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INTERNATIONAL CRIMINAL TRIBUNALS

Increasing Tensions: Victim Participation at the ICC, Pre-Trial Stage

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Abstract
This paper will give an overview of the basic principles of victim participation which apply throughout all three procedural stages, examine the current status of victim participation both in theory and in practice during the pre-trial stage, and explore the implications of victim participation for early court operations, the prosecution, defense and victims themselves. It will argue that although victim participation is a significant advancement in international criminal law its implementation has increased tensions between all court participants and unless concrete steps are taken to address the numerous issues surrounding participation this endeavor will likely prove costly and unworkable.

I. Introduction

In recognition of the plight of victims, the preamble of the Rome Statute states that States Parties are "mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity."[1] In furtherance of this recognition, the International Criminal Court became the first international criminal tribunal to endorse active victim participation. In addition to new protective measures and the right to reparations, the right of participation is a significant departure from previous international court practice. The Statute, Rules of Procedure and Evidence (Rules) and Regulations of the Court (Regulations) award victims the right to participate, other than as witnesses, in Court proceedings providing their participation does not infringe upon the rights of the accused. This participatory regime is an attempt to make a court that punishes individual perpetrators as well as a court that focuses on administering restorative justice.

Under this new framework, victims have the right to be represented by counsel, and, at present, victims' participation extends to issues over jurisdiction,[2] investigations,[3] indictments,[4] conditional release,[5] disclosure,[6] direct and cross-examination of

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[1] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002), U.N. Doc. A/CONF.183/9, *available at* http://www.un.org/law/icc/statute/romefra/htm [hereinafter Rome Statute], paragraph 2 of the Preamble.
[2] Rome Statute, *surpra* note 1, Article 19(3).
[3] Rome Statute, *surpa* note 1, Article 15.
[4] Rules of Procedure and Evidence, U.N. Doc. PCNICC/2000/1/Add.1 (2 November 2000) *available at* http://www.un.org/law/icc/asp/1stsession/report/english/part_ii_a_e.pdf [hereinafter ICC Rule(s)], ICC Rule 128.
[5] ICC Rule, *supra* note 4, 119(3).
[6] ICC Rule, *supra* note 4, 121(10).

witnesses,[7] admissibility and relevancy of evidence,[8] sentencing and other decisions of the Court.[9] Throughout the process, victims will not only be able to voice their concerns in regards to issues that personally effect them, but, more importantly, they will also be able to present legal arguments separate from those presented by the prosecution or defense. Apart from testifying as witnesses, victims, most likely through their legal representatives, will have the opportunity to act as interested parties by submitting observations and submissions, making representations,[10] attending[11] and participating in hearings,[12] and consulting the Court's record. As a correlation to participation, victims will have the right to confidentiality (anonymity),[13] right to notification,[14] access to court documents and information,[15] and the right to appeal reparation orders.[16]

Unlike previous international criminal tribunals, the ICC divides its work into *situations* and *cases*. Situations, which are "generally defined in terms of temporal, territorial and in some cases personal parameters," are investigated to see whether specific criminal investigations should arise and whether individuals should be charged with a criminal offense under the jurisdiction of the Court.[17] Cases, on the other hand, are comprised of specific incidents falling under the jurisdiction of the Court and include proceedings that follow the issuance of an arrest warrant or a summons to appear. The Court may deal with a number of situations at any given time and within these situations may try a number of cases and accused. Although in its infancy, at present, the Court has authorized four investigations of situations, including, in Uganda, the Democratic Republic of Congo (DRC), the Central African Republic, and in Darfur, Sudan. Additionally, the Court has three cases: *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya, Dominic Ongwen* (Kony, et al.) in the Uganda situation;[18] *The Prosecutor v. Thomas Lubanga Dyilo* (Lubanga) in the DRC situation; and *The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")* (Harun) in the Darfur, Sudan situation.

In order to properly appreciate the scope of victim participation it is important to understand what the Statute, Rules and Regulations provide. Likewise, it is essential to look at the practical effects of the Court's jurisprudence on victim participation.

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[7] ICC Rule, *supra* note 4, 91(3).
[8] ICC Rule, *supra* note 4, 72.
[9] See generally ICC Rule, *supra* note 4, 143 and 145.
[10] Rome Statute, *surpa* note 1, Article 15(3).
[11] ICC Rule, *supra* note 4, 91(2): "A legal representative of a victim shall be entitled to attend and participate in the proceedings in accordance with the terms of the ruling of the Chamber and any modification thereof given under rules 89 and 90. This shall include participation in hearings unless, in the circumstances of the case, the Chamber concerned is of the view that the representatives intervention should be confined to written observations or submissions. The Prosecutor and the defense shall be allowed to reply to any oral or written observation by the legal representative for victims."
[12] ICC Rule, *supra* note 4, 91(3)(a).
[13] See Rome Statute, *supra* note 1, Article 54, ICC Rule, *surpa* note 4, 16(2)(6), 43 and 81.
[14] ICC Rule, *surpa* note 4, 92.
[15] ICC Rules, *supra* note 4, 121(10) and 131.
[16] Rome Statute, *supra* note 1, Article 82(4).
[17] Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 17 January 2006, ICC-01/04-101_Corr, para. 65.
[18] Statement by the Chief Prosecutor Luis Moreno-Ocampo on the reported death of Raska Lukwiya, 14 August 2006, ICC-OTP-20060814-151.

This paper will give an overview of the basic principles of victim participation which apply throughout all three procedural stages. It will then examine the current status of victim participation both in theory and in practice during the pre-trial stage. Finally, the paper will explore the implications of victim participation for early court operations, the prosecution, defense and victims themselves.

