICTY, *Prosecutor v. Boškoski and Tarčulovski,* Case No. IT-04-82-A, Appeals Chamber, Judgment, 19 May 2010, para. 157; ICTY, *Prosecutor v. Stanišić and Župljanin,* Case No. IT-08-91-T, Trial Chamber, Judgment, 27 March 2013, para. 95; ICTR, *Prosecutor v. Ndindabahizi*, Case No. ICTR-01-71-T, Appeals Chamber, Judgment, 16 January 2007, para. 117; ICTR, *Prosecutor v. Nahimana et al.* (Media case), Case No. ICTR-99-52-A, Appeals Chamber, Judgment, 28 November 2007, para. 480; ICTR, *Prosecutor v. Nzabonimana,* Case No. ICTR-98-44D-T, Trial Chamber, Judgment, 31 May 2012, para. 1694; ICTR, *Prosecutor v. Ngirabatware*, Case No. ICTR-99-54-T, Trial Chamber, Judgment, 20 December 2012, para. 1291; SCSL, *Prosecutor v. Taylor*, Case No. SCSL-03-01-T, Trial Chamber, Judgment, 18 May 2012, para. 471. Similarly, the ICC has held that the expression "soliciting and inducing" should be understood as referring to any conduct by which a person is influenced by another to commit a crime. See ICC, *The Prosecutor v. Gbagbo*, Case No. ICC-02/11-01/11-656-Red, Pre-Trial Chamber I, Decision on the Confirmation of Charges against Laurent Gbagbo, 12 June 2014, para. 243; ICC, *The Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06-309, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Bosco Ntaganda, 9 June 2014, para. 153. See also Jérôme de Hemptinne, Robert Roth, Elies van Sliedregt, Marjolein Cupido, Manuel J. Ventura and Lachezar Yanev (eds), *Modes of Liability in International Criminal Law* (2019), p. 261.

279. ICTY, *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Trial Chamber, Judgment, 3 March 2000, para. 280; ICTY, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-T, Trial Chamber, Judgment, 26 February 2001, para. 387; ICTY, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-T, Trial Chamber, Judgment, 2 November 2001, para. 252; ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Chamber, Judgment, 2 September 1998, para. 482; ICTR, *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Trial Chamber, Judgment, 15 May 2003, para. 381.

280. ICTR, *Prosecutor v. Semanza,* Case No. ICTR-97-20-T, Trial Chamber, Judgment, 15 May 2003, para. 381; ICTR, *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Trial Chamber, Judgment, 7 June 2001, para. 30; ICTR, *Prosecutor v. Mpambara,* Case No. ICTR-01-65-T, Trial Chamber, Judgment, 12 September 2006, para. 18; ICTR, *Prosecutor v. Seromba*, Case No. ICTR-2001-66-I, Trial Chamber, Judgment, 13 December 2006, para. 304

acts or omissions[281] expressed through words or by other means of communication,[282] or just implied.[283] International jurisprudence has indeed confirmed that instigation could even be implicit[284] or, as the ICTR stated in the *Muvunyi* case, "subdued".[285] Further, instigation may result from various conducts. Accordingly, threats could also qualify as instigation.[286]

Both the ICTY and ICTR have also held that instigation includes direct and public incitement to commit crimes,[287] if this actually results in the commission of those crimes, contrary to the inchoate crime of direct and public incitement to commit genocide, which is punishable irrespective of whether the crime of genocide has been committed or not.[288] However, instigation does not need to be direct or public *per se*.[289]

With regard to instigation by omission,[290] both the ICTY and the ICTR have held that this form of liability may arise only when the instigator is under a duty to prevent the crime, and in circumstances where "the commander has created an environment permissive of criminal behaviour by subordinates."[291]

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281. ICTY, *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Trial Chamber, Judgment, 3 March 2000, paras 220, 389; ICTY, *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-T, Trial Chamber, Judgment, 31 March 2003, para. 60; ICTY, *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Trial Chamber, Judgment, 30 November 2005, para. 514; ICTY, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Trial Chamber, Judgment, 26 February 2009, para. 83; ICTY, *Prosecutor v. Tolimir*, Case No. IT-05–88/2-T, Trial Chamber, Judgment, 12 December 2012, para. 901; ICTY, *Prosecutor v. Đorđević*, Case No. IT-05-87/1-T, Trial Chamber, Judgment, 23 February 2011, para. 1870; ICTY, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Trial Chamber, Judgment, 24 March 2016, para. 572; para. 572; ICTR, *Prosecutor v. Karemera et al*., Case No. ICTR-98-44-T, Trial Chamber, Judgment, 2 February 2012, para. 1427; SCSL, *Prosecutor v. Taylor*, Case No. SCSL-03-01-T, Trial Chamber, Judgment, 18 May 2012, para. 472.
282. ICC, *The Prosecutor v. Harun and Kushayb*, Case No. ICC-02/05-01/07-2, Pre-Trial Chamber I, Warrant of Arrest for Ahmad Harun, 1 May 2007, para. 90; ICTR, *Prosecutor v. Ndindabahizi*, Case No. ICTR-01-71-T, Trial Chamber, Judgment, 15 July 2004, para. 271; ICTR, *Prosecutor v. Mpambara*, Case No. ICTR-01-65-T, Trial Chamber, Judgment, 12 September 2006, para. 18.
283. ICTY, *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Trial Chamber, Judgment, 3 March 2000, para. 280; ICTY, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-T, Trial Chamber Judgment, para. 549; ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Trial Chamber, Judgment, 1 September 2004, para. 269; ICTY, *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Trial Chamber, Judgment, 30 November 2005, para. 514.
284. SCSL, *Prosecutor v. Sesay et al.* (RUF case), Case No. SCSL-04-15, Trial Chamber, Judgment, 2 March 2009, paras 2117–2120. See also Trial of Major Karl Rauer and Six Others, British Military Court (Wuppertal, Germany), 18 February 1946, in UNWCC, Law Reports of Trials of War Criminals (London: HMSO, 1947–1949), Vol. IV, at 115.
285. ICTR, *Prosecutor v. Muvunyi*, Case No. ICTR-00-55-T, Trial Chamber, Judgment, 12 September 2006, para. 464.
286. ICTR, *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-A, Appeals Chamber, Judgment, 29 September 2014, para. 34. According to ICC jurisprudence, promises of financial or other advantages could be possible means to induce the commission of crimes. See ICC, *The Prosecutor v. Harun and Kushayb*, Case No. ICC-02/05-01/07-2, Pre-Trial Chamber I, Warrant of Arrest for Ahmad Harun, 1 May 2007, para. 90.
287. ICTR, *Prosecutor v. Nahimana et al.* (Media case), Case No. ICTR-99-52-A, Appeals Chamber, Judgment, 28 November 2007, para. 515 (in relation to genocide).
288. See e.g., Convention on the Prevention and Punishment of the Crime of Genocide, approved and proposed for signature and ratification or accession by General Assembly resolution 260 A (III) of 9 December 1948, art. III.
289. ICTY, *Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-T, Trial Chamber, Judgment, 27 March 2013, para. 96; ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Chamber, Judgment, 2 September 1998, para. 483; ICTR, *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Trial Chamber, Judgment, 15 May 2003, para. 381; ICTR, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Trial Chamber, Judgment, 1 December 2003, para. 762; ICTR, *Prosecutor v. Gacumbitsi*, Case No. ICTR-01-64-T, Trial Chamber, Judgment, 17 June 2004, para. 279.
290. Notably, isolated ICTY jurisprudence has held that omission may not give rise to individual criminal liability as instigation, holding, that contributions via omissions could be better characterized as aiding and abetting, instead. See ICTY, *Prosecutor v. Prlić et al*, Case No. IT-04-74-T, Trial Chamber, Judgment, 29 May 2013, paras 226-30. This position was however reversed by the MICT Appeals Chamber in MICT, *Prosecutor v. Šešelj*, Case No. MICT-16-99-A, Appeals Chamber, Judgment, 11 April 2018, para. 124, dismissing a similar finding in ICTY, *Prosecutor v. Šešelj*, Case No. IT-03-67-T, Trial Chamber, Judgment, 31 March 2016, para. 295. See also ICTY, *Prosecutor v. Karadžić*, No. IT-95-5/18-T, Trial Chamber, Judgment, 24 March 2016, para. 572.
291. ICTY, Prosecutor v. Galić, Case No. IT-98-29-T, Trial Chamber, Judgment, 5 December 2003, paras 168–169; ICTY, *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Trial Chamber, Judgment, 3 March 2000, paras 280, 337–339; ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Trial Chamber, Judgment, 1 September 2004, para. 269; ICTY, *Prosecutor v. Limaj*, Case No. IT-03-66-T, Trial Chamber, Judgment, 30 November 2005,

The ICTY has held that instigation does not require the instigator's presence at the crime scene,[292] as long as the "instigating message" gets to its intended recipient. Accordingly, instigation may entail an immediate relationship between the instigator and the instigated subject(s) or through one or more intermediaries.[293] Further, the instigator need not be in a position of authority, nor is a superior-subordinate relationship between the instigator and the perpetrator required.[294]

For instigation liability to arise, there must be some sort of causal connection between the instigating act and the commission of a crime, by either influencing or inducing the perpetrator to act in accordance with the content of the instigation.[295] In this regard, Tribunals have often required instigation to have "substantially contributed" to or have had a "substantial effect" on the perpetrator's conduct.[296] However, both the ICTY and ICTR jurisprudence have not required the instigation to have been a necessary condition without which the crime would not have takenplace.[297]

Furthermore, it is not required that the underlying crime be committed immediately after the act of instigation. However, the ICTR has clarified in the Nchamihigo case that for instigation to be punishable:

> [t]he period of time which elapsed between the instigation and the commission of the criminal act is a relevant consideration in determining whether there has been a substantial contribution; the longer the lapse of time, the weaker the link.[298]

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para. 514; ICTY, *Prosecutor v. Orić*, Case No. IT-03-68-T, Trial Chamber, Judgment, 30 June 2006, para. 273. See also ICC, *The Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/ 06-309, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Bosco Ntaganda, 9 June 2014, para. 155 and fn. 629, in which the Court affirms that responsibility under article 25(3)(b) can be brought about by an omission.

292. ICTR, *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-A, Appeals Chamber, Judgment, 29 September 2014, para. 34.
293. ICTY, *Prosecutor v. Orić*, Case No. IT-03-68-T, Trial Chamber, Judgment, 30 June 2006, para. 273.
294. ICTY, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Trial Chamber, Judgment, 24 March 2016, para. 572; ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Trial Chamber, Judgment, 1 September 2004, para. 359; ICTY, *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Trial Chamber, Judgment, 10 June 2010, para. 1008; ICTY, *Prosecutor v. Orić*, Case No. IT-03-68-T, Trial Chamber, Judgment, 30 June 2006, para. 272; ICTY, *Prosecutor v. Đorđević*, Case No. IT-05-87/1-T, Trial Chamber, Judgment, 23 February 2011, para. 1870; ICTR, *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Trial Chamber, Judgment, 15 May 2003, para. 257.
295. ICTY, *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Trial Chamber, Judgment, 3 March 2000, para. 278; ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Trial Chamber, Judgment, 1 September 2004, para. 269; ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Chamber, Judgment, 2 September 1998, para. 482; ICTR, *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Trial Chamber, Judgment, 7 June 2001, para. 30; ICTR, *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Trial Chamber, Judgment, 15 May 2003, para. 381; ICTR, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Trial Chamber, Judgment, 1 December 2003, para. 762.
296. MICT, Prosecutorv. Šešelj, Case No. MICT-16-99-A, Appeals Chamber, Judgment, 11 April 2018, para. 153; ICTY, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Appeals Chamber, Judgment, 17 December 2004, para. 27; ICTY, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84bis-T, Trial Chamber, Retrial Judgment, 29 November 2012, para. 623; ICTR, *Prosecutor v. Gacumbitsi*, Case No. ICTR-01-64-A, Appeals Chamber, Judgment, 7 July 2006, para. 129; ICTR, *Prosecutor v. Nahimana et al.* (Media case), Case No. ICTR-99-52-A, Appeals Chamber, Judgment, 28 November 2007, paras 480, 678; ICTR, *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Trial Chamber, Judgment, 31 May 2012, para. 1694; ICTR, *Prosecutor v. Ngirabatware*, Case No. ICTR-99-54-T, Trial Chamber, Judgment, 20 December 2012, para. 1291; SCSL, *Prosecutor v. Taylor*, Case No. SCSL-03-01-T, Trial Chamber, Judgment, 18 May 2012, para. 473.
297. ICTY, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Trial Chamber, Judgment, 24 March 2016, para. 572; ICTY, *Prosecutor v. Đorđević*, Case No. IT-05-87/1-T, Trial Chamber, Judgment, 23 February 2011, para. 1870; ICTY, *Prosecutor v. Galić*, Case No. IT-98-29-T, Trial Chamber, Judgment, 5 December 2003, para. 168; ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Trial Chamber, Judgment, 1 September 2004, para. 269; ICTY, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Appeals Chamber, Judgment, 17 December 2004, para. 27; ICTY, *Prosecutor v. Limaj*, Case No. IT-03-66-T, Trial Chamber, Judgment, 30 November 2005, para. 514; ICTY, *Prosecutor v. Orić,* Case No. IT-03-68-T, Trial Chamber, Judgment, 30 June 2006, para. 274; ICTR, *Prosecutor v. Gacumbitsi*, Case No. ICTR-01-64-A, Appeals Chamber, Judgment, 7 July 2006, para. 129; ICTR, *Prosecutor v. Seromba*, Case No. ICTR-2001-66-T, Trial Chamber, Judgment, 13 December 2006, para. 304.
298. ICTR, *Prosecutor v. Nchamihigo*, Case No. ICTR-01-63-T, Trial Chamber, Judgment, 12 November 2008, para. 368. See also ICTR, *Prosecutor v. Nahimana et al.* (Media case), Case No. ICTR-99-52-A, Appeals Chamber, Judgment, 28 November 2007, para. 513.

b) Mental element (mens rea)

With regard to the mental element required for instigation, the jurisprudence of the ICTY and ICTR has developed a double intent standard. First, the instigator must have the intent to engage in the underlying crime, being aware of its influencing effect on the final perpetrator. Second, the instigator must either have the intent to provoke or induce the perpetrator to commit the underlying crime or possess the awareness of the substantial likelihood that the underlying crime's perpetration will result from the act of instigation.[299]
Furthermore, International Tribunals have underlined that the instigator does not need to know exactly which crime will be perpetrated or its precise circumstances. Likewise, the instigator need not even know the exact identity of the final perpetrator, as long as they are "aware of the type and the essential elements of the crime to be committed".[300]

C. Ordering

Ordering is another accessorial mode of individual criminal liability - i.e., a form of participation in a crime perpetrated by someone else.[301] Liability for ordering is long established in international criminal law. As such, it was first explicitly recognized in Control Council Law No. 10, whereby persons who were "an accessory to the commission of any […] crime or ordered or abetted the same"[302] could be held criminally responsible, and it was subsequently addressed in many World War II cases.[303] Today, ordering is firmly recognized in the Statutes of several international criminal tribunals and courts,[304] including the ICTY,[305] the ICTR,[306] the SCSL,[307] the ECCC[308] and

299. ICTY, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Appeals Chamber, Judgment, 17 December 2004, paras 29 and 32; ICTY, *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-A, Appeals Chamber, Judgment, 19 May 2010, para. 68; ICTY, *Prosecutor v. Haradinaj*, Case No. IT-04-84bis-T, Trial Chamber, Retrial Judgment, 29 November 2012, para. 623; ICTY, *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Trial Chamber, Judgment, 24 March 2016, para. 572; ICTY, *Stanišić and Župljanin*, Case No. IT-08-91-T, Trial Chamber, Judgment, 27 March 2013, para. 95; ICTY, *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, Trial Chamber, Judgment, 15 April 2011, para. 1958; ICTR, *Prosecutor v. Muvunyi*, Case No. ICTR-00-55-T, Trial Chamber, Judgment, 12 September 2006, para. 465; ICTR, *Prosecutor v. Nahimana et al.* (Media case), Case No. ICTR-99-52-A, Appeals Chamber, Judgment, 28 November 2007, para. 480; ICTR, *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Trial Chamber, Judgment, 31 May 2012, para. 1694; ICTR, *Prosecutor v. Ngirabatware*, Case No. ICTR-99-54-T, Trial Chamber, Judgment, 20 December 2012, para. 1291; SCSL, *Prosecutor v. Taylor*, Case No. SCSL-03-01-T, Trial Chamber, Judgment, 18 May 2012, para. 471.
300. ICTY, *Prosecutor v. Orić*, Case No. IT-03-68-T, Trial Chamber, Judgment, 30 June 2006, para. 279; ICTR, *Prosecutor v. Kamuhanda*, Case No. ICTR-99-54A-T, Trial Chamber, Judgment, 22 January 2004, para. 599.
301. See Jérôme de Hemptinne, Robert Roth, Elies van Sliedregt, Marjolein Cupido, Manuel J. Ventura and Lachezar Yanev (eds), *Modes of Liability in International Criminal Law* (2019), pp. 284-306.
302. Control Council Law No. 10, op. cit., art. II(2)(b), *emphasis* added.
303. See e.g., *United States of America v. List et al.* ('Hostage Case'), Case No. 7, Military Tribunal V (Nuremberg), 19 February 1948, in TWC (Green Series), Vol. XI, pp. 1277–1279 (defendant Kuntze); *United States of America et al. v. Göring et al.*, International Military Tribunal (Nuremberg), 1 October 1946, in TWC (Blue Series), Vol. I, at 206, 311–314 (defendant Dönitz); 228, 234, 289–290 (defendant Keitel); 235–236, 289 (defendants Keitel and/or Jodl); 239–240, 281 (defendant Göring); 245 (defendant Sauckel); 287 (defendant von Ribbentrop); 291–293 (defendant Kaltenbrunner); 296 (defendant Rosenberg); 324 (defendant Jodl); 329 (defendant Seyss-Inquart); 340 (defendant Bormann); *United States of America v. von Leeb et al.* ('High Command Case'), Case No. 12, Military Tribunal V (Nuremberg), 27–28 October 1948, in TWC (Green Series), Vol. XI, pp. 560-561, 665, 693; *United States of America v. Altstötter et al.* ('The Justice Case'), Case No. 3, Military Tribunal III (Nuremberg), 3–4 December 1947, in TWC (Green Series), Vol. III, at 1085 (defendant Schlegelberger); *United States of America v. Greifelt et al.* ('The RuSHA Case'), Case No. 8, Military Tribunal I (Nuremberg), 10 March 1948, in TWC (Green Series), Vol. V, at 106 (defendant Cruetz); *United States of America v. von Leeb et al.* ('High Command Case'), Case No. 12, Military Tribunal V (Nuremberg), 27–28 October 1948, in TWC (Green Series), Vol. XI, p. 614 (defendant Reinhardt); p. 645 (defendant von Roques). See also *United States of America et al. v. Araki et al.,* Judgment, International Military Tribunal (Tokyo), 4 November 1948, in N. Boister and R. Cryer (eds.), Documents on the Tokyo International Military Tribunal: Charter, Indictment and Judgments (Oxford: Oxford University Press, 2008), p. 396 (defendant Matsui); pp. 542–543, 566 (defendant Tojo); p. 543 (defendant Hata); p. 610 (defendant Kimura).
304. See SPSC Regulation, section 14.3(b); EAC Statute, art. 10(2); KSC Law, art. 16(1)(a).
305. ICTY Statute, art. 7(1).
306. ICTR Statute, art. 6(1).
307. SCSL Statute, art. 6(1).
308. ECCC Law, art. 29.