II. Basic Principles of Victim Participation

a. Definition of Victims

Rule 85 defines victims as "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court," and goes on further to state that "victims may include organizations or institutions that have sustained direct harm to any of their property" so long as that property is dedicated to "religion, education, art or science or charitable purposes," historic monuments, hospitals and other places and objects that deal with humanitarian purposes.[19] Rather than adopt the definition of a victim found in the ICTY and ICTR Rules of Procedure and Evidence the drafters of the ICC Rules opted to create a new, broader definition. Rule 2 of both the ICTY and ICTR defines a victim as "a person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed." During drafting negotiations, it had been argued by victims' rights groups and others that this definition was limited in that it is worded in the singular and it does not include family members or institutions. The ICC definition not only defines victims in the plural, rather than the singular, but it also identifies a larger number of victims which includes family members. Also notable is the deletion of the wording "allegedly been committed." Arguably this wording promotes the presumption of innocence for the accused; however, it was problematic for the drafters of the ICC Rules because it linked the status of victim with specific actions of the accused. In contrast to the ICTY and ICTR definition, Rule 85 links the status of victims to the commission of a crime within the Court's jurisdiction rather than defining victims in relation to proceedings against a specific individual in respect to specific conduct.[20] The differences are subtle yet important.

What does this mean for the practical operations of the Court? First, the broad definition of victims allows for a greater numbers of victims to participate in proceedings. Victims include individuals who directly experienced physical harm, as well as family members and institutions. Because the definition does not define "harm," it is suggested that victims may be individuals who suffered physical, mental or emotional harm. The number of victim participants therefore may prove unworkable for the court. Second, and most controversial, the status of victim is not linked to an individual defendant, thereby supporting the argument that participation should be allowed even before a specific suspect has been named.

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[19] For a detailed description over the development of the drafting of a definition see Sylvia A. Fernández de Gurmendi, in *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* xlv, Roy S. Lee, ed., Transnational Publishers (2001) [hereinafter Lee] at 427-433.

[20] Stahn, Carsten, Héctor Olásolo and Kate Gibson, *Participation of Victims in the Pre-Trial Proceedings of the ICC*, 4 Journal of International Criminal Justice, 219, 222 (2006).

b. Overarching Rights of Victim Participation

Foremost among the enumerated participatory rights for victims is Article 68(3) of the Rome Statute, entitled "Protection of the victims and witnesses and their participation in the proceedings." Essentially, Article 68(3) is a result of the criticism against the lack of similar rights for victims at the *ad hoc* Tribunals,[21] and it reads:

> Where the personal interests of the victims are affected, the Court *shall* permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence (RPE). (emphasis added)

Article 68(3) reproduces text found in Article 6(b) of the Victims Declaration,[22] and is an attempt to move from a court that merely punishes individual perpetrators to a court focused on administering restorative justice.

Notwithstanding the fact that Article 68(3) is found within Part 6 of the Statute which deals with "the Trial," the Court has held Article 68(3) applicable throughout pre-trial, trial and post-trial proceedings. This is important because negotiations during the drafting of the Statute at the Rome Conference focused a great deal on whether the article should be limited to trial proceedings.[23] Many delegates at the Rome Conference feared that victim participation, as granted under Article 68(3), would have a crippling effect on the proceedings, particularly on the due process and fair trial rights of the accused.[24] This argument is still being put forward by both the Prosecution and defense in every case and situation at the Court. Nonetheless, in order to allay these concerns, the drafters of Article 68(3) "safeguarded" the article by inserting text which states that participation shall take place "in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial

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[21] Donat-Cattin, David, 'Article 68,' in Otto Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court*, Nomos Verlgsgesellschaft, Baden-Baden (1999)[hereinafter Donat-Cattin] p. 871; On the development of the drafting of Article 68, see Donat-Cattin at 874, where he writes that the current drafting stemmed from Article 43 of the International Law Commission Draft Statute of 1994 dealing with the Protection of the accused, victims and witnesses. This draft contained similar provisions to Article 22 of the ICTY Statute and Article 21 of the ICTR Statute. Later, in 1997 and important discussion took place during the UN ICC Preparatory Committee, the result of which included the addition of nine paragraphs dealing with victims to draft Article 43. Those nine paragraphs were re-elaborated on in the so-called Zutphen text of January 1998 (then Article 61). A second draft with minor modifications then became Article 68 of the Draft Statute transmitted by the Preparatory Commission to the Diplomatic Conference in 1998.

[22] Article 6(b) of the Victims Declaration reads: The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by: Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system; See Donat-Cattin at 879; See Article 6(b) of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (GA Res. 40/34 (1985)).

[23] Donat-Cattin at 873.

[24] Mekjian, Gerard J. and Mathew C. Varughese, *Hearing the Victim's Voice: Analysis of Victims' Advocate Participation in the Trial Proceedings of the International Criminal Court*, 17 Pace Int'l L. Rev. 1, 19 2005.

trial." In practice, this requires the Chambers to balance punitive with restorative justice principles.[25]

In addition to Article 68(3), Rule 86 from the Rules, entitled "General Principles," provides:

> A Chamber in making any direction or order, and other organs of the Court in performing their functions under the Statute or Rules, *shall* take into account the needs of all victims and witnesses in accordance with article 68, in particular, children, elderly persons, persons with disabilities and victims of sexual or gender violence. (emphasis added)

Rule 86, like Article 68, makes it mandatory for the Court to recognize victims. Rule 86 requires the Court to consider the needs of victims when making any direction or order. If read carefully, the rule makes no distinction between issues affecting the personal interests of victims and those that do not. Therefore, Rule 86 requires a Chamber to take victims' needs into account even when making decisions on matters that may or may not deal directly with victim issues. To illustrate this, a victim may be moderately interested in the disclosure disagreements between the prosecution and defense, which are sure to arise. The victim may express a "need" to the Court to either be informed of or weigh-in on disclosure practices. The Court is required to take into account victims' needs and in so doing the victim may attempt to influence a decision handed down by the Court regarding such issues which may or may not affect them.

c. Manner and Scope of Participation

The general manner and scope of victim participation can be found in a number of Rules. Rules 89 to 91 and 93 lay out the primary basis for victim participation at the ICC. In addition to participation pursuant to these rules, Rule 103 allows victims and victims' rights groups to participate as amicus curiae. Articles 15(3) and 19(3) also give victims explicit rights of participation but because they deal specifically with pre-trial proceedings rather than throughout all Court proceedings they will be discussed in a subsequent section of this paper.

Essentially, victim participation at the Court is a "procedure-specific concept," meaning that the scope and manner of participation inevitably depends upon the specific facts of a case or situation and stage of proceedings.[26] Moreover, the current Statute, Rules and Regulations give the Judges wide discretion in shaping the way in which victims will participate. While this discretion is necessary to achieve workable proceedings, it means that judges from different Chambers may rule differently on the same participation issue—thereby creating more inconsistency and increasing tension between court participants.

[25] Mekjian, *supra* note 24, at 20.
[26] Stahn, supra note 20, at 224.

Application for Participation

The purpose of victim participation before the Court is to allow victims the opportunity to present their views and concerns. For the sake of efficiency, it is usually necessary that a victim apply to participate if participating pursuant to Rules 89 to 91. Rule 89(1) and Regulation 86 make clear that victims wishing to "present their views and concerns" should file a written application for participation in either a situation or in a case. Generally, victims will need to meet the definition of victim under the Statute and demonstrate a judicially recognizable personal interest in the proceeding in order for the Court to grant victim status and allow participation.

In order to meet the definition of victims in regards to a *situation*, a causal link must exist between the harm suffered by a victim and a crime falling within the jurisdiction of the Court that was committed in the relevant situation.[27] For example, an individual may have had their home destroyed from an unlawful attack relating to the overall situation in Sudan being investigated by the Prosecution. That individual may apply for victim status and participatory rights in regards to the situation in Sudan. However, this does not mean that the individual granted victim status of a situation will also qualify to have victim status in a case. In order to meet the definition of victims in regards to a *case*, there must be a sufficient causal link between the harm suffered by the alleged victim and the crimes which the Chamber issued in an arrest warrant.[28] Therefore, it is foreseeable that an individual may be granted victim status in regards to a situation but will later be denied victim status in a specific case. To illustrate this, the individual who gained victim status for the destruction of property may not be able to show a sufficient causal link between the property destruction and the crimes charged in the indictment. This de-labeling of victim status could have a negative effect both on the victim's psyche and on perceptions of the court from victim communities.

Applicable Law and Criteria for determining victim status

Although the Rules were unclear in how the separate Chambers should make the determination of victim status in each situation or case,[29] in one of its pre-trial decisions, Pre-Trial Chamber I devised a scheme for determining victim status. There appears to be a presumption in favor of participation,[30] and any limitation on participation would need to be based on the "circumstances of the case."[31] The decision handed down by Pre-Trial Chamber I has thus far been followed by Pre-Trial Chamber II and will likely be followed in future cases. Using the definition of victims as found in Rule 85 and Article 68(3) as guides, the decision holds that Chamber must answer five main questions: (1) are the victim-applicants natural persons? (2) Have they suffered harm? (3) Do the crimes alleged by the victim-

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[27] See Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 17 January 2006, ICC-01/04-101_Corr.
[28] Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case the Prosecutor v. Thomas Lubanga Dyilo, 29 June 2006, ICC-01/04-01/06-172, p. 6.
[29] See Haslam, Emily, 'Victim Participation at the International Criminal Court: A Triumph of Hope over Experience?' in Dominic MacGoldrick, Peter Rowe and Eric Donnelly, eds., *The Permanent International Criminal Court: Legal and Policy Issues*, Hart Publishing, Oxford and Portland, Oregon (2004), p. 326.
[30] Lee at 466.
[31] Mekjian, *supra* note 24, at 27, citing Lee at 466.

applicants fall within the jurisdiction of the Court? (4) Is there a causal link between these crimes and the harm suffered by the victim-applicant? (5) Are the victims' personal interests affected?

The first question is relatively easy for the Court to answer. A natural person is any person who is not a legal person. Therefore, corporations or other such legal entities cannot be considered natural persons for the purpose of determining victim status. But the victim applicant must also meet the definition of victim as explained in the previous section. The second question requires the Court to define the notion of harm. In regards to the notion of harm, which is not defined in either the Statute or Rules, the Chamber must interpret the term on a case-by-case basis in light of Article 21(3). Article 21(3) provides that "the application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights." The decision noted that an early determination of victim status in a situation in no way makes a determination on the harm suffered by a victim, which will subsequently be determined by the Trial Chamber in the context of a case. The decision also noted that a single instance of harm suffered is sufficient to answer this second question in the affirmative. Moreover, harm may be physical, mental or emotional. In answering the third question, the Court must determine whether the crimes alleged fall within the jurisdiction of the Court. To do so, the Court must determine that the crime is one mentioned in Article 5 of the Statute; that the crime was committed within the time period laid down in Article 11; and that the crime meets the conditions described in Article 12 regarding the preconditions to jurisdiction. Answering the third question affirmatively does not prejudice a State Party or the defense to later challenge the jurisdiction of the Court. The fourth criteria as provided for in Rule 85(a) and established in the Pre-Trial Chamber I decision is the establishment of a causal link between the alleged crime and the harm suffered. However, at the early stage of proceedings, the Chamber found that it is not necessary to determine in any great detail the precise nature of the causal link and the identity of the person(s) responsible.