the ICC.[309] Further, as the ICTY established in the *Tadić* case, individual criminal responsibility for ordering under the Tribunal Statute (and its subsequent jurisprudence) reflects "ordering" a mode of individual criminal liability pursuant to customary international law.[310]

Before examining the constitutive elements of ordering as a mode of individual criminal liability, it is important to note that international case law comprises multiple factual findings where accused were found to have ordered specific acts or failed to do so (i.e., omissions) related to the commission of crimes, particularly when the accused had a connection with, or formed part of, a military chain of command. However, such findings did not automatically result in those specific acts or omissions being legally qualified as ordering. Indeed, in some cases, they gave rise, instead, to a conviction based on other modes of liability, such as aiding and abetting in the case of the ICTY[311] or forms of co-perpetration in the case of the ICC,[312] respectively.

i. Constitutive elements of ordering

Liability for ordering requires that:[313]

i. the accused, who is in a position of authority, instructed another person to commit the underlying crime;[314]
ii. the accused's order must have had a substantial effect on the commission of the underlying crime;[315] and
iii. the accused intended the commission of the underlying crime(s) pursuant to their order (i.e., direct intent)[316] or gave an order "with the awareness of the substantial likelihood

309. ICC Statute, art. 25(3)(b).
310. ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-T, Trial Chamber, Judgment, 7 May 1997, paras 663–669 (holding that the various modes of liability included in article 7(1) of the ICTY Statute (including ordering) have a basis in customary international law). See also ICTY, *Prosecutor v. Delalić et al.* (Čelebići case), Case No. IT-96-21-T, Trial Chamber, Judgment, 16 November 1998, para. 321.
311. See ICTY, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-T, Trial Chamber, Judgment, 27 September 2007, paras 609–613, 615–632, where Mrkšić was found to have aided and abetted (not ordered) the commission of crimes when he ordered the withdrawal of soldiers guarding detainees. Mrkšić's conviction was upheld on appeal: ICTY, *Prosecutor v. Mrkšić and Šljivančanin*, Case No. IT-95-13/1-A, Appeals Chamber, Judgment, 5 May 2009. See also ICTY, *Prosecutor v. Šainović et al.*, Case No. IT-05-87-A, Appeals Chamber, Judgment, 23 January 2014, para. 954: "the Trial Chamber was under no obligation to provide a legal definition of the [term] "order" […] as [this term was] used to describe factual findings rather than to provide a legal qualification of Šainović's acts".
312. ICC, *The Prosecutor v. Bemba et al.*, Case No. ICC-01/05-01/13-2275-Red, Appeals Chamber, Judgment, 8 March 2018, paras 783–784 (where Bemba was found – in a co-perpetration context – to have made an essential contribution to the commission of offences by, inter alia, ordering 'remedial measures' to protect and conceal criminal conduct).
313. See Jérôme de Hemptinne, Robert Roth, Elies van Sliedregt, Marjolein Cupido, Manuel J. Ventura and Lachezar Yanev (eds), *Modes of Liability in International Criminal Law* (2019), pp. 293-296.
314. See e.g., ICTY, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Appeals Chamber, Judgment, 17 December 2004, para. 28; ICTR, *Prosecutor v. Semanza*, Case No. ICTR-97-20-A, Appeals Chamber, Judgment, 20 May 2005, para. 361; ICTR, *Prosecutor v. Kalimanzira*, Case No. ICTR-05-88-A, Appeals Chamber, Judgment, 20 October 2010, para. 213; ICTR, *Prosecutor v. Setako*, Case No. ICTR-04-81-A, Appeals Chamber, Judgment, 28 September 2011, para. 240; ICTR, *Prosecutor v. Bagosora and Nsengiyumva*, Case No. IT-98-41-A, Appeals Chamber, Judgment, 14 December 2011, para. 277; ICTR, *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-A, Appeals Chamber, Judgment, 29 September 2014, para. 482. See also ICC, *The Prosecutor v. Mudacumura*, Case No. ICC-01/04-01/12-1-Red, Pre-Trial Chamber II, Decision on the Prosecutor's Application under Article 58, 13 July 2012, para. 63; ICC, *The Prosecutor v. Ntaganda,* Case No. ICC-01/04-02/06-309, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, 9 June 2014, para. 145.
315. ICTY, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-T, Trial Chamber, Judgment, 25 June 1999, para. 61; ICTR, *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Trial Chamber, Judgment, 7 June 2001, para. 30; ICTR, *Prosecuror v. Nahimana et al.* (Media case), Case No. ICTR-99-52-A, Appeals Chamber, Judgment, 28 November 2007, para. 492; ICTY, *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-A, Appeals Chamber, Judgment, 19 May 2010, para. 160; ICTY, *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, Trial Chamber, Judgment, 15 April 2011, para. 1956; ICTY, *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, Trial Chamber, Judgment, 30 May 2013, Vol. I, para. 1261; SCSL, *Prosecutor v. Taylor*, Case No. SCSL-03-01-A, Appeals Chamber, Judgment, 26 September 2013, paras 368, 589, 592; ECCC, *Kaing* alias *Duch*, Case No. 001/18-07-2007/ECCC/TC/E188, Trial Chamber, Judgment, 26 July 2010, para. 527; ECCC, *Nuon* and *Khieu*, ,Case No. 002/19-09-2007/ECCC/TC/E313, Trial Chamber, Case 002/01 Judgment, 7 August 2014, para. 702.
316. ICTY, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Appeals Chamber, Judgment, 17 December

that a crime will be committed in the execution of that order".[317]

a) Material element (actus reus)

Under international criminal law, individual criminal liability for ordering does not require a formal (*de jure*) superior–subordinate relationship between the accused and the perpetrators, nor "effective control" in the superior responsibility sense.[318] On the contrary, ICTY and ICTR jurisprudence has established that it is sufficient for the accused to have possessed some position of authority that enabled them to compel another person to commit the offence pursuant to their order.[319] Consequently, the authority of the person who gives the order may be informal (i.e., *de facto*) or of a purely temporary nature.[320]

International Tribunals have also held that the accused does not have to impart the order directly to the physical perpetrator(s).[321] Thus, individual criminal liability for ordering can arise from the passing down, transmitting or reissuing of orders.[322] Further, the accused need not be physically present when the order was given.[323]

2004, para. 29; ICTY, *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-A, Appeals Chamber, Judgment, 19 May 2010, para. 68; ICTR, *Prosecutor v. Ntagerura et al*., Case No. ICTR-99-46-A, 7 July 2006, Appeals Chamber, Judgment, para. 365; ICTR, *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Trial Chamber, Judgment, 7 June 2001, para. 31; SCSL, P*rosecutor v. Taylor*, Case No. SCSL-03-01-A, Appeals Chamber, Judgment, 26 September 2013, para. 589.

317. ICC, *The Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06-309, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, 9 June 2014, para. 145; ICTY, *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeals Chamber, Judgment, 29 July 2004, paras 42, 345, 428, 468, 481, 517, 543, 600, 645; ICTY, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Appeals Chamber, Judgment, 17 December 2004, para. 30; ICTR, *Prosecutor v. Ntagerura et al.*, Case No. ICTR-99-46-A, 7 July 2006, Appeals Chamber, Judgment, fn. 733; ICTR, *Prosecutor v. Nahimana et al.* (Media case), Case No. ICTR-99-52-A, Appeals Chamber, Judgment, 28 November 2007, para. 481; ICTR, *Prosecutor v. Bagosora and Nsengiyumva*, Case No. IT-98-41-A, Appeals Chamber, Judgment, 14 December 2011, fn. 642.
318. ICC, *The Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06-309, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, 9 June 2014, para. 145; ICTY, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Appeals Chamber, Judgment, 17 December 2004, para. 28; ICTY, *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-A, Appeals Chamber, Judgment, 19 May 2010, para. 164; ICTR, *Prosecutor v. Semanza*, Case No. ICTR-97-20-A, Appeals Chamber, Judgment, 20 May 2005, para. 361; ICTR, *Prosecutor v. Nahimana et al.* (Media case), Case No. ICTR-99-52-A, Appeals Chamber, Judgment, 28 November 2007, fn. 1162; ICTR, *Prosecutor v. Seromba*, Case No. ICTR-2001-66-A, Appeals Chamber, Judgment, 12 March 2008, paras 201–202.
319. ICTY, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Appeals Chamber, Judgment, 17 December 2004, para. 28; ICTY, *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-A, Appeals Chamber, Judgment, 19 May 2010, paras 361–363; ICTR, *Prosecutor v. Nahimana et al.* (Media case), Case No. ICTR-99-52-A, Appeals Chamber, Judgment, 28 November 2007, para. 481, fn. 1162; SCSL, *Prosecutor v. Sesay et al.* (RUF case), Case No. SCSL-04-15-A, Appeals Chamber, Judgment, 26 October 2009, para. 164.
320. ICTY, *Prosecutor v. D. Milošević*, Case No. IT-98-29/1-A, Appeals Chamber, Judgment, 12 November 2009, para. 290; ICTR, *Prosecutor v. Semanza*, Case No. ICTR-97-20-A, Appeals Chamber, Judgment, 20 May 2005, para. 363; ICTR, *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-A, Appeals Chamber, Judgment, 29 September 2014, para. 482; SCSL, *Prosecutor v. Sesay et al.* (RUF case), Case No. SCSL-04-15-T, Trial Chamber, Judgment, 2 March 2009, para. 273; SCSL, *Prosecutor v. Taylor*, Case No. SCSL-03-01-T, Trial Chamber, Judgment, 18 May 2012, para. 475.
321. ICC, *The Prosecutor v. Mudacumura*, Case No. ICC-01/04-01/12-1-red, Pre-Trial Chamber II, Decision on the Prosecutor's Application under Article 58, 13 July 2012, para. 63; ICTY, *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Trial Chamber, Judgment, 3 March 2000, para. 282, fn. 508; ICTY, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-T, Trial Chamber, Judgment, 26 February 2001, para. 388; ICTY, *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Trial Chamber, Judgment, 10 June 2010, Vol. I, para. 1012; SCSL, *Prosecutor v. Brima et al.* (AFRC case), Case No. SCSL-2004-16-T, Trial Chamber, Judgment, 20 June 2007, para. 772; SCSL, *Prosecutor v. Taylor*, Case No. SCSL-03-01-T, Trial Chamber, Judgment, 18 May 2012, para. 476.
322. ICTY, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Trial Chamber, Judgment, 26 February 2009, Vol. I, para. 87; ICTY, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84bis-T, Trial Chamber, Retrial Judgment, 29 November 2012, para. 624; ECCC, *Kaing* alias *Duch*, Case No. 001/18-07-2007/ECCC/TC/E188, Trial Chamber, Judgment, 26 July 2010, para. 527; SCSL, *Prosecutor v. Brima et al.* (AFRC case), Case No. SCSL-2004-16-T, Trial Chamber, Judgment, 20 June 2007, paras 774, 2059; SCSL, *Prosecutor v. Taylor*, Case No. SCSL-03-01-T, Trial Chamber, Judgment, 18 May 2012, para. 476.
323. ICTY, *Prosecutor v. Milutinović et al*., Case No. IT-05-87-T, Trial Chamber, Judgment, 26 February 2009, Vol. I, para. 87; ICTY, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84bis-T, Trial Chamber, Retrial Judgment, 29 November 2012, para. 624; SCSL, *Prosecutor v. Brima et al.* (AFRC case), Case No. SCSL-2004-16-T, Trial Chamber, Judgment, 20 June 2007, paras 774, 2059; ECCC, *Kaing* alias *Duch*, Case No. 001/18-07-2007/ECCC/TC/E188, Trial Chamber, Judgment, 26 July 2010, para. 527; SCSL, *Prosecutor v. Taylor*, Case No.

While the order need not be given in writing or in any one particular form,[324] positive action is required, meaning that an accused cannot be held liable for ordering as a result of an omission (i.e., failing to give an order).[325] In this regard, it is important to note, however, that "omitting to order" must be distinguished from "ordering an omission", e.g., ordering not to provide medical care to detainees, as the latter may attract criminal liability for ordering since it denotes positive action on the part of the accused, whereas the former may give rise to criminal liability under a different mode of liability, such as superior responsibility.[326] Furthermore, the act of ordering can be proven by taking into account omissions on the part of the accused as circumstantial evidence.[327]

The order need not be criminal on its face or otherwise inherently illegal.[328] Notably, where the order is illegal, some World War II cases suggested that the person who physically drafts the order (separate from the person with authority who issued it) may incur criminal responsibility where they exercise personal initiative in its drafting, rather than merely transcribing it or the general directives of a superior.[329]

International case law has also held that, for individual criminal liability for ordering to arise, it is necessary that:

i. the order must have had a "substantial effect" on the commission of the crime;[330] and

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SCSL-03-01-T, Trial Chamber, Judgment, 18 May 2012, para. 476.

324. ICTY, *Prosecutor v. Strugar*, Case No. IT-01-42-T, Trial Chamber, Judgment 31 January 2005, para. 331; ICTY, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Trial Chamber, Judgment, 26 February 2009, Vol. I, para. 88; ICTY, *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-A, Appeals Chamber, Judgment, 19 May 2010, para. 160; ICTY, *Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-T, Trial Chamber, Judgment, 27 March 2013, Vol. I, para. 98; ICTR, *Prosecutor v. Kamuhanda*, Case No. ICTR-99-54A-A, Appeals Chamber, Judgment, 19 September 2005, para. 76; ECCC, *Kaing* alias *Duch*, Case No. 001/18-07-2007/ECCC/TC/E188, Trial Chamber, Judgment, Case No. 001/18-07-2007/ECCC/TC/E188, 26 July 2010, para. 527.
325. ICTY, *Prosecutor v. Galić*, Case No. IT-98-29-A, Appeals Chamber, Judgment, 30 November 2006, para. 176; ICTY, *Prosecutor v. D. Milošević*, Case No. IT-98-29/1-A, Appeals Chamber, Judgment, 12 November 2009, para. 267; ICTR, *Prosecutor v. Bagosora and Nsengiyumva*, Case No. IT-98-41-A, Appeals Chamber, Judgment, 14 December 2011, para. 277; SCSL, *Prosecutor v. Sesay et al.* (RUF case), Case No. SCSL-04-15-A, Appeals Chamber, Judgment, 26 October 2009, para. 164.
326. ICTY, *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeals Chamber Judgment, 29 July 2004, paras 42, 468; ICTY, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Appeals Chamber, Judgment, 17 December 2004, para. 30; ICTY, *Prosecutor v. Galić*, Case No. IT-98-29-A, Appeals Chamber, Judgment, 30 November 2006, para. 176, fns 507–508; ICTY, *Prosecutor v. D. Milošević*, Case No. IT-98-29/1-A, Appeals Chamber, Judgment, 12 November 2009, para. 292; ICTR, *Prosecutor v. Nahimana et al.* (Media case), Case No. ICTR-99-52-A, Appeals Chamber Judgment, 28 November 2007, para. 481; ICTR, *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-A, Appeals Chamber, Judgment, 29 September 2014, para. 482; ICTR, *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Appeals Chamber, Judgment, 14 December 2015, para. 976, fn. 4448; SCSL, *Prosecutor v. Taylor*, Case No. SCSL-03-01-A, Appeals Chamber, Judgment, 26 September 2013, para. 589, fn. 1238.
327. ICTY, *Prosecutor v. Galić*, Case No. IT-98-29-A, Appeals Chamber, Judgment, 30 November 2006, para. 177.
328. ICTY, *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Trial Chamber, Judgment, 3 March 2000, para. 282. Some World War II cases, however, required the order to be illegal or that the order be capable of being applied in a criminal manner. See e.g., Military Tribunal V (Nuremberg Tribunal), *United States of America v. von Leeb et al.* ('High Command Case'), Case No. 12, 27–28 October 1948, in TWC (Green Series), Vol. XI, pp. 510–512, 515, 520, 524–525, 527, 560–561. See also K. J. Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (2011), pp. 254–255.
329. See e.g., Military Tribunal V (Nuremberg Tribunal), *United States of America v. von Leeb et al.* ('High Command Case'), Case No. 12, 27–28 October 1948, in TWC (Green Series), Vol. XI, pp. 513, 515, 651–653, 665–666, 669, 674, 683, 692–695; and Military Tribunal V (Nuremberg Tribunal), *United States of America v. List et al.* ('Hostage Case'), Case No. 7, 19 February 1948, in TWC (Green Series), Vol. XI, pp. 1287–1288.
330. See e.g., ICTY, *Prosecutor v. Aleksovski,* Case No. IT-95-14/1-T, Trial Chamber, Judgment, 25 June 1999, para. 61; ICTR, *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Trial Chamber, Judgment, 7 June 2001, para. 30; ICTR, *Prosecuror v. Nahimana et al.* (Media case), Case No. ICTR-99-52-A, Appeals Chamber, Judgment, 28 November 2007, para. 492; ICTY, *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-A, Appeals Chamber, Judgment, 19 May 2010, para. 160; ICTY, *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, Trial Chamber, Judgment, 15 April 2011, para. 1956; ICTY, *Prosecutor v. Stanišić and Simatović,* Case No. IT-03-69-T, Trial Chamber, Judgment, 30 May 2013, Vol. I, para. 1261; SCSL, *Prosecutor v. Taylor*, Case No. SCSL-03-01-A, Appeals Chamber, Judgment, 26 September 2013, paras 368, 589, 592; ECCC, *Kaing* alias *Duch*, Case No. 001/18-07-2007/ECCC/TC/E188, Trial Chamber, Judgment, 26 July 2010, para. 527; ECCC, *Nuon* and *Khieu*, ,Case No. 002/19-09-2007/ECCC/TC/E313, Trial Chamber, Case 002/01 Judgment, 7 August 2014, para. 702.