In addition to meeting the criteria laid out in Rule 85(a), the Court found that the "personal interests" criterion explicitly referenced in Article 68(3) constitutes an additional criterion to be met by victims, "over and above the victim status accorded to them."[32] However, this is not difficult when applying during the investigation of a situation because the Charmer found that the personal interests of victims are affected in general at the investigation stage, "since the participation of victims at this stage can serve to clarify the facts, to punish the perpetrators of crimes and to request reparations for the harm suffered."[33]

The Chamber will use the "grounds to believe" standard when making application assessments for a situation, but once a warrant of arrest is issued the examination criteria become more restrictive. Therefore, at the investigation stage of a situation, the Court must only determine that there are reasonable grounds to believe that the victim-applicant meets the criteria set forth in Rule 85(a) and the burden lies on the

[32] Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, and VPRS 6, 17 January 2006, ICC-01/04-101-tEN-Corr, para 62.
[33] Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, and VPRS 6, 17 January 2006, ICC-01/04-101-tEN-Corr, para 63.

victim-applicant. The Chamber found, however, that the criterion set out in Rule 85(a) is a non-exhaustive and non-definitive assessment. The Court further found that:

> In assessing the applications for participation, the Chamber will first examine each Applicant's statement. It will then consider the arguments presented by ad hoc Defense counsel and the Prosecutor. The Chamber will draw on other sources such as official United Nations reports.[34]

At the early stages, the Court will not engage in a strict assessment but instead will check whether the victim's account of the events is consistent with official reports. Logically, the Court has the discretion under Rule 89(2) to reject an application if it does not meet the criteria set forth in Article 68(3), Rule 85(a) and Court jurisprudence.

For practical purposes, the Court usually appoints a single judge to handle victim applications and issues. For example on 22 November 2006 Pre-Trial Chamber II decided to designate Judge Mauro Politi, from Italy, as a single judge responsible for all issues arising in connection with victims' applications for participation in the proceedings in the situation in Uganda and in the Kony, et al. case.[35] The appointment of a single judge to deal with victims' applications streamlines the application process and aids in the efficiency of court proceedings. This is particularly true when a large number of victims have applied to participate.

In addition to victim applications, Rule 89 provides for the specific court process for victim participation—which was lacking in the ICTY and ICTR Rules in regards to victim-witness participation. In other words, it tells the Registrar what it is generally responsible for and what the Chambers is responsible for. Rule 89 emphasizes the role of the Registrar and Chambers by providing, in part, that the "Registrar shall provide a copy of the application to the Prosecutor and the defense," and the Chambers shall "specify the proceedings and manner in which participation is considered appropriate." It is important to note that both the Prosecution and defense will be given victim applications to comment upon—yet the information in the applications may be redacted for protection purposes. It does not specify when the Prosecution or defense should, if ever, receive un-redacted applications; instead, leaving it to the Court to make such determinations. Because victims have the possibility of participating prior to the naming of a suspect or the filing of charges against an accused, the Registrar will be unable to provide applications to defense counsel since there will not yet be an accused. Instead, the Registrar will provide copies of victim applications to the ad hoc defense counsel from the Office of the Public Counsel for the Defense (OPD), who in turn will have to speak on behalf of the defense in general.[36] This will also be the case when an accused has yet to retain counsel.

Under Rule 89, the relevant Chamber has complete discretion over the scope of victim participation and this discretion remains flexible throughout all proceedings.

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[34] Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, and VPRS 6, 17 January 2006, ICC-01/04-101-tEN-Corr, para 101.
[35] Decision Designating a Single Judge on Victim Issues, 22 November 2006, ICC-02/04-01/05-130.
[36] At the early stages of proceedings, before a suspect retains counsel, Regulation 77(4) provides that the OPD shall protect the rights of defense generally.

Importantly, the Rules provide that any ruling initially made by a Chamber under Rule 89 can later be modified.[37] The rationale for later modifications was to allow for greater victim participation should participation be limited by an earlier ruling. But it may also work in the alternative. Pre-trial decisions granting broad participation can later be modified and narrowed by a Trial Chamber. One example of modification is if a Chamber denies a victim's request to pose a certain question to a witness following the direct-examination of that witness, that decision does not bar the Chamber from later allowing a victim's request to pose the same question to the same witness following cross-examination. The victim, however, would not be able to appeal a decision barring them from asking the question at all or appeal decisions limiting their participation.[38] Significantly, victims may not appeal a decision denying them victim status in the first place. Instead, a victim may make "successive requests" to participate by re-filing their application,[39] which in turn will need to be re-examined by the relevant Chamber, usually a single judge, and ruled upon. Despite the fact that this will likely frustrate victim applicants and take up the Court's time and resources, drafters felt that victims should have the ability to re-file application requests as the court proceedings progress. However, once victims are granted the right to participate in a situation there is no need to re-apply to participate in a case.[40] The Court will automatically review their status.

Victims' Right to Legal Counsel and Other Forms of Participation

Another major, yet controversial, development found in the Rules in regards to victim participation is Rule 90 and 91, which gives victims the right to legal representation. Legal representatives will aid victims in understanding Court procedures, advise victims of their rights and represent their interests in the proceedings. Donat-Cattin comments that "there is no effective access to justice without skilful and responsible legal representation."[41] He notes that continental-law jurisdictions clearly stress the importance of empowering victims through legal counsel.[42] Along the same lines, Mekjian finds the right to legal representation to be the "most important and most procedurally challenging aspect to apply within the ICC."[43] It is not surprising then that during drafting of the Rules the right to legal representation was a contentious issue that raised a number of questions.

The most pressing issues surrounding the idea of a victim's legal counsel centered on (1) the ability of the victim to choose a representative; (2) the ability of the victim to afford a legal representative; (3) the need to group victims together in order to make participation possible; and (4) conflicts of interest that would almost certainly arise.[44] In order to deal with these issues, drafters decided that both the Registrar and the relevant Chamber would play a large role in the process. Due to the sheer number of anticipated victims, it will likely be impossible for most victims to participate individually in Court proceedings—although in theory it is possible to do so. And

[37] ICC Rule, *supra* note 4, 91(1).
[38] Lee at 466.
[39] Bitti in Lee, *supra* note 19, at 463.
[40] Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, and VPRS 6, 17 January 2006, ICC-01/04-101-tEN-Corr, para 67.
[41] Donat-Cattin, *supra* note 21, at 881.
[42] Donat-Cattin, *supra* note 21, at 881
[43] Mekjian, *supra* note 24, at 22.
[44] Lee, *supra* note 19, at 463, 262-284.

despite the fact that Rule 90(1) says that a victim is free to choose legal counsel, in order to ensure the effectiveness of the proceedings, the Chamber may request groups of victims to choose a common legal representative(s).[45] If victims are unable to agree upon a common legal representative the Chamber may request the Registrar to choose one or more to represent the group.[46] However, problems arise when groups of victims have incompatible or conflicting interests. For example, one group of victims may be former male child soldiers while another group may be former female child soldiers that were sexually abused by their fellow soldiers. In another example, there may be some victims whose property was destroyed while other victims who were tortured or physical abused. In both scenarios, the two sets of victims will not have the same interests. Moreover, in complex cases, the Court will have victims affected in a variety of different, and at times, competing ways. Rule 90(4) requires both the Chamber and the Registrar to ensure that conflicts of interests are avoided, but it is unclear exactly how they will be able to do this if a large number of victims participate in a complex case involving a wide range of charges. Practically speaking, the number of victim representatives will likely need to remain feasible to work with.

When choosing or appointing a legal representative for victims, the legal counsel must meet the criteria found under Rule 22(1), which provides for qualification for legal counsel for the defense. Despite debates over whether there should be separate qualifications for victims' counsel, drafters decided that formal requirements for defense counsel and victims' counsel should be the same.[47]

In regards to procedural matters, the delegates of the negotiation of the Rules not only had to decide upon the right of a victim to have a legal representative, but also on the victims' advocate's scope of participation. Therefore, Rule 91 specifically addresses the manner in which victim's counsel may participate in the proceedings. Rule 91(2) states:

> A legal representative of a victim *shall* be entitled to attend and participate in the proceedings in accordance with the terms of the ruling of the Chamber and any modification thereof given under rules 89 and 90. This *shall* include participation in hearings unless, in the circumstances of the case, the Chamber concerned is of the view that the representative's intervention should be confined to written observations or submissions. The Prosecutor and the defense shall be allowed to reply to any oral or written observation by the legal representative for victims. (emphasis added)

When looking at Rule 91(2), it appears that the victims, or their counsel, will, at a minimum, always be able to attend proceedings, and, may orally participate. Both "attend" and "participate" were used because many delegates felt that "attendance" does not adequately denote the right to orally intervene.[48] Rule 91(2) once again highlights that the manner of the participation is at the discretion of the judges. However, the Rule uses the term *shall*, rather than *may*; indicating, that any limitations on victim participation will be the exception, rather than the rule.

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[45] ICC Rule, *supra* note 4, 90(2)
[46] ICC Rule, *supra* note 4, 90(3)
[47] Bitti in Lee, *supra* note 19, at 464.
[48] Mekjian, *supra* note 24, at 27.

As with most negotiations, the product of the drafting meetings was the result of major compromises. Most of the compromises ended in favor of greater victim involvement—both oral and written. For example, it appears that even if the Chamber wishes to limit participation of those victims already granted victim status, victim's counsel will still be able to submit either written "observations" or "submissions" depending upon the ruling of the Court. Therefore, even a limitation of confining participation to a written observation or submission in no way completely prohibits victim's counsel from participation.

In regards to oral interventions, legal representatives of victims may participate in a number of ways. In addition to Rule 89, which specifically mentions the possibility of making opening and closing statements, victims' counsel may also participate by questioning a witness, an expert or the accused, if the accused decides to testify. The questioning of witnesses, experts and the accused was a very controversial form of participation. Many delegates during drafting feared that Rule 91(3) would be detrimental to both the prosecution and/or the defense.[49] Therefore, compromises were made. First, the victim's counsel must obtain permission by filing an application before being allowed to question any witness. Second, this form of participation is limited by Rule 91(3)(b), which requires the Trial Chamber to adhere to a balancing test, namely balancing the interests of all those involved. The "Holistic Balancing Test," as it is referred to by Mekjian, requires the Trial Chamber to take into account (1) the stage of the proceedings; (2) the rights of the accused; (3) the interests of witnesses; and (4) the need for a fair, impartial and expeditious trial as stated under Article 68(3). However, the wording of Article 68(3) implies that victims' rights can not come at the expense of defense rights. Therefore, what Mekjian refers to as a Holistic Balancing Test is actually a tiered evaluation, where the rights of the accused should arguably take precedence.

Despite all of the rules regarding victims' legal counsel, the right to legal representation for victims is not unconditional. Prior to finding out their status as victim participants, victim-applicants in the Uganda situation and Kony et al. case requested the Court to obtain legal representation on their behalf. Rather than doing so, the single judge found that legal representation is not necessary *per se* for victims to participate and further found that there is no unconditional right for victims to be provided with legal counsel prior to the Chamber's decision on the merit of the application for participation. The judge then referred them to the Office of Public Counsel for Victims for assistance and support.[50] This decision has not yet been tested however and it remains to be seen if it will be followed by other Chambers.