ii. the crime must be fully committed/executed.[331]

Accordingly, there is no need to prove that the crime would not have been committed but for the issuing of the order concerned.[332]

With regard to the above "substantial effect" or contribution requirement, in some cases, the ICTY and ICTR appear to have added an additional requirement to establish individual criminal liability with respect to ordering, namely, that the acts of ordering must have had a "*direct* and substantial effect on the commission of the illegal act", i.e., the underlying crime [emphasis added].[333]

b) Mental element (mens rea)

With regard to the mental element required for ordering, the ICTY has held that it is that of the person who imparts or passes down the order that is relevant, not that of the subordinate executing the order.[334] Further, International Tribunals have ruled that for liability for ordering to arise, it must be established that the accused in issuing the order intended to bring about the commission of the crime, or were aware of the substantial likelihood that such crime would be committed by the execution of their order.[335] Accordingly, International Tribunals have held that

331. ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Trial Chamber, Judgment, 1 September 2004, para. 267; ICTY, *Prosecutor v. Martić*, Case No. IT-95-11-T, Trial Chamber, Judgment, 12 June 2007, para. 441; ICTR, *Prosecutor v. Nahimana et al.* (Media case), Case No. ICTR-99-52-A, Appeals Chamber, Judgment, 28 November 2007, para. 481; ICTR, *Prosecutor v. Karera*, Case No. ICTR-01-74-A, Appeals Chamber, Judgment, 2 February 2009, para. 211; ECCC, *Kaing* alias *Duch*, Case No. 001/18-07-2007/ECCC/TC/E188, Trial Chamber, Judgment, 26 July 2010, para. 527; ECCC, *Nuon* and *Khieu*, 002/01, Case No. 002/19-09-2007/ECCC/TC/E313, Trial Chamber, Judgment, 7 August 2014, para. 702. See also Military Tribunal I (Nuremberg Tribunal), *United States of America v. Greifelt et al*. ('The RuSHA Case'), Case No. 8, 10 March 1948, in TWC (Green Series), Vol. V, p. 147; Military Tribunal II (Nuremberg), *United States of America v. Ohlendorf et al.* ('Einsatzgruppen Case'), Case No. 9, 8–9 April 1948, in TWC (Green Series), Vol. IV, at 486; *United States of America v. von Leeb et al.* ('High Command Case'), supra n. 7, pp. 615–616. In some cases, international tribunals also held that the order must have effected "the commission of the illegal act": ICTY, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84bis-T, Trial Chamber (Retrial) Judgment, 29 November 2012, para. 624; ICTY, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Trial Chamber, Judgment, 29 May 2013, Vol. I, para. 232; ICTR, *Prosecutor v. Kamuhanda*, Case No. ICTR-99-54A-A, Appeals Chamber, Judgment, 19 September 2005, para. 75; ICTR, *Prosecutor v. Seromba*, Case No. ICTR-2001-66-A, Appeals Chamber, Judgment, 12 March 2008, para. 201; ICTR, *Prosecutor v. Renzaho*, Case No. ICTR-97-31-A, Appeals Chamber, Judgment, 1 April 2011, para. 315; ICTR, ICTR, *Prosecutor v. Setako*, Case No. ICTR-04-81-A, Appeals Chamber, Judgment, 28 September 2011, para. 240.

332. ICTY, *Prosecutor v. Strugar*, Case No. IT-01-42-T, Trial Chamber, Judgment 31 January 2005, para. 332; ICTY, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Trial Chamber, Judgment, 26 February 2009, Vol. I, para. 88; ICTY, *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Trial Chamber, Judgment, 10 June 2010, Vol. I, para. 1013; ICTY, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Trial Chamber, Judgment, 29 May 2013, Vol. I, para. 232; SCSL, *Prosecutor v. Charles Taylor,* Case No. SCSL-03-01-T, Trial Chamber, Judgment, 18 May 2012, para. 477.

333. See e.g., ICTR, *Prosecutor v. Kamuhanda*, Case No. ICTR-99-54A-A, Appeals Chamber, Judgment, 19 September 2005, para. 75; ICTR, *Prosecutor v. Seromba*, Case No. ICTR-2001-66-A, Appeals Chamber, Judgment, 12 March 2008, para. 201; ICTR, *Prosecutor v. Munyakazi*, Case No. ICTR-97-36A-T, Trial Chamber, Judgment, 5 July 2010, para. 432; ICTR, *Prosecutor v. Hategekimana*, Case No. ICTR-00-55B-A, Appeals Chamber, Judgment, 8 May 2012, para. 67; ICTR, *Prosecutor v. Nzabonimana*, Case No. ICTR-98-44D-T, Trial Chamber, Judgment, 31 May 2012, para. 1695; ICTR, *Prosecutor v. Ndindiliyimana et al.*, Case No. ICTR-00-56-A, Appeals Chamber, Judgment, 11 February 2014, paras 291, 365; ICTY, *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Trial Chamber, Judgment, 10 June 2010, Vol. I, para. 1013; ICTY, *Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-T, Trial Chamber, Judgment, 27 March 2013, Trial Chamber, Judgment, Vol. I, para. 98; ICTY, *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, Trial Chamber, Judgment, 29 May 2013, Vol. I, para. 232; ICTY, *Prosecutor v. Karadžić,* Case No. IT-95-5/18-T, Trial Chamber, Judgment, 24 March 2016, para. 573; ICTY, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-T, Trial Chamber, Judgment, 26 February 2001, para. 385.

334. ICTY, *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Trial Chamber, Judgment, 3 March 2000, para. 282; ICTY, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-T, Trial Chamber, Judgment, 26 February 2001, para. 388.

335. ICTY, *Prosecutor v. Strugar*, Case No. IT-01-42-T, Trial Chamber, Judgment, 31 January 2005, para. 333; ICTY, *Prosecutor v. Kordić and Čerkez*, Case No. IT-65-14/2-A, Appeals Chamber, Judgment, 17 December 2004, para. 30; ICTY, *Prosecutor v. Limaj et al*, Case No. IT03-66-T, Trial Chamber, Judgment, 30 November 2005, para. 515; ICTY, *Prosecutor v. Galic*, Case No. IT-98-29-A, Appeals Chamber, Judgment, 30 November 2006, para. 152; ICTR, *Prosecutor v. Nahimana et al.* (Media case), Case No. ICTR-99-52-A, Appeals Chamber, Judgment, 28 November 2007, para. 481; ICTR, *Prosecutor v. Renzaho*, Case No. 97-31-A, Appeals Chamber, Judgment, 1 April 2011, para. 315; ICTR, *Prosecutor v. Bagosora and Nsengiyumva*,

when the accused order an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of the order, then they are considered as "having accepted the crime". [336]

D. Planning

Planning is a long-established mode of individual criminal liability under international law. The Statutes of both the Nuremberg and Tokyo Tribunals sanctioned the planning or preparation of a crime against peace and recognized the responsibility of "[l]eaders, organisers, instigators and accomplices participating in the *formulation* or execution of a common *plan* or conspiracy to commit any of the foregoing crimes [and] for all acts performed by any persons in execution of such plan".[337] In the same vein, the Statutes of several contemporary International Tribunals,[338] including the ICTY,[339] ICTR[340] and SCSL,[341] proscribe planning as a mode of participation in the crimes under international law falling within their jurisdiction. As such, planning, as a mode of individual criminal liability, is also considered to reflect customary international law.[342]

In international criminal law, planning is generally understood as a mode of individual criminal liability that aims at criminally sanctioning individuals who devise a plan entailing one or several crimes that are subsequently perpetrated.[343] Accordingly, under the ICTY, ICTR and SCSL jurisprudence, planning is only punishable when it actually results in the commission of a crime in furtherance of the original plan or design.[344] An individual who plans a crime will incur liability

Case No. ICTR-98-41-A, Appeals Chamber, Judgment, 14 December 2011, at fn. 642; ICTR, *Prosecutor v. Niyiramasuhuko et al*, Case No. ICTR-98-42-A, Appeals Chamber, Judgment, 14 December 2015, para. 976.

336. ICTY, *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeals Chamber, Judgment, 29 July 2004, paras 42, 345, 428, 468, 481, 517, 543, 600, 645, fn. 974; ICTY, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Appeals Chamber, Judgment, 17 December 2004, para. 30; ICTY, *Prosecutor v. D. Milošević*, Case No. IT-98-29/1-T, Trial Chamber, Judgment, 12 December 2007, para. 958; ICTY, *Prosecutor v. Martić*, Case No. IT-95-11-A, Appeals Chamber, Judgment, 8 October 2008, paras 221, 223; ICTR, *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-A, Appeals Chamber, Judgment, 14 December 2015, para. 976, fn. 4448; SCSL, Prosecutor v. Taylor, Case No. SCSL-03-01-A, Appeals Chamber, Judgment, 26 September 2013, fn. 1365.

337. See IMT Statute, art. 6(2)(a) and IMTFE Statute, art. 5(2)(a), *emphasis* added.

338. All these Statutes use an ambivalent formula when stating that a person who "aided and abetted in the planning" of a crime shall be individually responsible for this crime. This could be interpreted as meaning that planning is a crime in itself. However, in their jurisprudence these tribunals have not adopted this interpretation.

339. ICTY Statute, art. 7(1).

340. ICTR Statute, art. 6(1).

341. SCSL Statute, art. 6(1).

342. See ICTY, *Prosecutor v. Delalić at al.* (Čelebići case), Case No. IT-96-21-T, Trial Chamber, Judgment, 16 November 1998, para. 325; ICTY, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-T, Trial Chamber, Judgment, 25 June 1999, paras 60–61; and ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-T, Trial Chamber, Judgment, 7 May 1997, para. 673.

343. See e.g., ICTY, *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-A, Appeals Chamber, Judgment, 19 May 2010, para. 171; ICTY, *Prosecutor v. D. Milošević*, Case No. IT-98-29/1-A, Appeals Chamber, Judgment, 12 November 2009, para. 268; ICTY, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Appeals Chamber, Judgment, 17 December 2004, para. 26; ICTY, *Prosecutor v. Tolimir*, Case No. IT-05-88/2-T, Trial Chamber, Judgment, 12 December 2012, paras 899–900; ICTY, *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Trial Chamber, Judgment, 10 June 2010, paras 1005–1006; ICTR, *Prosecutor v. Nahimana et al.* (Media case), Case No. ICTR-99-52-A, Appeals Chamber, Judgment, 28 November 2007, para. 479; ICTR, *Prosecutor v. Ngirabatware*, Case No. ICTR-99-54-T, Trial Chamber, Judgment, 10 December 2012, para. 1290; ICTR, *Prosecutor v. Karemera et al.*, Case No. Case No. ICTR-98-44-T, Trial Chamber, Judgment, 2 February 2012, para. 1426; ICTR, *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Trial Chamber, Judgment, 24 June 2011, para. 5591; ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Chamber, Judgment, 2 September 1998, para. 480. See also SCSL, *Prosecutor v. Brima et al.* (AFRC case), Case No. SCSL-04-16-T, Trial Chamber, Judgment, 20 June 2007, para. 766; SCSL, *Prosecutor v. Taylor*, Case No. SCSL-03-01-A, Appeals Chamber, Judgment, 26 September 2013, para. 492; SCSL, *Prosecutor v. Sesay et al.* (RUF case), Case No. SCSL-04-15-A, Appeals Chamber, Judgment, 26 October 2009, para. 687; SCSL, *Prosecutor v. Brima et al.* (AFRC case), Case No. SCSL- 2004-16-A, Appeals Chamber, Judgment, 22 February 2008, para. 301.

344. See Jérôme de Hemptinne, Robert Roth, Elies van Sliedregt, Marjolein Cupido, Manuel J. Ventura and Lachezar Yanev (eds), *Modes of Liability in International Criminal Law* (2019), pp. 355-366. See also ICTY, *Prosecutor v. D. Milošević*, Case No. IT-98-29/1-A, Appeals Chamber, Judgment, 12 November 2009, para. 268; ICTY, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Appeals Chamber, Judgment, 17 December 2004, para. 26; ICTY, *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Trial Chamber, Judgment, 10 June 2010, para. 1006; ICTR, *Prosecutor v. Nahimana et al.* (Media case), Case No. ICTR-99-52-A, Appeals Chamber,

for planning that crime which is ultimately committed by others,[345] and a person cannot be convicted of both planning and committing the same crime.[346]

i. Constitutive elements of planning

Like other modes of liability, planning comprises the following material *(actus reus*) and mental (*mens rea*) elements:

i. planning entails that one or several individuals plan or design an act or an omission resulting in one or several international crimes that must ultimately be perpetrated;[347]
ii. second, the individual(s) must plan an act or an omission with the intent that one or several international crimes be committed in the execution of the plan, or alternatively, the accused must be aware of the substantial likelihood that one or several crimes would be committed in the execution of that plan.[348]

a) Material element (actus reus)

With regard to the material element of planning, international jurisprudence has generally held that:

i. the accused designed the criminal conduct constituting one or more crimes that are later perpetrated;[349]
ii. the planning be a factor that substantially contributed to criminal conduct constituting one or more crimes.[350]

Judgment, 28 November 2007, para. 479; ICTR, *Prosecutor v. Musema*, Case No. IT- 96-13-T, Trial Chamber, Judgment, 27 June 2000, para. 115; ICTR, *Prosecutor v. Seromba*, Case No. ICTR-2001-66-I, Trial Chamber, Judgment, 13 December 2006, para. 303; SCSL, *Prosecutor v. Sesay et al.* (RUF case), Case No. SCSL-04-15-T, Trial Chamber, Judgment, 2 March 2009, para. 268.