In addition to having discretion to determine who may be provided with legal counsel, the Chamber has the discretion to determine the form, type, manner and order of participation.[51] For example, this may mean that a victim's representative is barred from posing a question directly to a witness. Instead, a judge may pose the question

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[49] Mekjian 28, *supra* note 24, citing Lee at 467.
[50] Decision on legal representation, appointment of counsel for the defence, protective measures and time-limit for submission of observations on applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06; 1 February 2007, ICC-01/04-01/05-134.
[51] ICC Rule, *supra* note 4, 91(3)(b).

or the question may be significantly modified by the Court. The implications of the judges' discretion are abundant.

d. Seeking the Views of Victims and Victims Seeking to Share their Views

In addition to having the opportunity to participate in proceedings in accordance with Rules 89 to 91, victims have the limited opportunity to participate when they do not formally apply to participate pursuant to Rule 89. They may do so pursuant to two rules: Rule 93 and Rule 103. Rule 93 is a general rule that reads:

> A Chamber may seek the views of victims or their legal representatives participating pursuant to Rules 89 to 91 on any issue, *inter alia*, in relation to issues referred to in Rules 107, 109, 125, 128, 136, 139, and 191. In addition, a Chamber may seek the views of other victims, as appropriate.

Rule 93 allowed drafters of the Rules to reduce the number of specific references to victims, such as those that once existed in drafts of the various versions of the Rules. Although this rule requires the Chamber to invite the views of other victims, it is foreseeable that victims not participating in accordance with Rules 89 to 91 will let it be known that they would like to share their views on a specific subject. It is still unclear who these "other" victims will be, but it is likely they may be victims who have applied yet have been denied formal victim status but whom the Court would be interested in hearing or victims who participate pursuant to Article 15(3) or 19(3). Once again, the Court's prudence will be a major factor in how far victim participation will extend.

Rule 93 is further supplemented by Rule 103. Rule 103(1), dealing with amicus curiae and other forms of submission, provides that a Chamber may, at any state of the proceedings, deem it desirable to "invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate." "Amicus curiae" is a legal Latin phrase, literally translated as "friend of the court." It allows someone, not party to the case, to provide information on a point of law or some other aspect of the case in order to aid the court in deciding a matter before it. The information may come in the form of a written brief, learned treatise or oral testimony. The decision of whether or not to admit the information lies with the discretion of the court.

III. Pre-Trial Stage: The Preliminary Examination Phase

The ICC is the first international tribunal to have a formal Pre-Trial Chamber which deals with procedural issues arising prior to the start of trial.[52] The Pre-Trial Chamber, unlike in previous tribunals, has, under certain circumstances, the power to

[52] Trial duration affects a court's credibility, legitimacy and effectiveness, and the duration of trials has long been a problem for international criminal tribunals. The average time during pre-trial preparation at the ICTY was 10 months while trials lasted approximate 12 months. Despite the complexities of international prosecutions this was seen as too long. Therefore, the ICTY created case status hearing to try to streamline the pre-trial process. Status hearings are standard hearings where routine issues like schedules, evidentiary issues, and trial dates are discussed. And although the ICTY has had case status hearings since 1999, the ICC is the first international tribunal to have a formal Pre-Trial Chamber.

authorize an investigation,[53] the power to review the Prosecutor's decision not to proceed with an investigation,[54] the power to deal with issues of admissibility,[55] the power to take testimony from witnesses or examine, collect or test evidence for the purpose of trial under its "unique investigative opportunity" and most importantly for this thesis,[56] the power to shape early victim participation. It is still debatable whether a Pre-Trial Chamber speeds up the trial process generally but it did provide a forum to flesh out the new procedures for victim participation at this stage of the proceedings. In order to analyze procedural rules and court practice, it is helpful to break down the pre-trial stage into three phases: (1) the preliminary examination phase; (2) the investigation phase; and (3) the prosecution phase.

The preliminary examination phase takes place once a situation has been referred to the Office of the Prosecutor (OTP), upon receipt of information by the OTP about a situation through a communication or once the OTP decides to closely follow a situation on its own. Referrals may only be made by a State Party or the Security Council of the United Nations. However, victims, like other individuals or organizations, have the opportunity to participate in a limited way by submitting communications to the OTP on potential situations falling under the Court's jurisdiction. The Prosecutor is obligated to evaluate all the material submitted—whether the material submitted is a referral or communication.[57] After conducting a preliminary examination of the information, which can take as long as the Prosecutor deems necessary, the Prosecutor must then decide whether to authorize the initiation of an investigation or prosecution.

a. Initiation and Authorization of an Investigation

At the ICTY and ICTR, the decision of whether to initiate an investigation fell exclusively within the discretionary power of the Prosecutor. Neither the Court nor victims had any control over what investigations the Prosecutor carried out. Once a prosecution team completed its investigations, they would submit a report to the chief prosecutor, who then evaluated the evidence and determined whether there was enough evidence to indict a suspect. If the chief prosecutor determined there was enough evidence for an indictment, the prosecutor drafted an indictment and forwarded it to the Registry for confirmation by a judge. Nowhere in this process did victims have a chance to share their views and concerns with the Court in regards to investigations carried out by the Prosecutor. The process followed by the ICTY and ICTR was significantly changed in the Statute and Rules of the ICC. Victims may communicate their interest in the initiation of an investigation, the Pre-Trial Chamber taking victims' concerns into consideration pursuant to Rule 86 is given more oversight over the actions of the Prosecutor, and victims have a limited opportunity to participate in proceedings concerning investigations.