345. ICTY, *Prosecutor v. Stakić*, Case No. IT-97-24-T, Trial Chamber, Judgment, 31 July 2003, para. 443; ICTY, *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Trial Chamber, Judgment, 3 March 2000, para. 278; ICTR, *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-I, Trial Chamber, Judgment, 7 June 2001, para. 30.
346. ICTY, *Prosecutor v. D. Milošević*, Case No. IT-98-29/1-A, Appeals Chamber, Judgment, 12 November 2009, para. 268; ICTY, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Appeals Chamber, Judgment, 17 December 2004, para. 26; ICTY, *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Trial Chamber, Judgment, 10 June 2010, para. 1006; ICTR, *Prosecutor v. Nahimana et al.* (Media case), Appeals Chamber, Judgment, Case No. ICTR-99-52-A, 28 November 2007, para. 479; ICTR, *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Trial Chamber, Judgment, 24 June 2011, para. 5591; SCSL, *Prosecutor v. Brima et al.* (AFRC case), Appeals Chamber, Judgment, Case No. SCSL-2004-16-A, 22 February 2008, para. 766; SCSL, *Prosecutor v. Sesay et al.* (RUF case), SCSL-04-15-A, Appeals Chamber, Judgment, 26 October 2009, para. 687.
347. ICTY, *Prosecutor v. Kordić and Čerkez*, Case No. IT-65-14/2-A, Appeals Chamber, Judgment, 17 December 2004, para. 26; ICTY, *Prosecutor v. Limaj et al*., Case No. IT-03-66-T, Trial Chamber, Judgment, 30 November 2005, para. 513; ICTY, *Prosecutor v. D. Milošević*, Case No. IT-98-29/1-T, Trial Chamber, Judgment, 12 December 2007, para. 956; ICTR, *Prosecutor v. Nahimana et al.* (Media case), Case No. ICTR-99-52-A, Appeals Chamber, Judgment, 28 November 2007, para. 479.
348. ICTY, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Appeals Chamber, Judgment, 17 December 2004, para. 31; ICTY, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Trial Chamber, Judgment, 26 February 2009, fn. 84; ICTY, *Prosecutor v. Tolimir*, Case No. IT-05-88/2-T, Trial Chamber, Judgment, 12 December 2012, para. 900; ICTR, *Prosecutor v. Ngirabatware*, Case No. ICTR-99-54-T, Trial Chamber, Judgment, 10 December 2012, para. 1290. See also Jérôme de Hemptinne, Robert Roth, Elies van Sliedregt, Marjolein Cupido, Manuel J. Ventura and Lachezar Yanev (eds), *Modes of Liability in International Criminal Law* (2019), pp. 359-361.
349. ICTY, *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-A, Appeals Chamber Judgment, 19 May 2010, para. 171; ICTY, *Prosecutor v. D. Milošević,* Case No. IT-98-29/1-A, Appeals Chamber, Judgment, 12 November 2009, para. 268; ICTY, *Prosecutor v. Kordić and Čerkez*, Appeals Chamber, Judgment, IT-95-14/2-A, 17 December 2004, para. 26; ICTR, *Prosecutor v. Nahimana et al.* (Media case), Appeals Chamber, Judgment, Case No. ICTR-99-52-A, 28 November 2007, para. 479; SCSL, *Prosecutor v. Taylor*, Case No. SCSL-03-01-A, Appeals Chamber, Judgment, 26 September 2013, para. 492; SCSL, *Prosecutor v. Sesay et al.* (RUF case), SCSL-04-15-A, Appeals Chamber, Judgment, 26 October 2009, para. 687; SCSL, *Prosecutor v. Brima et al.* (AFRC case), Appeals Chamber, Judgment, Case No. SCSL-2004-16-A, 22 February 2008, para. 301.
350. ICTY, *Prosecutor v. D. Milošević*, Case No. IT-98-29/1-A, Appeals Chamber, Judgment, 12 November 2009, para. 268; ICTY, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Appeals Chamber, Judgment, 17 December 2004, para. 26; ICTY, *Prosecutor v. Tolimir*, Case No. IT-05-88/2-T, Trial Chamber, Judgment, 12 December 2012, para. 900; ICTY, *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Trial Chamber,

Further, while there are often several people involved in devising a plan, International Tribunals have held that individual criminal liability for planning may also be ascribed to the conduct of one person acting, that is, devising a criminal plan, alone.[351] Additionally, numerous ICTY and ICTR Trial Chamber judgments have held that planning takes place "at both the preparatory and execution phases", without providing a precise explanation as to what this phrase exactly means.[352]

In some Trial Chamber judgments, the ICTY has adopted some additional requirements with respect to the extent and nature of planning. For example, in some cases, the Tribunal appears to have required that the accused plan or design a concrete crime.[353] However, the vast majority of case law before the ICTY, ICTR and SCSL have adopted a broader approach, meaning that the accused needs only design the criminal conduct constituting one or more crimes, e.g., conduct that had the predominant purpose to indiscriminately attack civilians, and not necessarily an underlying crime as such.[354]

b) Mental element (mens rea)

With regard to the mental element of planning, international jurisprudence has held that the accused must intentionally plan or design an act or an omission with the intent that one or several crimes be committed in the execution of that plan or design; alternatively, they must be aware of the substantial likelihood that one or more crimes would be committed in the execution of that plan. [355]

Judgment, 10 June 2010, para. 1006; ICTR, *Prosecutor v. Nahimana et al.* (Media case), Case No. ICTR-99-52-A, Appeals Chamber, Judgment, 28 November 2007, para. 479; ICTR, *Prosecutor v. Musema*, Case No. IT- 96-13-T, Trial Chamber, Judgment, 27 June 2000, para. 115; ICTR, *Prosecutor v. Seromba*, Case No. ICTR-2001-66-I, Trial Chamber, Judgment, 13 December 2006, para. 303; SCSL, *Prosecutor v. Sesay et al.* (RUF case), Case No. SCSL-04-15-T, Trial Chamber, Judgment, 2 March 2009, para. 268.

351. ICTY, *Prosecutor v. Kordić and Čerkez,* Case No. IT-95-14/2-A, Appeals Chamber, Judgment, 17 December 2004, para. 26; ICTY, *Prosecutor v. Tolimir*, Case No. IT-05-88/2-T, Trial Chamber, Judgment, 12 December 2012, para. 900; ICTY, *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Trial Chamber, Judgment, 10 June 2010, para. 1006; ICTR, *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Trial Chamber, Judgment, 24 June 2011, para. 5591; ICTR, *Prosecutor v. Seromba,* Case No. ICTR-2001-66-I, Trial Chamber, Judgment, 13 December 2006, para. 303; ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Chamber, Judgment, 2 September 1998, para. 480; ICTR, *Prosecutor v. Nahimana et al.* (Media case), Case No. ICTR-99-52-A, Appeals Chamber, Judgment, 28 November 2007, para. 479; SCSL, *Prosecutor v. Sesay et al.* (RUF case), Case No. SCSL-04-15-A, Appeals Chamber, Judgment, 26 October 2009, para. 687; SCSL, *Prosecutor v. Sesay et al.* (RUF case), Case No. SCSL-04-15-T, Trial Chamber, Judgment, 2 March 2009, para. 268; SCSL, *Prosecutor v. Brima et al.* (AFRC case), Appeals Chamber, Judgment, Case No. SCSL-2004-16-A, 22 February 2008, para. 301.

352. See e.g., ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Trial Chamber, Judgment, 1 September 2004, para. 268; ICTY, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-T, Trial Chamber, Judgment, 26 February 2001, para. 386; ICTY, *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Trial Chamber, Judgment, 30 November 2005, para. 513; ICTY, *Prosecutor v. Galić*, Case No. IT-98-29-T, Trial Chamber, Judgment, 5 December 2003, para. 168; ICTY, *Prosecutor v. Krstić*, Case No. IT-98-33-T, Trial Chamber, Judgment, 2 August 2001, para. 601; ICTR, *Prosecutor v. Akayesu*, Trial Chamber, Judgment, ICTR-96-4-T, 2 September 1998, para. 479; ICTR, *Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-T, Trial Chamber, Judgment, 17 June 2004, para. 271; ICTR, *Prosecutor v. Semanza*, Case No. ICTR-97-20-7, Trial Chamber, Judgment, 15 May 2003, para. 380; ICTR, *Prosecutor v. Musema*, Case No. IT- 96-13-T, Trial Chamber, Judgment, 27 June 2000, para. 119; ICTR, *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Trial Chamber, Judgment, 6 December 1999, para. 37. See also SCSL, *Prosecutor v. Sesay et al.* (RUF case), Case No. SCSL-04-15-T, Trial Chamber, Judgment, 2 March 2009, para. 268; SCSL, *Prosecutor v. Brima et al.* (AFRC case), Appeals Chamber, Judgment, Case No. SCSL-2004-16-A, 22 February 2008, para. 301.

353. ICTY, *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Trial Chamber, Judgment, 1 September 2004, para. 268; ICTY, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-T, Trial Chamber, Judgment, 26 February 2001, para. 386.

354. See e.g., ICTY, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Appeals Chamber, Judgment, 17 December 2004, para. 26; ICTY, *Prosecutor v. D. Milošević*, Case No. IT-98-29/1-A, Appeals Chamber, Judgment, 12 November 2009, para. 268; ICTY, *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-A, Appeals Chamber Judgment, 19 May 2010, paras 171-172, underscoring that the legitimate character of an operation does not exclude an accused's criminal responsibility for planning, instigating and ordering crimes committed in the course of this operation if the goal is to be achieved by the commission of crimes; ICTR, *Prosecutor v. Nahimana et al.* (Media case), Case No. ICTR-99-52-A, Appeals Chamber, Judgment, 28 November 2007, para. 479; SCSL, *Prosecutor v. Taylor*, Case No. SCSL-03-01-A, Appeals Chamber, Judgment, 26 September 2013, para. 493.

355. ICTY, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Appeals Chamber, Judgment, 17 December 2004, para. 31; ICTY, *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Trial Chamber, Judgment, 26 February 2009, fn. 84; ICTY, *Prosecutor v. Tolimir*, Case No. IT-05-88/2-T, Trial Chamber, Judgment, 12

V. Superior or command responsibility

The principle that military and civilian superiors bear responsibility for failure to take necessary and reasonable measures to prevent or punish crimes committed by their subordinates when under a duty to do so is well established in international law.[356]

The origins of superior responsibility (or command responsibility) as a distinct form of individual criminal liability can be traced back to the Yamashita case where the Supreme Court of the United States considered:

> […] whether the law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the law of war […] and whether he may be charged with personal responsibility for his failure to take such measures when violations result.[357]

Eventually, in *re Yamashita*, the US Supreme Court answered the above questions affirmatively.

Superior responsibility was subsequently developed and applied to both military and civilian superiors at the Nuremberg and Tokyo trials,[358] and recognized in various international treaties and legal documents.[359] The Statutes of the ICTY, the ICTR, the SCSL and the ECCC all set out superior responsibility as a mode of individual criminal liability.[360] Superior responsibility is also recognized as a mode of individual criminal liability pursuant to customary international law.[361]

December 2012, para. 900; ICTR, *Prosecutor v. Ngirabatware*, Case No. ICTR-99-54-T, Trial Chamber, Judgment, 10 December 2012, para. 1290.

356. ICTY, *Prosecutor v. Hadzihasanović*, Case No. IT-01-47-AR72, Appeals Chamber, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, para. 31; ICTR, *Prosecutor v. Muvunyi*, Case No. ICTR-2000-55A-T, Trial Chamber, Judgment, 12 September 2006, para. 473. See also Jérôme de Hemptinne, Robert Roth, Elies van Sliedregt, Marjolein Cupido, Manuel J. Ventura and Lachezar Yanev (eds), *Modes of Liability in International Criminal Law* (2019), pp. 409-430.
357. United States Supreme Court, In re Yamashita, 327 US 1 (1946) at 14–15. The case examined the individual criminal responsibility of General Yamashita with respect to the atrocities committed by members of the Imperial Japanese Army in the Philippines between 9 October 1944 and 2 September 1945. The United States Military Commission in Manila and the United States Supreme Court answered the above questions affirmatively. Prior to that, echoes to the doctrine of superior responsibility may be identified in the wake of World War I, see Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, 'Report presented to the Preliminary Peace Conference' (1920) 14 Am J Int'l L 95, 121.
358. See e.g., *United States of America v. Pohl et al.* ('The Pohl Case'), Case No. 4, Military Tribunal II (Nuremberg), 3 November 1947, TWC (Green Series), Vol. V, at 981–982; *United States of America et al. v. Araki et al.*, Tokyo Tribunal, 4 November 1948, in J. Pritchard et al. (eds.), The Tokyo War Crimes Trial (New York: Garland, 1981), at 49788 in respect of Koki Hirota, former Foreign Minister. See also Trial of General Tanaka Hisakasu and Five Others (1948) 6 Law Reports of Trials of War Criminals, pp. 66, 78–79; Trial of Franz Holstein and Twenty-Five Others (1949) 8 Law Reports of Trials of War Criminals, pp. 22, 26, 32; Trial of Lieutenant-General Baba Masao (1949) 11 Law Reports of Trials of War Criminals, pp. 56, 58–60; Trial of Takashi Sakai (1949) 3 Law Reports of Trials of War Criminals, pp. 1–2; and Trial of SS Brigadeführer Kurt Meyer (1948) 4 Law Reports of Trials of War Criminals, pp. 97, 99, 107–109.
359. See ICPPED, art. 6(1)(b); Additional Protocol I to the Geneva Conventions, arts 86 and 87; *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, principle 27(b); *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, principle 19; *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, principle 24 (all stating that superiors must be held responsible for torture and ill-treatment, enforced disappearances and arbitrary deprivations of life committed by their subordinates). See also CAT, *General Comment No. 2: Implementation of Article 2 by States Parties*, 24 January 2008, CAT/C/GC/2, available at: https://www.refworld.org/docid/47ac78ce2.html [accessed 5 September 2022], para. 26, stating that under international law, States must hold liable "those exercising superior authority – including public officials … for torture or ill-treatment committed by subordinates where they knew or should have known that such impermissible conduct was occurring, or was likely to occur, and they failed to take reasonable and necessary preventive measures."
360. ICTY Statute, art. 7(3); ICTR Statute, art. 6(3); SCSL Statute, art. 6(3); and ECCC Law, art. 29.
361. See e.g., ICTY, *Prosecutor v. Hadzihasanović et al.*, Case No. IT-01-47-AR72, Appeals Chamber, Decision on Interlocutory Appeals Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, para. 31; ECCC, *Ieng et al.*, Case No. 002/19-09-2007-ECCC/OCIJ (PTC 145 & 146), Pre-Trial Chamber, Decision of the Pre-Trial Chamber on Appeals by Nuon Chea and Ieng Thirith against the Closing Order, 15 February 2011, paras 190–232. See also ICRC Customary IHL Database, Study on Customary International Humanitarian Law conducted by the International Committee of the Red Cross, 2005, Rule 152 and relevant

i. Constitutive elements of superior or command responsibility

Under international criminal law, superior or command responsibility requires the following three elements to be met:

(a) The existence of a superior-subordinate (*de facto* or *de jure*) relationship;
(b) The superior must have had the requisite knowledge that a subordinate was about to commit, was committing or had committed a crime; and
(c) The superior's failure to take the necessary and reasonable measures to prevent the commission of a crime or to punish the alleged perpetrator.[362]

a) Superior-subordinate (de facto or de jure) relationship

The first requirement of superior responsibility as a mode of individual criminal liability is the existence of a superior-subordinate (*de facto* or *de jure*) relationship.[363] In interpreting this first requirement, International Tribunals have held that it must be shown that the superior exercised "effective control"[364] over the subordinate on the facts of the particular case.[365] Neither the formal nature of the relationship between the parties,[366] nor their subjective opinions about it,[367] are relevant. Indeed, as the ICTY and ICTR have held, *de jure* authority may establish a strong basis for a judicial inference of effective control, but it is not conclusive to assess this element.[368] Similarly, as the ICTY explained in the Orić case, the formal titles or chains of command may be relevant, but they are not decisive.[369]

The ICTY, ICTR and SCSL have underlined that the superior should generally be able at least to induce compliance with their instructions, often through threat of enforcement powers (formal or informal),[370] rather than the exercise of mere influence.[371] In addition, the ICTY and the ICTR have held that more than one superior may exercise effective control over a

practice.

362. ICTY, *Prosecutor v. Delalić et al.* (Čelebići case), Case No. IT-96-21-T, Trial Chamber, Judgment, 16 November 1998, para. 346; ICTY, *Prosecutor v. Orić*, Case No. IT-03-68-A, Appeals Chamber, Judgment, 3 July 2008, para. 18; ICTR, *Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-A, Appeals Chamber, Judgment, 7 July 2006, para. 143. See also Jérôme de Hemptinne, Robert Roth, Elies van Sliedregt, Marjolein Cupido, Manuel J. Ventura and Lachezar Yanev (eds), *Modes of Liability in International Criminal Law* (2019), pp. 416-422.
363. ICTY, *Prosecutor v. Halilović*, Case No. IT-01-48-A, Appeals Chamber, Judgment, 16 October 2007, paras 59, 210; ICTY, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Appeals Chamber, Judgment, 17 December 2004, para. 827; ICTR, *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Trial Chamber, Judgment, 15 May 2003, para. 401.
364. SCSL, *Prosecutor v. Brima et al.* (AFRC case), Case No. SCSL-2004-16-A, Appeals Chamber, Judgment, 22 February 2008, para. 257; ICTY, *Prosecutor v. Halilović*, Case No. IT-01-48-A, Appeals Chamber, Judgment, 16 October 2007, para. 59; ICTR, *Prosecutor v. Bagilishema* Case No. ICTR-95-1A-A, Appeals Chamber, Judgment, 3 July 2002, paras 50, 60-61.
365. ICTY, *Prosecutor v. Hadžihasanović and Kubura*, Case No. IT-01-47-T, Trial Chamber, Judgment, 15 March 2006, para. 84; ICTR, *Prosecutor v. Kayishema and Ruzindana*, Trial Chamber Judgment, ICTR-95-1-T, 21 May 1999, para. 229.
366. ICTY, *Prosecutor v. Halilović*, Case No. IT-01-48-A, Appeals Chamber, Judgment, 16 October 2007, paras 59 and 210; ICTR, *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-A, Appeals Chamber, Judgment, 3 July 2002, paras 50 and 61.
367. SCSL, *Prosecutor v. Brima et al.* (AFRC case), Case No. SCSL-2004-16-A, Appeals Chamber, Judgment, 22 February 2008, para. 257; ICTY, *Prosecutor v. Halilović*, Case No. IT-01-48-A, Appeals Chamber, Judgment, 16 October 2007, para. 59; ICTR, *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-A, Appeals Chamber, Judgment, 3 July 2002, paras 50, 60-61.
368. ICTY, *Prosecutor v. Hadžihasanović and Kubura*, Case No. IT-01-47-A, Appeals Chamber, Judgment, 22 April 2008, para. 21; ICTY, *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Appeals Chamber, Judgment, 28 February 2005, paras 144 and 382; ICTR, *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-A, Appeals Chamber, Judgement, 1 June 2001, para. 294; ICTR, *Prosecutor v. Ntagerura et al*, Case No. ICTR-99-46-T, Trial Chamber, Judgment, 25 February 2004, para. 628.
369. ICTY, *Prosecutor v. Orić*, Case No. IT-03-68-A, Appeals Chamber, Judgment, 3 July 2008, paras 91–92.
370. ICTY, *Prosecutor v. Blaškić,* Case No. IT-95-14-A, Appeals Chamber, Judgment, 29 July 2004, para. 69; ICTY, *Prosecutor v. Hadžihasanović and Kubura*, Case No. IT-01-47-T, Trial Chamber, Judgment, 15 March 2006, paras 86-88.
371. SCSL, *Prosecutor v. Brima et al.* (AFRC case), Case No. SCSL-2004-16-A, Appeals Chamber, Judgment, 22 February 2008, para. 289; ICTR, *Prosecutor v. Setako*, Case No. ICTR-04-81-T, Trial Chamber, Judgment, 25 February 2010, para. 459; ICTY, *Prosecutor v. Delalić et al.* (Čelebići case), Case No. IT-96-21-A, Appeals Chamber, Judgment, 20 February 2001, paras 257–266, and 300.

particular subordinate unit.[372] Superior responsibility does not extend to acts committed by the subordinates prior to the assumption of command by the commander.[373]

Finally, it is important to note that the superior-subordinate relationship is not restricted to the context of military or paramilitary organizations.[374] Accordingly, any civilian may be in a position to exercise the powers (and bear the responsibility) of a superior, albeit their means and methods of work may differ from conventional military standards.[375] In this regard, in the *Delalić* case, the ICTY noted that the term "command" normally pertains to powers that attach to a military superior, while the term "control", which has a wider meaning, may encompass powers wielded by civilian leaders. As a result, civilian leaders may equally incur individual criminal liability in relation to acts committed by their subordinates or other persons under their effective control.[376]

b) Failure to take the necessary and reasonable measures to prevent the commission of a crime or to punish the alleged perpetrator (actus reus)

The second requirement of superior (or command) responsibility as a mode of individual criminal liability is that the superior must have failed to take the necessary and reasonable measures to prevent the commission of a crime or to punish the alleged perpetrator.[377] As the ICTY has held in multiple cases, "necessary measures" are the steps appropriate for the superior to discharge their obligation – showing that they genuinely tried to prevent or punish – and "reasonable" measures are those reasonably falling within the material powers of the superior.[378]

ICTY jurisprudence has also affirmed that what is necessary and reasonable in a specific set of circumstances is linked to the degree of effective control wielded by the superior over their subordinates.[379] Indeed, what may be materially possible depends on the superior's degree of effective control over their subordinates at the time their duty arises.[380]

With respect to the issue of whether a superior's response is "reasonable", the ICTY has held that it depends partly on the time by which they gain the requisite knowledge, the methods

372. ICTR, *Prosecutor v. Nizeyimana*, Case No. ICTR-00-55C-A, Appeals Chamber, Judgment, 29 September 2014, para. 201; ICTY, *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, Appeals Chamber, Judgment, 30 January 2015.
373. ICTY, *Prosecutor v. Hadžihasanović et. al.*, Case No. IT-01-47-AR72, Appeals Chamber, Decision Interlocutory Appeal Challenging Jurisdiction in Relation to Superior Responsibility, 16 July 2003, para. 51; ICTY, *Prosecutor v. Halilović*, Case No. IT-01-48-A, Appeals Chamber, Judgment, 16 October 2007, para. 67; ICTY, *Prosecutor v. Perišić*, Case No. IT-04-81-A, Appeals Chamber, Judgment, 28 February 2013, paras 87, 110.
374. SCSL, *Prosecutor v. Brima et al.* (AFRC case), Case No. SCSL-2004-16-A, Appeals Chamber, Judgment, 22 February 2008, para. 257; ICTR, *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-A, Appeals Chamber, Judgment, 3 July 2002, para. 51; ICTY, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Appeals Chamber, Judgment, 24 March 2000, para. 76.
375. ICTY, *Prosecutor v. Delalić et al.* (Čelebići case), Case No. IT-96-21-A, Appeals Chamber, Judgment, 20 February 2001, para. 195; ICTR, *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-A, Appeals Chamber, Judgment, 3 July 2002, paras 35, 52; ICTY, *Prosecutor v. Orić*, Case No. IT-03-68-T, Trial Chamber, Judgment, 30 June 2006, para. 320; ICTY, *Prosecutor v. Brđanin*, Case No IT-99-36-T, Trial Chamber, Judgment, 1 September 2004, paras 281–283.
376. ICTY, *Prosecutor v. Delalić*, Case No. IT-96-21-A, Appeals Chamber, Judgment, 20 February 2001, para. 196.
377. ICTY, *Prosecutor v. Halilović*, Case No. IT-01-48-A, Appeals Chamber, Judgment, 16 October 2007, para. 59; ICTY, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Trial Chamber, Judgment, 17 December 2004, para. 827; ICTR, *Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-A, Appeals Chamber, Judgment, 7 July 2006, para. 143; ICTR, *Prosecutor v. Setako*, Case No. ICTR-04-81-A, Appeals Chamber, Judgment, 28 September 2011, para. 269.
378. ICTY, *Prosecutor v. Orić*, Case No. IT-03-68-A, Appeals Chamber, Judgment, 3 July 2008, para. 177; ICTY, *Prosecutor v. Blaškić*, Case No IT-95-14-A, Appeals Chamber, Judgment, 29 July 2004, para. 72; ICTR, *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Trial Chamber, Judgment, 15 May 2003, para. 406.
379. ICTY, *Prosecutor v. Blaškić*, Case No IT-95-14-A, Appeals Chamber, Judgment, 29 July 2004, para. 72; ICTY, *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, Appeals Chamber, Judgment, 30 January 2015, para. 1929.
380. ICTY, *Prosecutor v. Delalić et al*. (Čelebići case), Case No. IT-96-21-T, Trial Chamber, Judgment, 16 November 1998, para. 395. See also ICC, *The Prosecutor v. Bemba*, Case No. ICC-01/05-01/08, Pre-Trial Chamber II, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, para. 443.

and means available to them, and the ill that the measure is intended to remedy.[381] Thus, the superior is required to use "every means" practicable,[382] and not merely those within their *de jure* powers.[383] Once a superior knows or has reason to know a crime has been committed, it is considered reasonable for them to initiate an investigation insofar as they are able, and/or to submit a report to the competent authorities requesting them to take direct remedial action.[384]

As the ICTY and ICTR have explained in numerous cases, a "failure to punish" is a legally distinct concept and a separate basis for incurring criminal liability as a superior than a "failure to prevent".[385] The "duty to prevent" arises for a superior from the moment he knows or has reason to know that a crime is about to be committed, while the "duty to punish" arises only after the commission of the crime.[386] However, superiors may not "pick and choose" which obligation to discharge: when they could have taken preventive action, it will plainly never be reasonable for a superior to choose not to prevent the commission of a crime and, instead, merely to punish it thereafter.[387]

With respect to the duty to punish crimes that have already taken place, international jurisprudence has held that this element should also be examined in light of the superior's degree of effective control over his/her subordinates.[388] In any event, the superior need not dispense the punishment personally.[389] As the ICTY held in the *Popović* case, what is required in the first place is that the commander takes measures aimed at securing an adequate investigation capable of leading to the initiation of a prosecution.[390] That said, as the ICTY noted in the Hadžihasanović case, in some circumstances disciplinary measures are required, but these will often be insufficient given the gravity of the crimes concerned.[391] As a result, the case law has held that, depending on the context, submitting the matter to the competent authorities will fulfil the commander's obligation, as long as the report is sufficient to trigger the action of those authorities.[392]

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381. ICTY, *Prosecutor v. Orić*, Case No. IT-03-68-T, Trial Chamber, Judgment, 30 June 2006, para. 329; ICTY, *Prosecutor v Hadžihasanović and Kubura*, Case No. IT-01-47-T, Trial Chamber, Judgment, 15 March 2006, para. 155.
382. ICTY, *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeals Chamber, Judgment, 29 July 2004, paras 72 and 417; ICTY, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-T, Trial Chamber, Judgment, 27 September 2007, para. 568; ICTY, *Prosecutor v. Popovic et al.*, Case No. IT-05-88-A, Appeals Chamber, Judgment, 30 January 2015, paras 1928-1929.
383. ICTY, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-A, Appeals Chamber, Judgment, 5 May 2009, para. 94; *Prosecutor v. Orić*, Case No. IT-03-68-T, Trial Chamber, Judgment, 30 June 2006, paras 329 and 331; ICTY, *Prosecutor v. Hadžihasanović and Kubura*, Case No. IT-01-47-T, Trial Chamber, Judgment, 15 March 2006, paras 122 and 170; ICTY, *Prosecutor v. Limaj et al.*, Case No IT-03-66-T, Trial Chamber, Judgment, 30 November 2005, para. 526.
384. ICTY, *Prosecutor v. Halilović*, Case No. IT-01-48-A, Appeals Chamber, Judgment, 16 October 2007, para. 182; ICTY, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-T, Trial Chamber, Judgment, 27 September 2007, para 568; ICTY, *Prosecutor v. Orić*, Case No. IT-03-68-T, Trial Chamber, Judgment, 30 June 2006, para. 336; ICTY, *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Trial Chamber, Judgment, 30 November 2005, para. 529.
385. ICTY, *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeals Chamber, Judgment, 29 July 2004, para. 83; ICTY, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-T, Trial Chamber, Judgment, 27 September 2007, para. 566; ICTY, *Prosecutor v. Halilović*, Case No. IT-01-48-T, Trial Chamber, Judgment, 16 November 2005, para. 72; ICTR, *Ndahimana v. Prosecutor*, Case No. ICTR-01-68-A, Appeals Chamber, Judgment, 16 December 2013, para. 79.
386. ICTY, *Prosecutor v. Hadzihasanović and Kubura*, Case No. IT-01-47-A, Appeals Chamber, Judgment, 22 April 2008, para. 260.
387. ICTY, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-T, Trial Chamber, Judgment, 27 September 2007, para. 566; ICTY, *Prosecutor v. Orić*, Case No IT-03-68-T, Trial Chamber, Judgment, 30 June 2006, para. 326; ICTY, *Prosecutor v. Hadžihasanović and Kubura*, Case No IT-01-47-T, Trial Chamber, Judgment, 15 March 2006, para. 126; ICTR, *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Trial Chamber, Judgment, 7 June 2001, para. 49
388. ICTY, *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeals Chamber, Judgment, 29 July 2004, para. 72.
389. ICTY, *Prosecutor v. Hadžihasanović et al.*, Case No. IT-01-47-A, Appeals Chamber, Judgment, 22 April 2008, para. 154; ICTY, *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-A, Appeals Chamber, Judgment, 19 May 2010, para. 230.
390. ICTY, *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, Appeals Chamber, Judgment, 30 January 2015, para. 1932. This is understood to be the minimum standard.
391. ICTY, *Prosecutor v. Hadžihasanović et al.*, Case No. IT-01-47-A, Appeals Chamber, Judgment, 22 April 2008, para. 152.
392. ICTY, *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, Appeals Chamber, Judgment, 30 January 2015,

Finally, international case law has held that the superior reporting the crimes of their subordinates would not be sufficient to fulfil the superior's obligations in situations where they know that those to whom the report would ordinarily be submitted are themselves involved in perpetrating crimes.[393] However, in this situation the prosecution must establish the existence of other authorities to whom the defendant ought to have submitted their report.[394]

c) Knowledge that a subordinate is about to commit, is committing or has committed a crime (mens rea)

The third requirement of superior (or command) responsibility is that the superior either knew or had reason to know that a subordinate was about to commit, was committing or had committed a crime.[395] Under both ICTY and ICTR jurisprudence, this mental element implies that a superior's knowledge must not be presumed simply by virtue of their command position.[396]

Accordingly, in the *Blagojević and Jokić* case, the ICTY held that:

> [c]ommand responsibility is not a form of strict liability […] The mens rea requirement is satisfied when it is established that: (i) the commander had actual knowledge, established through either direct or circumstantial evidence, that his subordinates were committing or about to commit crimes within the jurisdiction of the Tribunal; or (ii) he had in his possession such information which would put him on notice of the risk of such offences, in that it indicated or alerted him to the need for additional investigation in order to determine whether such crimes had been or were about to be committed by his subordinates.[397]

According to international case law, various factors may be considered to assess a superior's actual knowledge. These may include the number of illegal acts, their scope, whether their occurrence is widespread, the time during which the prohibited acts took place, the type and number of forces involved, the means of available communication, the *modus operandi* of similar acts, the scope and nature of the superior's position and responsibility in the hierarchal structure, the location of the commander at the time, and the geographical location where the actsoccurred.[398]

With respect to the "had reason to know" standard, the ICTY and ICTR have explicitly held this does not encompass negligence, meaning that it is a more stringent standard than "should have known".[399] In this regard, the Tribunals have observed that:

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para. 1932.

393. ICTY, *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-A, Appeals Chamber, Judgment, 19 May 2010, para. 234. See also ICC, *The Prosecutor v. Bemba*, Case No. ICC-01/05-01/08-3343, Trial Chamber III, Judgment Pursuant to Article 74 of the Statute, 21 March 2016, para. 208.
394. ICTR, *Prosecutor v. Ntagerura*, Case No. ICTR-99-46-A, Appeals Chamber, Judgment, 7 July 2006, para. 345.
395. ICTY, *Prosecutor v. Halilović*, Case No. IT-01-48-A, Appeals Chamber, Judgment, 16 October 2007, para. 59; ICTY, *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Trial Chamber, Judgment, 17 December 2004, para. 827; ICTR, *Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-A, Appeals Chamber, Judgment, 7 July 2006, para. 143; ICTR, *Prosecutor v. Setako*, Case No. ICTR-04-81-A, Appeals Chamber, Judgment, 28 September 2011, para. 269.
396. ICTY, *Prosecutor v. Mrkšić et al.*, Case No IT-95-13/1-T, Trial Chamber, Judgment, 27 September 2007, para. 563; ICTY, *Prosecutor v. Orić*, Case No. IT-03-68-T, Trial Chamber, Judgment, 30 June 2006, para. 319; ICTY, *Prosecutor v. Hadžihasanović and Kubura*, Case No. IT-01-47-T, Trial Chamber, Judgment, 15 March 2006, para. 94; ICTR, *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Trial Chamber, Judgment, 1 December 2003, para. 776.
397. ICTY, *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Trial Chamber, Judgment, 17 January 2005, para. 792.
398. See e.g., ICTY, *Prosecutor v. Delalić et al.* (Čelebići case), Case No. IT-96-21-T, Trial Chamber, Judgment, 16 November 1998, para. 386; ICTY, *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Trial Chamber, Judgment, 3 March 2000, para. 307; ICTY, *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-T, Trial Chamber, Judgment, 31 March 2003, paras 71–72; ICTY, *Prosecutor v. Strugar*, Case No. IT-01-42-T, Trial Chamber, Judgment, 31 January 2005, para. 368; ICTY, *Prosecutor v. Orić*, Case No. IT-03-68-A, Appeals Chamber, Judgment, 3 July 2008, para. 319; ICTR, *Prosecutor v. Bagosora et al*, Case No. ICTR-98-41-T, Trial Chamber, Judgment, 18 December 2008, para. 2014; SCSL, *The Prosecutor v. Sesay et al.* (RUF case), Case No. SCSL-04-15-T, Trial Chamber, Judgment, 2 March 2009, para. 309.
399. ICTY, *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeals Chamber, Judgment, 29 July 2004, para. 62; ICTR, *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-A, Appeals Chamber, Judgment, 3 July 2002, para. 37.

i. general information that puts the superior on notice of possible unlawful acts by their subordinates is sufficient;[400]
ii. the information, even if general, must relate to the elements of the underlying crime;[401]
iii. the information only needs to have been provided or made available to the superior or for it to be in their possession, and it is not required that the superior actually acquainted themselves with the information;[402] and
iv. the information must put the superior on notice of *possible* unlawful acts [*emphasis* added].[403]

Further, in assessing whether the accused has constructive knowledge, the International Tribunals have generally required a "finely balanced assessment"[404] of the facts of the particular case.[405] For example, the ICTY has held that it is sufficient that the superior was in possession of information that would have alerted them to the fact of past or imminent crimes, or that would have put them on notice.[406] In other words, the information in the superior's possession must at least demonstrate a present and real risk that crimes had been, or were about to be, committed by subordinates.[407] Accordingly, where a superior is charged with torture, "it is not enough that an accused has sufficient information about beatings […] he must also have information – albeit general – which alerts him to the risk of beatings being inflicted for one of the [prohibited] purposes."[408] Indeed, "[a]lthough the information may be general in nature, it must be sufficiently specific to demand further clarification". Further, in some circumstances, knowledge of the prior commission of crimes by identified subordinates may be sufficient notice of future crimes. [409]

As mentioned above, whether the accused have actual knowledge or reasons to know of the commission of the crimes by their subordinates, it is necessary that they know or have reasons to know that all the elements of these crimes have been, are being, or are about to be committed by their subordinates. Thus, with respect to crimes of specific intent, such as persecution as a crime against humanity, the accused must have knowledge or reasons to know that the relevant subordinates had a discriminatory intent.[410]

400. See ICTR, *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-A, Appeals Chamber, Judgment, 3 July 2002, para. 42: '[T]he Appeals Chamber, however, deems it necessary to make a distinction between the fact that the Accused had information about the general situation that prevailed in Rwanda at the time, and the fact that he had in his possession general information which put him on notice that his subordinates might commit crimes."
401. ICTY, *Prosecutor v. Krnojelac* (Foča case), Case No. IT-97-25-A, Appeals Chamber, Judgment, 17 September 2003, para. 155.
402. ICTY, *Prosecutor v. Delalić et al.* (Čelebići case), Case No. IT-96-21-A, Appeals Chamber, Judgment, 20 February 2001, para. 239. Accordingly, the Tribunal stated that "it is not required that he actually acquainted himself with the information" for superior liability to arise.
403. ICTY, *Prosecutor v. Strugar*, Case No. IT-01-42-A, Appeals Chamber, Judgment, 17 July 2008, para. 304. As the Tribunal stated, it is enough that the superior be in possession of "sufficiently alarming information putting [them] on notice of the risk that crimes might subsequently be carried out by his subordinates and justifying further inquiry".
404. ICTY, *Prosecutor v. Strugar*, Case No. IT-01-42-T, Trial Chamber, Judgment, 31 January 2005, para. 417.
405. ICTY, *Prosecutor v. Krnojelac* (Foča case), Case No. IT-97-25-A, Appeals Chamber, Judgment, 17 September 2003, para. 156; ICTY, *Prosecutor v. Delalić et al.* (Čelebići case), Case No. IT-96-21-A, Appeals Chamber, Judgment, 20 February 2001, para. 239.
406. ICTY, *Prosecutor v. Delalić et al.* (Čelebići case), Case No IT-96-21-A, Appeals Chamber, Judgment, 20 February 2001, paras 238–239; ICTY, *Prosecutor v. Mrkšić et al.,* Case No. IT-95-13/1-T, Trial Chamber, Judgment, 27 September 2007, para. 564; ICTY, *Prosecutor v. Orić*, Case No. IT-03-68-T, Trial Chamber, Judgment, 30 June 2006, para. 322.
407. ICTY, *Prosecutor v. Mrkšić et al*, Case No. IT-95-13/1-T, Trial Chamber, Judgment, 27 September 2007, para. 564; ICTY, *Prosecutor v. Hadžihasanović and Kubura*, Case No IT-01-47-T, Trial Chamber, Judgment, 15 March 2006, para. 97.
408. ICTY, *Prosecutor v. Krnojelac* (Foča case), Case No. IT-97-25-A, Appeals Chamber, Judgment, 17 September 2003, paras 155, 166, and 171.
409. ICTY, *Prosecutor v. Hadžihasanović and Kubura*, Case No IT-01-47-A, Appeals Chamber, Judgment, 22 April 2008, paras 30–31.
410. ICTY, *Prosecutor v. Krnojelac* (Foča case), Case No. IT-97-25-A, Appeals Chamber, Judgment, 17 September 2003, paras 155 and 187; ICTY, *Prosecutor v. Milutinović et al.*, Case No IT-05-87-T, Trial Chamber, Judgment, 26 February 2009, para. 119.