In deciding whether to initiate an investigation, the ICC Prosecutor is required to consider whether the information available provides a reasonable basis to believe that a crime falling under the Court's jurisdiction has been or is being committed, and the

[53] Rome Statute, *supra* note 1, Article 15(4).
[54] Rome Statute, *supra* note 1, Article 53(3).
[55] Rome Statute, *supra* note 1, Articles 17-18.
[56] Rome Statute, *supra* note 1, Article 56.
[57] Rome Statute, *supra* note 1, Article 53(1).

admissibility of a potential case under Article 17; all the while taking into account the gravity of the crimes and "the interests of victims" and whether justice would be served through an investigation.[58] So long as the initiation of an investigation is based on a referral the Prosecutor retains his discretionary power to proceed without oversight from the Court.[59] Therefore, the decision to initiate an investigation is not reviewable by the Pre-Trial Chamber unless the investigation was initiated *proprio motu*. If the Prosecutor initiates an investigation *proprio motu* then victims have the explicit statutory right to present their views and concerns to the Court and the Pre-Trial Chamber has the power to review the Prosecutor's decision. Article 15(3) provides:

> If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.

Therefore, if the Prosecutor believes, under his *proprio motu* powers, that there is a reasonable basis to proceed with an investigation, he must request the Pre-Trial Chamber to authorize the investigation. In contrast, if the Prosecutor believes there is a reasonable basis to proceed with an investigation based upon a referral from a State Party or the Security Council, he is not required to seek Pre-Trial Chamber authorization.

Although to date, the Prosecutor has not sought authorization of an investigation pursuant to his *proprio motu* powers, Article 15(3) explicitly recognizes one of the earliest opportunities for victims to participate in actual court proceedings. And like the Statute, the Rules further support early victim participation by laying out the procedure the Prosecutor should follow when seeking an authorization of an investigation. In accordance with Rule 50, the Prosecutor must first inform any victims known to him or the Victim and Witnesses Unit (VWU) when seeking authorization of an investigation.[60] This notification obligation rests on the Prosecutor but the VWU or the Victim Participation and Reparations Section (VPRS) could potentially have the ultimate responsibility of actual notification to the victims. Under Rule 50(3), after victims have been notified, they may make representations in writing to the relevant Pre-Trial Chamber. The Pre-Trial Chamber then has the discretion to request any additional information from the victims who made representations and may also deem it necessary to hold a hearing pursuant to Rule 50(4) in order to hear their views and concerns. But again, victims only have the statutory right to participate in regards to initiation of an investigation if the Prosecutor acts pursuant to his *proprio motu* powers and seeks authorization for an investigation. If this is not case, then victims must apply for participation in the situation pursuant to Rules 89 to 91.

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[58] Rome Statute, *supra* note 1, Article 53(1).
[59] However, once the Prosecutor brings charges against an individual the Pre-Trial Chambers retains supervisory powers during the confirmation of charges hearing where it must authorize and confirm the charges alleged by the Prosecutor.
[60] ICC Rules, *supra* note 4, 50(1), 50(4) and Rule 92(2).

From July 2002 to 1 February 2006, the OTP has received three referrals from States Parties,[61] one referral from the UN Security Council and 1732 communications from individuals or groups in at least 103 different countries.[62] Sixty percent of the communications originate in four countries: the United States, United Kingdom, France and Germany. According to the Update on Communications Received by the OTP, the communications include reports on alleged crimes in 139 countries. Upon initial review of the communications, 80 percent were found to be "manifestly outside the jurisdiction of the Court."[63] The OTP divided the communications as follows:

- 5% of communications concerned events outside the temporal jurisdiction of the Court (prior to 1 July 2002);
- 24% of communications concerned allegations outside the subject-matter jurisdiction of the Court (genocide, crimes against humanity and war crimes);
- 13% of communications concerned allegations outside the personal or territorial jurisdiction of the Court;
- 38% of communications were manifestly ill-founded because they failed on multiple jurisdictional grounds or provided no basis for analysis.

The OTP identified 20 percent of communications as warranting further analysis. Since the creation of the OTP, 10 situations have been subject to intensive analysis. Of these 10 situations, four have led to initiation of investigation, two have been dismissed and four currently remain under analysis. The situations currently under analysis are complex—particularly in regards to the differences amongst the victims. For example, the Ivory Coast situation appears to involve over a thousand potential victims of willful killing while the Central African Republic situation has a high number of victims of sexual violence. These facts and statistics show that the Court must be prepared, at the pre-trial stage, to deal with victim issues and anticipating their participatory rights and concerns.

b. Decision by the Prosecutor not to Initiate an Investigation, seek Authorization of an Investigation or Initiate a Prosecution

What happens when the Prosecutor decides not to initiate an investigation, seek authorization of an investigation or initiate a prosecution? During negotiations over the Rules, some delegates, mainly from France, argued that the general right of victims to have access to justice suggests that they have a right to review a Prosecutor's decision *not* to prosecute or investigate a certain situation. In contrast, other delegates felt that any review over the Prosecutor's discretion not to initiate an investigation would unjustifiably usurp the Prosecutor's independence and that judges would have too much power if given the power of review.[64] Ultimately, it appears that Prosecution retains some discretion while the judges have some supervisory role.

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[61] The three referrals by States Parties have come from Uganda, the Democratic Republic of Congo (DRC) and the Central African Republic (CAR), each referring situations in their own territories.
[62] Update on Communications Received by the Office of the Prosecutor of the ICC, available on the ICC website
[63] Update on Communications Received by the Office of the Prosecutor of the ICC, *available at* http://www.icc-cpi.int/library/organs/otp/OTP_Update_on_Communications_10_February_2006.pdf.
[64] Stahn, *supra* note 20, at 230, citing H. Olásolo, *The Triggering Procedure of the International Criminal Court*, Martinus Nijhoff Publishers, The Hague, Boston, London (2005), p. 65; See also H. Friman in Lee, *supra* note 19, at 497.