VI. Tunisian law in light of international law and standards

Individual criminal responsibility is considered a general principle of Tunisian criminal law. It is enshrined in the Tunisian Constitution, which provides that "penalties are individual", i.e., that criminal penalties ought to be imposed on those found individually criminally responsible.[411] Tunisian doctrine defines criminal responsibility in relation to the capacity of an individual to commit a crime and, consequently, to be held accountable through the imposition of a penal sanction under the law.[412]

With respect to modes of liability, Chapter III of the Tunisian Criminal Code, entitled "Persons Liable to Punishment", provides for several forms of complicity.[413] While the Criminal Code lacks detailed provisions defining "commission" and "co-perpetration" as modes of individual criminal liability under Tunisian criminal law, interpretation by the Tunisian jurisprudence and doctrine has defined these modes, as will be further elaborated in this section. Accordingly, the modes of individual criminal liability that can be relied upon in Tunisian criminal law include:

i. direct commission;[414]
ii. co-perpetration;[415] and
iii. complicity, including aiding and abetting and instigation[416].

The Tunisian legal framework does not provide for all known modes of individual criminal liability under international law as regards crimes under international law. In particular, superior responsibility as a mode of individual criminal liability for crimes under international law is absent from the Tunisian domestic legal framework.

As already mentioned in the introduction of this Guide, while the 2013 Law seems to refer to "the legislation in force" to be applied by the competent authorities in respect to principles of accountability,[417] it also refers to ratified international conventions in respect to crimes falling within the jurisdiction of the SCC. In turn, these conventions provide for modes of individual criminal liability under which States Parties have the duty to investigate, prosecute, try and, if found guilty, punish those responsible for the crimes concerned. In light of this, as discussed above in Chapter 2, while determining individual criminal responsibility for gross human rights violations that amount to crimes under international law, the SCC should interpret domestic law, to the extent possible, in a manner consistent with Tunisia's international treaty and customary international law obligations, including with respect to the applicable modes of individual criminal liability and the principle of legality.[418]

To this effect, the following sections describe the relevant modes of individual criminal liability in light of relevant domestic jurisprudence and authoritative scholarly commentaries on the Tunisian Criminal Code, and analyze the Tunisian legal framework in light of international law and standards, highlighting the most significant gaps in the Tunisian legal framework and jurisprudence vis-à-vis international law, and analyzing their implications for achieving justice before the SCC.

A. Direct commission

Although direct commission (or perpetration) is not explicitly listed or defined in the Tunisian

411. 2014 Constitution, art. 28 (now abrogated), 2022 Constitution, art. 34.
412. See Mahmoud Dawood Yaacoub, *Criminal Responsibility*, 6 March 2013, available at https://maitremahmoudyacoub.blogspot.com/2013/03/blog-post_6.html [Access date: 5 April 2022].
413. Tunisian Criminal Code, art. 32.
414. Based on article 37 of the Tunisian Criminal Code on criminal intent as a requirement to incur individual criminal liability.
415. Faraj al-Qasir, *Public Criminal Law*, University Publication Centre, 2006 [hereinafter: "F. al-Qasir"], p. 172.
416. Tunisian Criminal Code, art. 32.
417. See 2013 Law, arts 6 and 7. It is unclear whether this provision means to refer to the jurisdiction of the said competent authorities or the very principles of accountability.
418. See ICJ, Practical Guide 1, pp. 94, 96.

Criminal Code as a mode of individual criminal liability *per se*,[419] it can be deduced as such from the Code, as shown by judicial decisions and scholarly commentaries.

Tunisian courts have developed jurisprudence on the perpetrator's individual criminal liability based on the definition of the crime and its elements as provided in the Criminal Code. Scholarly publications on Tunisian criminal law have outlined the perpetrator as the human being who is criminally responsible for the commission of a crime through a positive or negative act (omission) necessary to make up the criminal act as specified in the Criminal Code, or the person who, in cases provided by the law, attempts to commit a crime.[420]

i. Constitutive elements of direct commission

Under Tunisian criminal law, direct commission comprises two elements. First, the conduct of the perpetrator must cover the material elements of the underlying crime – i.e., the perpetrator is physically committing a positive or a negative act (omission) that constitutes the criminal act. Second, the perpetrator must have had both the general and, where applicable, special or specific intent to commit the crime and the knowledge that the act carried out will result in the crime.

a) Material element (actus reus)

Article 37 of the Tunisian Criminal Code provides: "No one shall be punished unless for an act committed intentionally, except in the cases specifically provided for by law." Scholarly commentaries describe article 37 as the legal provision pursuant to which the law punishes (voluntary) acts, which can consist in either a positive or negative act (omission).[421] A positive act can take the form of a continuous action or an action that has a beginning and an end in time, or of several actions that are connected to each other by a criminal purpose.[422]

The IVD, in the context of the transitional justice process, found that article 37 of the Criminal Code establishes individual criminal responsibility exclusively for a positive act.[423] According to the IVD, one of the specific cases in which the Tunisian legislator provided for criminal responsibility arising from an "inaction" can be found in article 101 *bis* of the Criminal Code regarding the crime of torture, which provides: "civil servants or their likes, having ordered, incited, consented or *turned a blind eye* on acts of torture during or in connection with the discharge of their duties, shall be held accountable for the crime of torture [emphasis added]."[424] Nonetheless, it is uncertain whether such "inaction" would amount to direct commission, rather than another form of "participation" giving rise to the individual criminal liability as a principal perpetrator.

While Tunisian criminal law does not generally provide for indirect perpetration – that is, where the principal perpetrator commits a criminal act through another person – some jurisprudence has, to this effect, relied on article 101 of the Criminal Code which states: "Any public official who, in the exercise or on the occasion of the exercise of their functions, without legitimate reason, *uses or causes to be used* violence against people, is punished by five years' imprisonment and a fine of 120 dinars" (about 38 US Dollars) [*emphasis* added]. With respect to this, in case No. 2854/2012, pursuant to article 101, the Criminal Chamber of the Tribunal of First Instance of Tunis found Tunisia's former President, Zein al-Abidine Ben Ali, guilty of committing the offence of using violence in the exercise of official functions without legitimate reasons in relation to the acts of torture, sexual violence and unlawful detention to which Rashad Jaidan was subjected

419. Under Chapter III of Part I of the Tunisian Criminal Code dedicated to "*Persons Liable to Punishment*", article 32 defines the accomplice and only mentions the "perpetrator" when referencing the support the former provides to the latter.
420. F. al-Qasir, p. 169. This is inspired by French criminal law: see French Criminal Code, art. 121-4: "The perpetrator of the offense is the person who: 1. Commits the incriminated acts; 2. Attempts to commit a crime or, in the cases provided for by law, a felony". However, attempt is defined in article 59 of the Tunisian Criminal Code, which provides that it is punishable "as the offence itself".
421. Abada al-Kafi, *Commentary on the Tunisian Criminal Code*, second edition (2016) [hereinafter "A. al-Kafi, Commentary on the Tunisian Criminal Code"], article 37, p. 83, relying on French criminal law doctrine.
422. Ibid.
423. IVD, Final Report, Executive Summary, p. 82 (English version).
424. Ibid.

by security forces. In this respect, the Court stated:

> "Although the defendant [Ben Ali] controlled the centres of influence and authority of the State, especially the officials of the Ministry of Interior, there is no evidence that he personally assaulted the plaintiff [Rashad Jaidan]. The defendant was rather responsible for appointing security officials, including those responsible for torture, whom he deemed suitable for such positions, and gave the officials an unlimited mandate for using all kinds of torture against any person who represented a threat to him."[425]

The Court thus relied on article 101 of the Criminal Code, which proscribes a specific *modus operandi* with respect to the crime of using violence, to convict Ben Ali as a principal perpetrator for having officials perpetrate acts of violence.

The limitation of this approach is that the offence under article 101 fails to reflect the totality and gravity of the criminal acts involved, which in the case at hand included torture and sexual violence. Such approach is thus not adequate from an accountability perspective.

b) Mental element (mens rea)

Article 37 of the Criminal Code enshrines the general criminal law principle according to which a criminal intent is generally required to establish individual criminal responsibility.

Criminal intent is defined as the direction of the offender's intent towards a particular goal, namely performing a criminal act, or refraining from doing what the law prescribes. Criminal intent constitutes the mental element of the crime, which is "the will of the offender to commit an act that is [criminalized and] punishable by law."[426]

General intent corresponds to the perpetrator's will to "take the decision to commit that act and persist to do so, despite knowing that the intended act is criminalized by law."[427] In addition, the offender must be free to make this decision, as their will only comes into play when the decision is made by a person who is *compos mentis* (i.e., a person who is of sound mind and mentally capable to use and have control over their mental faculties).[428]

With respect to some crimes, special or specific intent is required besides the general intent to fully establish the mental element of the crime.[429] Special or specific intent must be proven to establish that the perpetrator intended to commit a specific act. For instance, establishing individual criminal responsibility for the crime of murder requires proving that the perpetrator not only intended to commit the act of assault knowing it is criminalized by law (general intent), but also intended to kill the victim and directed their will towards the criminal act of murder, not the mere act of assault.

Tunisian law also provides for a form of criminal intent that gives rises to criminal liability, and that is close to *dolus directus* of second degree,[430] namely, the awareness of the substantial likelihood that the crime would occur as a consequence of one's conduct. In case No. 11006, the Indictment Chamber[431] reviewed the indictment of 22 government and senior security officials.[432]

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425. Criminal Chamber of the Tribunal of First Instance in Tunis, Case. No. 2854/2012, 8 April 2015, Criminal Verdict summarized by Jude Baya Qisani, p. 20 [ICJ's unofficial translation]. The reasoning held in this case, as well as other cases referred to below, is analysed in this Guide for the purpose of highlighting jurisprudential interpretations of modes of liability in respect to facts that are relevant to the material jurisdiction of the SCC. Reference thereto is by no means an endorsement of the legitimacy of these proceedings, which raise concerns in terms of international human rights law and standards with respect to in absentia proceedings.
426. A. al-Kafi, *Commentary on the Tunisian Criminal Code*, op. cit., Article 37, p. 84.
427. Idem.
428. Ibid., p. 85
429. Idem.
430. See above Chapter 3, Section a.
431. According to article 116 of the Tunisian Code of Criminal Procedure, if the indictment chamber considers that the act does not constitute an offence, or that there are not sufficient charges against the suspect, it declares that there is no need to proceed, and orders the release of the detained suspect. If there are "sufficient presumptions of guilt", it refers the accused to trial before the competent court.
432. Indictment Chamber (Court of Appeals), Case No. 11006, 19 May 2016 (hereinafter "Case No. 11006

The case involved the killing of an individual who was tortured by security officials in the context of a crackdown against opponents to the former regime.[433] In determining the mode of criminal responsibility under which a senior security official was to be charged and referred to trial, the Chamber found that he had contributed, along with others, to the assault that had caused the victim's death,[434] and, therefore, that he was to be charged as the "principal perpetrator" of the crime of intentional assault causing death without the intent to kill with premeditation, under article 208 of the Criminal Code.[435] In this regard, the Chamber established the material element (i.e., the act of assault) and the mental element (i.e., intent to inflict violence with the knowledge it would eventually result in death),[436] concluding that, for charging purposes, it was satisfied that he had the required criminal intent in that he had known in advance that the violence inflicted on the victim and the detention conditions imposed on him would have led to his death. While the Indictment Chamber confirmed the charges against him pursuant to direct commission as the mode of individual criminal liability, it could have possibly also done so through joint commission, as detailed below.

B. Joint commission

i. Tunisian legal framework and practice

The Tunisian Criminal Code does not define co-perpetration or joint commission as a mode of individual criminal responsibility *per se*.[437] However, legal scholars have described the "co-perpetrator" ("*coauteur*" in French) in instances where more than one person willingly performs the acts constituting the material element of a crime. Under this definition, each of the individuals who performed part of the material element of the crime can be held jointly liable as a co-perpetrators of the crime, and shall each be charged, tried and if convicted punished as the "principal perpetrator" of the crime.[438]

a) Constitutive elements of joint commission

(1) Material element (actus reus)

Tunisian judicial decisions have applied the concept of co-perpetration to characterize the individual criminal liability of a plurality of individuals as co-perpetrators and, thus, as "principal perpetrators". For example, in the above-mentioned case No. 11006, the Indictment Chamber charged a senior security official, along with others, as a co-perpetrator of the crime of assault resulting in death after considering the level of contribution required to qualify a person as a co-perpetrator. In particular, the Chamber considered that the fact that he, as the supervisor of security officials, started assaulting the victim in front of his subordinates was "tantamount to

Indictment Chamber Decision"). Because the trial has not taken place, the identity of the victims and charged persons and the location of the case are not mentioned in this Guide, which only refers to the legal reasoning held by the Indictment Chamber for legal analysis purposes.

433. Case No. 11006 Indictment Chamber Decision, p. 70.

434. *Idem*.

435. Ibid., p. 71.

436. *Idem*.

437. It should be noted, however, that article 131 of the Tunisian Criminal Code incriminates criminal conspiracy (*association de malfaiteurs* in French) as an offence in relation to attacks against people and property, which consists in "any gang formed, whatever its duration or the number of its members, or any agreement established for the purpose to prepare or commit [such attacks]" [ICJ's unofficial translation]. This offence focuses on the preparation of crimes rather than the contribution to the commission of the crime. Moreover, several articles of the Criminal Code proscribing group criminality against internal State security provide that each member of a group to which a criminal act or purpose is attributed shall individually bear criminal responsibility: see, e.g., articles 77 and 79 of the Criminal Code. While membership in a group with a common criminal purpose and coordinated actions to commit a crime, albeit as an offence as opposed to a mode of liability, is a close take on JCE as a form of joint commission under international criminal law, scholarly interpretations of what these offences entail in terms of individual criminal liability do not appear to be aligned with JCE requirements or with the right to be presumed innocent and the principle of personal culpability. See F. al-Qasir, op. cit., pp. 217-218. Lastly, the IVD's findings on group criminality do not appear to have any bearings on individual criminal liability. See IVD, Final Report, Executive Summary, p. 80 (English version), referring to article 3 of the 2013 Law.

438. F. al-Qasir, *op. cit.*, p. 171.

giving the actual signal to his subordinates to desecrate the victim's body",[439] and that he had, therefore, contributed to the assault as a co-perpetrator.

A multiplicity of perpetrators may raise difficulties in proving the causal link between the acts of the material actors (or co-perpetrators) and the criminal end result. For instance, a person may be killed after being tortured by several perpetrators who all deny inflicting the fatal blow.[440] In the above-mentioned case No. 11006, the Indictment Chamber has held that, in such a situation, the criminal liability of each individual who jointly contributed to the criminal end result through criminal acts must be established based on the evidence. [441] In this regard, the said Chamber relied on two decisions of the Court of Cassation: first, Decision No. 9966, which provided that "a person shall not be found criminally responsible as the principal perpetrator of the crime of assault leading to death, unless he [or she] was the one who inflicted the beating causing the death […]";[442] and second, Decision No. 5600, which provided that "if several individuals cooperate to take a human life by severe beating [and assault] without the intention to kill, and it is not possible to find out who caused the fatal injury, then they are all considered as the principal perpetrators and shall be punished according to article 208 of the Criminal Code."[443]

In the context of the crime of assault resulting in death, Tunisian jurisprudence has thus held that the level of contribution required to qualify an individual who, jointly with others, committed acts constituting the material element of the underlying crime as a co-perpetrator is the causal link between the defendant's conduct (i.e., assault) and the criminal end result (i.e., death), as established by the evidence.

In practice, in the absence of superior responsibility as a mode of individual criminal liability in Tunisian law for crimes under international law, co-perpetration may allow to prosecute officials for their contribution to the commission of crimes by their subordinates. Officials or superiors may thus contribute to a lesser degree to the commission of the crime, and still be held individually criminally liable as co-perpetrators if the evidence establishes beyond reasonable doubt that there is a causal link between their contribution and the criminal end result. However, it appears that this would only apply to contribution through a positive act, whereas superior responsibility concerns omissions.

(2) Mental element (mens rea)

Since a co-perpetrator is characterized as a principal perpetrator under Tunisian law, the mental element required to establish criminal responsibility for direct commission is applicable in the case of co-perpetration or joint commission. This means that, when examining the criminal responsibility of the co-perpetrator, judges must consider whether it is established that the defendant willingly took the decision and persisted to commit the act constituting the underlying crime, while being aware of the criminal nature of the end result. In addition, the special intent to commit the particular underlying crime must be established, if need be.

For instance, in the above-mentioned case No. 11006 before the Indictment Chamber, the mental element of all the accused to be charged as co-perpetrators of the crime of assault leading to death was deemed to have been established. The Chamber found that the accused intentionally jointly committed acts of assault (and torture, albeit this crime was not charged) against the victim with knowledge that such acts were inhumane and might result in death, and yet persisted and proceeded with their criminal acts.[444] Thus, it seems that Tunisian jurisprudence has indeed opted to apply the mental element required for direct commission to co-perpetration or joint commission.

439. Case No. 11006 Indictment Chamber Decision, p. 70.
440. Ibid.
441. Idem, referring to the Court of Cassation's decision No. 5600 of 28 March 1981.
442. Court of Cassation, Decision No. 9966, 3 April 1974.
443. Court of Cassation, Decision No. 5600, 28 March 1981.
444. Case No. 11006 Indictment Chamber Decision, p. 70.

ii. Assessment in light of international law and standards

Joint commission or co-perpetration is not a well-defined mode of individual criminal responsibility under Tunisian law. As discussed above, Tunisian jurisprudence on co-perpetration does not make a clear distinction between the principal perpetrator (direct commission), the co-perpetrator (joint commission), and the accomplice or accessory (participation).

Therefore, to adequately determine the level of individual criminal responsibility of each suspect when adjudicating cases of co-perpetration, SCC judges will have to clearly define the constitutive elements of co-perpetration in a harmonized fashion, with clear tests to distinguish co-perpetration from complicity, which is arguably a less serious mode of individual criminal liability. Given that, as discussed above, the first two categories of JCE form part of customary international law,[445] SCC judges may consider relying on the constitutive elements of co-perpetration under customary international law to clarify the elements of co-perpetration under Tunisian law for crimes under international law, provided that it is clearly set out in the legal reasoning, with due respect for the principle of legality and the accused's right to a fair trial, including the right to be presumed innocent, as detailed above.

C. Complicity

i. Tunisian legal framework and practice

Under Tunisian criminal law, individuals can be held criminally responsible as accomplices for various forms of participation in the commission of a crime. Complicity is a mode of criminal responsibility used to hold accountable individuals who did not carry out the conduct constituting the material element of a crime but who participated in the commission of the crime in one of the forms listed under article 32 of the Criminal Code on complicity.[446]

The Tunisian legislator did not define the concept of complicity *per se*, rather it provided -- in an exhaustive list -- the different forms of participation in a crime that give rise to individual criminal responsibility as an accomplice. An accomplice is defined as an individual who orders, solicits, induces or instigates the commission of a crime, or otherwise aids, abets or assists the principal perpetrators.[447] According to article 32 of the Criminal Code, an accomplice is a person who, *inter alia*:

i. "guides to commit a crime, or prompts the commission of a crime by gifts, promises, threats, abuse of power or authority, machinations or culpable artifice";[448]
ii. "knowing the purpose to be achieved, has procured weapons, instruments or any other means likely to facilitate the execution of the crime";[449]
iii. "knowing the purpose to be achieved, has aided and abetted the perpetrator of a crime in the acts that prepared or facilitated the crime or in those that completed it […]";[450]
iv. "knowingly aids, abets or assists the perpetrators of a crime to ensure, through concealment or other means, the benefit of the crime or the impunity of the perpetrators";[451] or
v. "knowingly provides housing, shelter or meeting place on a regular basis to the perpetrators of offences against state security, public order, persons or properties."[452]

The conduct of the accomplice must constitute one of the factors contributing to the occurrence of the criminal end result, and the causal link between the conduct of the accomplice and the

445. As discussed above in Chapter 2, Section b-iii and Chapter 3, Section c of this Guide, JCE is widely recognized as a doctrine based on customary international law by 1975 and most likely even as far back as 1955, except for JCE III whose customary nature between 1975 and 1979 was questioned by the ECCC, and whose applicability to special intent crimes was questioned by the STL.
446. F. al-Qasir, op. cit., p. 173.
447. Ibid., pp. 183-185.
448. Tunisian Criminal Code, art. 32, para. 1.
449. Ibid., para. 2.
450. Ibid., para. 3.
451. Ibid., para. 4.
452. Ibid., para. 5.

result as such must be clear and unambiguous.[453]

In the context of collective criminality where two or more individuals agree to commit a specific crime, the role of one of them can be limited to providing assistance to ensure the success of the criminal plan, while the role of the other consists in carrying out the material element/s of the crime. In this scenario, the former person is considered as an accomplice to the crime, while the latter is described as the principal perpetrator for having contributed to the execution of the crime.[454] However, some Tunisian jurists have developed two concepts of criminal participation: a broad concept in which everyone who personally participated in the execution of the criminal plan are considered as principal perpetrators or co-perpetrators (as detailed above); and a narrow concept in which the accomplice provides assistance to the principal perpetrator who implements the material element/s of the crime.[455]

In Case No. 71191, the Tribunal of First Instance of the Permanent Military Court of Tunis considered the criminal responsibility of seven government and senior security officials, including the former President, Zein El Abidine Ben Ali, and the Minister of Interior, Rafik Qassimi, for the killing of eight individuals and injury to others during the protests that took place on 12 and 13 January 2011 in Tunis.[456] In its judgment, the Court found that the concept of complicity as a mode of individual criminal responsibility under Tunisian criminal law is based on two principles: first, the distinction between the definitions of the principal perpetrator and the accomplice; and second, the criminal doctrine of "borrowing criminality".[457] Under Tunisian criminal law, it is indeed considered that the criminal responsibility and punishment of the accomplice are "borrowed" from the principal perpetrator in accordance with article 33 of the Criminal Code, which states that, "unless mentioned otherwise by the law, the accomplice of a crime incurs the same penalty as the one incurred by the principal perpetrator of that crime."

a) Constitutive elements of complicity

(1) Material element (actus reus)

Under Tunisian criminal law, the material element of complicity consists of one of the acts of participation as laid down in article 32 of the Criminal Code. According to legal scholars, acts of participation are subject to a set of general conditions pursuant to the same provision.[458]

First, pursuant to article 32, all acts of participation are positive actions and, therefore, an omission cannot amount to complicity. However, as noted above, the Tunisian legislator provides for criminal responsibility as a result of an "inaction" regarding the crime of torture by officials who "turned a blind eye to acts of torture during or in connection with the discharge of their duties."[459] Yet, it is unclear whether such form of participation would amount to commission, including co-perpetration, or complicity. Jurisprudence that will be reviewed below with regard to superior responsibility has established criminal responsibility for complicity with regard to officials who failed to take an action to stop or investigate acts of killings and torture committed

453. Samia al-Ayari, Final Lecture of Training on Participation in a Crime, National Commission for Lawyer – Tunis, 2010-2011, p. 2. Available at: https://avocat.org.tn/media/articles/memoires/liste2011-2012/8.pdf.

454. *Idem*.

455. *Idem*.

456. See ICJ, *Illusory Justice, Prevailing Impunity: Lack of effective remedies and reparation for victims of human rights violations in Tunisia*, 13 May 2016, p. 89. The reasoning held in this case and in other cases referred to below is analysed in this Guide for the purpose of highlighting jurisprudential interpretations of complicity in respect to facts that are relevant to the material jurisdiction of the SCC. Reference thereto is by no means an endorsement of the legitimacy of these proceedings, which raise concerns in terms of international human rights law and standards with respect to in absentia proceedings and adjudication of serious human rights violations by military courts.

457. Tribunal of First Instance of the Permanent Military Court of Tunis, Case No. 71191, pp. 899-900. According to the doctrine of "borrowed criminality", the criminal liability of the accomplice is indistinguishable from and contingent upon that of the principal perpetrator. The doctrine relies on the ascertion that the acts of the accomplice in and of themselves would ordinarily not be qualified as criminal, but for their relationship with the criminal acts perpetrated by the main perpetrator whose "criminality" they "borrow".

458. F. al-Qasir, op. cit., pp. 179-183.

459. Tunisian Criminal Code, art. 101 *bis*. See also IVD, Final Report, Executive Summary, p. 82 (English version).

by their subordinates.[460]

Second, attempting to carry out the act of participation is insufficient to amount to complicity.[461] To be held criminally liable, the accomplice must have completely executed the act of participation, in which case complicity is punishable even if the principal perpetrator has been compelled to abandon the commission of the crime and the their acts amount to attempt.

Third, in principle, the material element of complicity is not established unless the act of participation was executed before or during the execution of the crime.[462] In exceptional cases, however, some acts carried out subsequent to the commission of the crime may be considered to constitute complicity, for example, as described above, helping the principal perpetrators to benefit from the proceeds of their crime or to escape accountability.[463]

The five acts of participation underlying the material element of complicity as laid down in article 32 can be gathered under the following two categories of complicity acts: aiding and abetting; and instigation.

- Aiding and abetting

One of the forms of aiding and abetting consists in providing guidance. [464] such as information or instructions, to the principal perpetrator that facilitates the commission of the crime, as provided under a portion of article 32, first paragraph -- the second portion of paragraph 1 is characterized as instigation, as explained below. The information must be accurate and help the perpetrator to commit the crime. In addition, aiding and abetting consists of the four forms of assistance provided under article 32, paragraphs 2 to 5, of the Criminal Code,[465] namely:

i. "knowing the purpose to be achieved, has procured weapons, instruments or any other means likely to facilitate the execution of the crime";[466]
ii. "knowing the purpose to be achieved, has aided and abetted the perpetrator of a crime in the acts that prepared or facilitated the crime or in those that completed it […]";[467]
iii. "knowingly aids, abets or assists the perpetrators of a crime to ensure, through concealment or other means, the benefit of the crime or the impunity of the perpetrators";[468] or
iv. "knowingly provides housing, shelter or meeting place on a regular basis to the perpetrators of offences against state security, public order, persons or properties."[469]

These forms provide a large range of acts under which, for example, officials and superiors may be found individually criminally responsible as accomplices.

In the above-mentioned case No. 11006 concerning the torture and killing of an individual, the Indictment Chamber considered the criminal responsibility of a senior government official as an accomplice to charge him with the crime of assault resulting in the death of the victim.[470] In particular, the Chamber found that he participated in the crime by providing legal protection to the security forces that used violence to implement his policy, and by covering up their crimes and implementing a system of impunity, as per article 32, paragraph 4.[471]

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460. See below Section d of this Chapter.
461. F. al-Qasir, op. cit., pp. 181-182.
462. Ibid., p. 182-183.
463. Ibid., pp. 179-182.
464. The legislator used the Arabic word /*arshada*/ meaning "to guide someone to something". In Arabic, this verb tends to evoke positive acts such as in "to guide him to come to his senses" or "to guide him to do a good deed". The word "guide" does not carry the same meaning as the wording used in the official French version: "*a […] donné des instructions pour la commettre*".
465. F. al-Qasir, op. cit., pp. 185-186.
466. Tunisian Criminal Code, art. 32, para. 2.
467. *Idem*, para. 3.
468. *Idem*, para. 4.
469. *Idem*, para. 5.
470. Case No. 11006 Indictment Chamber Decision, p. 79.
471. *Idem*.

In the same case, the Indictment Chamber charged another senior government official as an accomplice to the crime of assault leading to the death of the victim, by providing all the material means to facilitate the commission of the crimes, including securing a place to commit acts of torture and assaults against the people arrested, and to cover up the crimes, such as providing specific cars to move the victims secretly.[472] In addition, it found that he protected his subordinates from any accountability measures by covering up their crimes and ensuring their impunity. According to the Chamber, these acts constituted the material element of complicity in relation to the defendant, as per article 32, paragraphs 2 and 4. Regarding the mental element, the Chamber emphasized that, despite the fact that he knew his subordinates systematically tortured and assaulted arrested dissidents, he provided aid to facilitate their crimes.[473]

- Instigation

Under article 32, paragraph 1, of the Criminal Code, instigation as an act of complicity means "prompting" or provoking the principal perpetrator to commit a crime. Article 32 requires that prompting or provoking occur under one of the circumstances or through one of the means specified under paragraph 1, namely "by gifts, promises, threats, abuse of power or authority, machinations or culpable artifice." Thus, instigation is not considered as an act of complicity unless it is accompanied by one of the means leading to prompting the principal perpetrator to commit the crime. In the absence of causal link between the commission of the crime and one of the means of instigation mentioned above, the instigator cannot be held accountable as an accomplice.[474]

In the above-mentioned case No. 11006, the Indictment Chamber, considering the criminal responsibility of a senior government official for the purpose of the charges, relied on his status as a commander, and his adoption of a systematic policy of arresting dissidents to protect the regime and removing all possible legal constraints on the security forces to ensure their impunity.[475] With respect to this official, the Chamber considered that this policy constituted the material element of complicity in the crime. Furthermore, the Chamber found that the principal perpetrators who committed the crime of assault had acted to comply with his orders and the regime in place, which indicates his "abuse of authority" within the meaning of article 32, paragraph 1 of the Criminal Code.[476] Therefore, the Indictment Chamber charged him as an accomplice for prompting the crime of assault by abusing of his authority and power as a commander.

(2) Mental element (mens rea)

Tunisian criminal law requires, as part of the mental element of complicity, that the individual *intend* to carry out an act constituting the material element of complicity, *knowing* that such act would assist in the commission of the crime, and being *aware* of the constitutive elements of the crime, including the material element and the state of mind or criminal intent of the principal perpetrator.[477] The criminal intent of the accomplice can generally be inferred from the accomplice's knowledge of the intent of the principal perpetrator.[478]

The requirement of knowledge of the criminal intent of the principal perpetrator is reflected in the above-mentioned jurisprudence in case No. 11006, in which the Indictment Chamber stated that, although a senior government official knew his subordinates systematically tortured and assaulted the arrested dissidents, he nonetheless provided aid to facilitate their crimes, concluding that he could be charged as an accomplice to the crime of assault causing the death of the victim.[479]

472. Ibid., p. 80.
473. *Idem*.
474. F. al-Qasir, op. cit., pp. 183-184.
475. Case No. 11006 Indictment Chamber Decision, p. 79.
476. *Idem*.
477. F. al-Qasir, op. cit., pp. 186-187.
478. *Idem*.
479. Indictment Chamber of the Court of Appeals in Nabeul, Case No. 11006, p. 80.

ii. Assessment in light of international law and standards

Some of the forms of participation in the commission of a crime provided for in international criminal law can be found, albeit worded differently, among the material acts of complicity listed by article 32 of the Criminal Code. However, SCC judges may consider whether this provision, read in light of customary international law, would allow holding an individual criminally responsible for crimes under international law as an accomplice for conduct not explicitly listed, such as, *inter alia*, ordering, planning and encouragement (or lending moral support), or for an omission.

Although as discussed above, article 32 appears to suggest that only positive acts can constitute the material element of complicity, SCC judges may consider identifying exceptions, drawing on international jurisprudence, where the individual had a legal duty to act, or interpreting existing provisions in certain situations, for example, where the tacit approval of an individual in a position of authority amounts to encouragement and, thereby, to a positive act.[480] As mentioned above, article 101 bis of the Criminal Code provides for the criminal responsibility of officials who turn a blind eye to torture, but without specifying whether this amounts to commission or complicity.

In any event, with respect to crimes under international law, SCC judges should consider the criminal responsibility of high officials who failed to take necessary measures in their power or authority to prevent the commission of crimes by their subordinates, or who were present at the time the crime was committed and failed to take action to prevent or punish its commission by their subordinates, as discussed below.

D. Superior responsibility

i. Tunisian legal framework and practice

In investigating and referring cases to the SCC, the IVD prioritized those involving [high-ranking State] officials of the highest degree of responsibility,[481] where sufficient incriminating evidence indicates the individual criminal responsibility of superiors over acts committed by their subordinates.[482] The IVD justified its investigation strategy, stating:

> "Such officials have surely played a pivotal role, for their mere explicit or implicit incitement, the complicit silence they maintained in respect of the abhorrent practices conducted by the officers under their supervision and authority, and their reluctance to exercise their preventive role to counter abuses, constitute the main causes leading to the occurrence of such violations [official translation]."[483]

There is no specific provision in the Tunisian Criminal Code explicitly setting out superior responsibility as a mode of individual criminal liability as established for under international criminal law with respect to crimes under international law. To recall, in order to hold a superior criminally responsible for crimes committed by a subordinate, the following elements must be proven: 1) subordination and effective control; 2) actual or constructive knowledge, and 3) failure to take necessary and reasonable measures (prevent or punish).[484]

Nevertheless, some Tunisian courts have tended to apply superior responsibility principles while relying on another mode of individual criminal responsibility, such as complicity, as provided for by Tunisian criminal law, to convict a small number of high-ranking officials for the killing and injury of persons during the 2011 uprising.[485]

480. See above Chapter 4, Section a-i-a).
481. See IVD, Final Report, Executive Summary, p. 74 (English version).
482. Idem.
483. Ibid., p. 82.
484. See Chapter 5.
485. See ICJ, *Illusory Justice, Prevailing Impunity: Lack of effective remedies and reparation for victims of human rights violations in Tunisia*, 13 May 2016, pp. 88-90.

a) Tunisian legal provisions

Article 32 of the Criminal Code, which, as detailed above, defines complicity, may apply to superior State officials who order or instigate the commission of a crime by their subordinates, or who aid, abet or assist their subordinates in committing a crime, including by ensuring their impunity. However, it is not clear if a superior's failure to take the necessary and reasonable measures to prevent, punish or report their subordinate's crimes would constitute *per se* an act of complicity pursuant to article 32, given the requirement of a positive act and the knowledge requirement.

In addition, Law No. 48 of 1966 on criminal omissions criminalizes "whoever deliberately fails to stop a felony or misdemeanour from being committed on the body of a person without fearing a danger on him [or her] or others", as an offence punishable by five years of imprisonment and a 10,000 Tunisian Dinar fine (about 3,203 US Dollars).[486] Law No. 48-66 applies to all persons and all crimes and imposes no specific obligations on superior State officials to prevent crimes committed by subordinates under their control. While its application in such a case may theoretically be possible, it would not apply on the basis of constructive knowledge, as the criminal intent applicable to the direct commission of a crime would be required. More importantly, its application would fail to reflect the full criminal conduct of a superior who is criminally responsible for crimes under international law, and to punish the superior in a fashion that is commensurate with the gravity of such crimes, not least because the accused would not be found individually criminally responsible for the underlying crime, but only for this specific offence.

Moreover, article 101 bis of the Criminal Code pro*vides that "civil servants or their likes, having ordered, incited, consented or* turned a blind eye on acts of torture during or in connection with the discharge of their duties, shall be held accountable for the crime of torture." This provision may apply to State officials in a command position with respect to the crime of torture committed by their subordinates, including for their failure to prevent or punish the crime, although it is uncertain whether it could apply based on constructive knowledge.

b) Tunisian jurisprudence

In the above-mentioned Case No. 71191, the Tribunal of First Instance of the Permanent Military Court of Tunis considered the criminal responsibility as accomplices of seven government and senior security officials, including the former President, Zein El Abidine Ben Ali, and the Minister of Interior, Rafik Qassimi,[487] involved in the killing of eight individuals and injury to others during the protests that took place on 12 and 13 January 2011 in Tunis. In particular, the Court found that Ben Ali had planned and instigated the crimes by providing the Internal Security Forces (ISF) with means designed to kill the demonstrators, including weapons and aiders to execute the crime.[488] He was found guilty as an accomplice of murder and attempted murder, pursuant to article 32, paragraph 1 of the Criminal Code, referring to "abuse of power", and paragraph 2, referring to the provision of means.[489] Notably, the Court built its legal reasoning on a number of grounds, three of which are closely intertwined with the elements to establish superior responsibility under international criminal law, namely: i) a subordination link and effective control; ii) actual or constructive knowledge; and iii) failure to take necessary and reasonable measures.[490]

First, the Court clearly aimed to establish the existence of a relationship of subordination between the accused and those who committed the underlying crime, which, under international criminal law, requires the superior to exercise effective control over their subordinates. With respect to this, the Court referred to the hierarchical structure of the ISF, pointing out that Ben Ali was the top member and "the effective supervisor" of the ISF as per Law No. 70 of 1982, and that ISF's

486. Law No.66-48 of 3 June 1966 on criminal omissions, art. 1.

487. See ICJ, *Illusory Justice, Prevailing Impunity: Lack of Effective Remedies and Reparation for Victims of Human Rights Violations in Tunisia*, 13 May 2016, pp. 88-90.

488. Tribunal of First Instance of the Permanent Military Court of Tunis, Case No. 71191, p. 899.

489. Ibid., p. 900.

490. Cassese, Antonio and Paola Gaeta, *Cassese's International Criminal Law*. 3rd ed. Oxford: Oxford University Press, 2013, p. 187.

officers obeyed Ben Ali's orders.[491]

Second, the Court appears to have aimed to establish the accused's actual – and/or possibly *constructive* – knowledge of the involvement of their subordinates in the crimes. The judgment referred, in particular, to statements reaffirming that "the leadership of the security sector submitted reports to the President [Ben Ali] successively on […] the fall of more victims since the start of the protests, but [Ben Ali] continued nonetheless to use the policy of repression and killing."[492]

Third, the failure of the accused to prevent the commission of the crimes or to punish the subordinates was also highlighted in the judgment. The Court stated that, although Ben Ali received proactive and successive reports on the security situation resulting from his orders to the ISF to use lethal weapons against the demonstrators, he refused to withdraw his orders and change the policy of repression and killing. The Court added that in "comparative and international law", inaction over crimes would suffice to engage the responsibility of "High Commanders of the country, including the President",[493] although it did not further elaborate on its content and applicability in domestic law.

The Court also found Rafiq Qassimi, as the supervisor of the ISF and as executor of Ben Ali's orders, guilty as an accomplice, pursuant to article 32, paragraphs 2 and 3, of the crimes of murder and attempted murder, based on "abuse of power" as well as on his inaction and silence over the killing of demonstrators.[494] While this jurisprudence on complicity echoes the elements of superior responsibility, including with respect to the superior's failure to act, it does not clearly establish the criminal responsibility of a superior based on constructive knowledge of the crimes committed by subordinates.

In Case No. 95646, the Tribunal of First Instance of the Permanent Military Court of El Kef considered the criminal responsibility of 22 accused, including Ali Seriati, the General Director of State Security, and Al-Hussein Zaytoun, the Head of National Security in Kasserine, with respect to several distinct incidents of killings and injury in the context of the 2011 protests.[495] Ali Seriati was charged as an accomplice, pursuant to article 32, for the crime of premeditated murder, based on various alleged acts, including bringing tear gas bombs from Libya, his permanent presence in the "Crisis Cell" in the Ministry of Interior, his involvement in the design of security plans to repress demonstrations using live ammunition, and ordering the Director of Prisons to "kill a prisoner or two" to stop the protest movement in Nadour Prison.[496]

The Court found that those allegations were insufficient to convict the accused as an accomplice of the crime. The Court acquitted him on the basis that he had no ties to the Minister of Interior and was not considered as one of its security commanders since he was the General Director of Security for the President's and other high officials. The Court reasoned that his presence in two meetings was only the result of the President's orders, not of his personal initiative.[497] The Court further found that, even assuming that the accused was aware of the killings and had not taken any action to stop them, he could not be held responsible since he was not part of the security structure and was therefore unable to influence the decision-making process.[498]

Al-Hussein Zaytoun was also charged as an accomplice pursuant to article 32, paragraphs 2 and 3, of the Criminal Code, on the basis of allegations that he was aware of the security plan in Kasserine, was present at the shootings, and had entrusted his co-accused, Wissam Al-Wartatani, to go to the Security Centre in Nour's Quarter where Al Wartatani intentionally opened fire on demonstrators. The Court found that his mere presence was not sufficient to convict him, as it was not proven that the accused was in contact with the principal perpetrators,

491. Tribunal of First Instance of the Permanent Military Court of Tunis, Case No. 71191, p. 900.
492. Ibid., p. 899.
493. Ibid., p. 900. No international or comparative law jurisprudence was cited to support this finding.
494. Ibid., p. 903.
495. See ICJ, Illusory Justice, Prevailing Impunity: Lack of effective remedies and reparation for victims of human rights violations in Tunisia, 13 May 2016, pp. 90-92.
496. Tribunal of First Instance of the Permanent Military Court of El Kef, Case No. 95646, Judgment, p. 707.
497. *Idem*.
498. Ibid., Judgment, p. 709.

even indirectly.[499]

Furthermore, in the same case, the Court considered the criminal responsibility of Rafik Qassimi, the Minister of Interior, based on his role as a supervisor of the ISF and as an executor of Ben Ali's orders. The Court first examined Qassimi's knowledge of the criminal intent of the principal perpetrators and found that such knowledge could be presumed since he was the person that was "most in control of the security forces".[500] Based on his abuse of power, his assistance to the principal perpetrators, and his failure to take the necessary steps to stop the killing of the demonstrators despite the acquired knowledge, Qassimi was convicted as an accomplice of premeditated murder and attempted premeditated murder.

The Court relied on almost a similar legal reasoning in the case of Ben Ali where the Court established his knowledge in relation to crimes committed by his subordinates, based on two reasons. First, the Court found that Ben Ali's position as the Supreme Commander of the ISF had enabled him to supervise the "engineering of the repression of popular protests."[501] Second, the Court relied on a circular issued on 15 January 2011 by Qassimi, following the departure of Ben Ali, prohibiting the use of live ammunition against demonstrators as the basis to deduce that Ben Ali allowed such practices and did not act to stop them.[502] Accordingly, the Court convicted Ben Ali as an accomplice of premeditated murder and of attempted premeditated murder.[503] An analogy could be drawn between this legal reasoning in relation to the mens rea of both Qassimi and Ben Ali as accomplices in the crimes and the elements establishing superior responsibility as provided for under international criminal law, including the constructive knowledge requirement of the superior, where they had reason to know of the crimes committed by their subordinates, although it is not entirely clear.

The two judgments of the military courts in cases No. 71191 and No. 95646 present a confusing picture. On the one hand the Court convicted Ben Ali and Qassimi by relying on an expanded interpretation of article 32 of the Criminal Code, referring, in case No. 71191, to their inaction or silence over the killings of demonstrators and "abuse of power", and, in case No. 95646, to their presumed knowledge of the crimes committed by their subordinates. On the other hand, a stricter interpretation of article 32 appears to have been applied to other senior law enforcement officials who were acquitted even though in some instances they were alleged to have carried out material acts (e.g., Seriati's order to kill prisoners) or were present during the killing of demonstrators (e.g., Al-Hussein Zaytoun). The lack of a relationship of subordination and effective control over the perpetrators of the crime seems to explain this divergence of approach, at least with regard to Seriati.

ii. Assessment in light of international law and standards

Tunisian criminal law does not fully provide a basis for superior responsibility as a mode of individual criminal liability for crimes under international law, including torture. In addition, the broad interpretation of complicity in some judicial decisions has shown limitations in terms of clarity and consistency, which, in turn, give rise to concern at the very least with respect to the principle of legality as detailed above.

This is not satisfactory, particularly in light of Tunisia's obligations under the UNCAT, as interpreted by the CAT, which has held that: "those exercising superior authority - including public officials - cannot avoid accountability or escape criminal responsibility for torture or ill-treatment committed by subordinates where they knew or should have known that such impermissible conduct was occurring, or was likely to occur, and they failed to take reasonable and necessary preventive measures.[504] As noted above, it is unclear whether article 101 *bis* of the Tunisian Criminal Code, incorporating the Convention into domestic law and defining the

499. Ibid., p. 727.
500. Ibid., p. 704.
501. Ibid., p. 702.
502. See ICJ, *Illusory Justice, Prevailing Impunity: Lack of effective remedies and reparation for victims of human rights violations in Tunisia*, 13 May 2016, p. 90.
503. Tribunal of First Instance of the Permanent Military Court of El Kef, Case No. 95646, Judgment, p. 703.
504. CAT, *General Comment No. 2: Implementation of Article 2 by States Parties*, 24 January 2008, CAT/C/GC/2, available at: https://www.refworld.org/docid/47ac78ce2.html [accessed 5 September 2022], para. 26.

crime of torture, and which would proscribe the conduct of a civil servant, who would "turn a blind eye" to acts of torture during or in connection with the discharge of their duties, fully encompasses this mode of liability, including with respect to constructive knowledge.
While the UNCAT imposes obligations on States and not on individuals, as underscored by the CAT, it "does not limit the international responsibility that individuals can incur for perpetrating torture and ill-treatment under customary international law".[505] Accordingly, customary international law, as recognized by the international jurisprudence referred to in this Guide,[506] may provide a clearer and more legally sound basis for SCC judges to consider applying superior responsibility, rather than overbroad interpretations of complicity or co-perpetration, to characterize the criminal responsibility of commanders for crimes under international law, including but not limited to torture, committed by their subordinates where relevant.

In any event, as mentioned above, in light of Tunisia's obligations under customary and treaty international law with respect to modes of individual criminal liability, SCC judges will have to decide whether they have the authority to apply customary international law directly or to interpret existing domestic law in light of customary international law in order to fill gaps whether resulting in impunity for behaviour that is criminalized under international treaty or customary law or resulting in the failure to comprehensively and adequately characterize the criminality of the conduct.

505. Ibid., para. 15.
506. See Chapter 5.

VII. Recommendations

As discussed above in Chapter 6, the Tunisian legal framework presents gaps regarding the individual criminal responsibility incurred by individuals who contribute, along with others, to the commission of crimes under international law when the importance of their role would not be adequately reflected if characterized as complicity and yet, a causal link cannot be established between their contribution and the commission of all the crimes by the group of individuals acting pursuant to a common purpose. Moreover, superiors who did not contribute to the crimes committed by their subordinates through a positive action or whose knowledge of the crimes committed by their subordinates cannot be specifically established cannot be punished under Tunisian law other than through broad interpretations of complicity which may undermine the fundamental principle of legality enshrined under article 15 of the International Covenant on Civil and Political Rights (ICCPR), and which may not be commensurate with the seriousness of their role in the perpetration of the crimes.

As detailed in Practical Guide 1,[507] the Tunisian Constitution is clear on the primacy of international treaties over domestic law,[508] and there is nothing in the Constitution that precludes domestic courts, including the SCC, from applying international treaties and customary international law as relevant. Accordingly, the SCC should give due regard to international treaties and customary international law when assessing how they should apply Tunisian law in a manner consistent with Tunisia's international obligations.

Under general principles of State responsibility in international law, as well as under human rights treaties, the SCC is an organ of the State and its acts and certain forms of inaction can result in Tunisia violating its international legal obligations. The SCC must accordingly exercise all means open to it to help ensure Tunisia comply with its obligations deriving from binding international law whether under treaties and or customary international law. These obligations apply to the criminalization of conduct in international law, as well the foundational principles of criminal law.

Under international law, a State "may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[509] Any gaps in Tunisian law would not provide a justification in international law for failing to prosecute those responsible for crimes under international law. Tunisian courts may therefore face dilemmas where national law appears to be inconsistent with international law.

Accordingly, in determining the accused's individual criminal liability for gross human rights violations that amount to crimes under international law, the SCC should, when exercising their powers, interpret domestic law, to the extent possible, in a manner consistent with Tunisia's treaty and customary international law obligations, including with respect to the scope of criminal conduct or the applicable mode of individual criminal responsibility and the principle of legality. Where Tunisian law does not otherwise explicitly criminalize certain modes of liability, the SCC will need to decide whether Tunisian law provides authority for the SCC to directly apply definitions of modes of liability set out in treaties or customary international law, or to interpret existing modes of liability in light of these definitions.

In light of the above analysis, the ICJ recommends that when a SCC judge is confronted with the absence of a definition of a mode of liability under domestic law that codified individual criminal responsibility at the time of commission of the offence, the judge should examine whether the conduct concerned was considered a mode of liability under international law at the time of the offence. In so doing, the judge should establish whether, at the time of commission, the conduct was criminalized pursuant to a mode of liability by virtue of an applicable treaty or, if the conduct was not explicitly proscribed by the provisions of an international treaty, whether it was so pursuant to customary international law. If so, the judge should consider whether the specialized provisions of Tunisian law applicable to the SCC and transitional justice allow the SCC to apply the mode of liability enshrined under international law in the case at hand to determine whether the accused person is responsible for their conduct (whether by act or omission).

507. ICJ, Practical Guide 1, pp. 9-33.
508. See 2014 Constitution, art. 20 (now abrogated); 2022 Constitution, art. 74.
509. Vienna Convention on the Law of Treaties, art. 27.

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Justice Adolfo Azcuna, Philippines
Ms Hadeel Abdel Aziz, Jordan
Mr Reed Brody, United States
Justice Azhar Cachalia, South Africa
Prof. Miguel Carbonell, Mexico
Justice Moses Chinhengo, Zimbabwe
Prof. Sarah Cleveland, United States
Justice Martine Comte, France
Marzen Darwish, Syria
Mr Gamal Eid, Egypt
Mr Roberto Garretón, Chile
Ms Nahla Haidar El Addal, Lebanon
Prof. Michelo Hansungule, Zambia
Ms Gulnora Ishankanova, Uzbekistan
Ms Imrana Jalal, Fiji
Justice Kalthoum Kennou, Tunisia
Ms Jamesina Essie L. King, Sierra Leone
Prof. César Landa, Peru
Justice Ketil Lund, Norway
Justice Qinisile Mabuza, Swaziland
Justice José Antonio Martín Pallín, Spain
Prof. Juan Méndez, Argentina
Justice Charles Mkandawire, Malawi
Justice Yvonne Mokgoro, South Africa
Justice Tamara Morschakova, Russia
Justice Willly Mutunga, Kenya
Justice Egbert Myjer, Netherlands
Justice John Lawrence O'Meally, Australia
Ms Mikiko Otani, Japan
Justice Fatsah Ouguergouz, Algeria
Dr Jarna Petman, Finland
Prof. Mónica Pinto, Argentina
Prof. Victor Rodriguez Rescia, Costa Rica
Mr Alejandro Salinas Rivera, Chile
Mr Michael Sfard, Israel
Prof. Marco Sassoli, Italy-Switzerland
Justice Ajit Prakash Shah, India
Justice Kalyan Shrestha, Nepal
Ms Ambiga Sreenevasan, Malaysia
Justice Marwan Tashani, Libya
Mr Wilder Tayler, Uruguay
Justice Philippe Texier, France
Justice Lillian Tibatemwa-Ekirikubinza, Uganda
Justice Stefan Trechsel, Switzerland
Prof. Rodrigo Uprimny Yepes, Colombia