If the Prosecutor determines that there is no reasonable basis to proceed with an investigation, the Prosecutor must inform the Pre-Trial Chamber and the State Party making the referral or the Security Council depending upon the referral situation of the reasons for not proceedings.[65] In accordance with Rule 49, where a decision was taken not to initiate an investigation on the basis of communications received, the OTP typically informs senders of the communication of the reasons for not proceeding further. If the Prosecutor decides not to proceed with an investigation referred by a State Party or the Security Council and that determination is based solely on the fact that an investigation would not serve the interests of justice, the Pre-Trial Chamber may not only review the decision but must confirm the Prosecutor's decision not to proceed and the Court is required to take victims' concerns into account when making that decision.[66] This is not the case, however, when the Prosecution decides not to proceed on the basis of a communication—no Pre-Trial Chamber confirmation is required.

While Article 53(3) makes no express mention of victim involvement, when reviewing the Prosecutor's decision not to initiate an investigation, this does not necessarily mean that victims will not have an opportunity to share their views and concerns. The Pre-Trial Chamber can rely on Rule 93, which allows the Court to "seek the views of victims or their legal representatives…*on any issue*" in relation to requests for review under Article 53(3)(a) and in relation to review by the Pre-Trial Chamber under Article 53(3)(b) (emphasis added). Moreover, if a Chamber does not seek the view of a victim, that victim or victims' right group is still free to make a request for leave to submit observations under Rule 103, dealing with amicus curiae.[67] The DRC situation illustrates this tactic. In the DRC situation, the Women's Initiative for Gender Justice filed an amicus brief addressing an number of fundamental issues including the nature of the independence of the Prosecutor, the relationship between the Prosecutor and the Pre-Trial Chamber, the system of checks and balances in Court procedures, judicial supervision of prosecutorial discretion and the role and rights of victims.[68] The NGO stressed that the Statute and Rules provide for greater powers vested in the Pre-Trial Chamber which it could exercise when certain charges are overlooked by the Prosecution.[69] Arguably, through the increased role of the judges, victims will be able to present their views and concerns in an attempt to curb prosecutorial discretion. The role of the Chamber is important in this respect because it must decide on which victims get to participate and the manner and scope of involvement. Again, this will depend upon the circumstances of the case and the makeup of the Chamber.

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[65] Rome Statute, *supra* note 1, Article 53(2).
[66] Rome Statute, *supra* note 1, Article 53(3)(b).
[67] ICC Rule 103 provides that a Chamber can grant anyone leave to submit, in writing or orally, any observation on any issue that it deems appropriate.
[68] The Women's Initiative tried to submit the amicus brief in the case of *The Prosecutor v. Thomas Lubanga Dyilo* but the Pre-Trial Chamber denied their request for leave to submit observations. Instead, they were invited to re-file their request for leave to submit observations in the record in the DRC situation.
[69] See Request submitted pursuant to Rule 103(1) of the Rules of Procedure and Evidence for leave to participate as amicus curiae with confidential annex 2, 10 November 2006, ICC-01/04-313.

IV. Pre-Trial Stage: The Investigation Phase

The investigation phase starts with the initiation or authorization of an investigation into a particular situation. This phase does not end when the prosecution phase of a case begins. To the contrary, the investigation phase into a situation may continue for an unlimited number of years. For example, the investigation into the DRC situation will likely continue even after the conclusion of the Lubanga case. Unlike in the preliminary examination phase where victim participation is limited to submitting information for examination by the prosecutor or taking part in Article 15(3) proceedings, victims have broader rights during the investigative phase of a situation to participate.

a. Victim Participation in the Investigation Phase

The central question arising at this point of the proceedings is whether victims have a right to participate during the investigation of a situation prior to the naming of a suspect, request for warrant of arrest or summons to appear. In the DRC situation, the Court answered a resounding *yes*, despite the fact that investigations were ongoing and no decisions had yet been made by the OTP of what charges to pursue. The Court found that the broad approach to victim participation during this phase is supported by the Statute, Rules and a number of human rights documents.[70]

There are different rationales for involving victims at this early stage of proceedings. First, it is assumed that victims, in general, have the best information about the nature and extent of alleged crimes and therefore their input could be invaluable. Second, and most controversial, some commentators suggest that victim involvement can add "objectivity" to the proceedings by "ensuring a view other than the Prosecutor's."[71] Needless to say, the extent to which victims would be able to participate during the pre-trial stage generated lengthy discussions during the drafting of the Rules. Some delegations wanted victims to act as full parties at this stage, whereas other delegations felt that victim participation would negatively affect the efficiency of pre-trial proceedings.[72] For those delegates who questioned the right of victims to actively participate in proceedings, particularly during the pre-trial stage of situations, prior permission from the Pre-Trial Chamber was a crucial safeguard.

Following the referral of the situation into the DRC, the Prosecutor officially announced his decision to open the first investigation of the Court. Thereafter, the ICC President assigned the DRC situation to Pre-Trial Chamber I. On 14 June 2005, the President of the International Federation for Human Rights (FIDH) submitted applications for participation of victims designated VPRS 1-6 and authorized Emmanuel Daoud to represent them.[73] On 11 August 2005 the ad hoc Defense

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[70] See European Court of Human Rights, *Ogur v. Turkey* (21594/93) [1999] *European Convention on Human Rights* (ECHR) 30, § 92; *Kelly and others v. The United Kingdom* (30054/96) [2001] ECHR 324, § 98.
[71] Stahn, *supra* note 20, at 226.
[72] John T. Holmes in Lee, *supra* note 19, at 332.
[73] Letter from Mr. Sidiki Kaba, President of the International Federation for Human Rights (FIDH), submitting the applications for participation of victims designated VPRS 1-6 and authorizing Emmanuel Daoud to represent them, 14 June 2005, ICC-01/04-24-Conf-Exp.

counsel filed a response to the victim applications.[74] Notably, the ad hoc Defense counsel did not challenge the applicability of Article 68(3) to the investigation of a situation or the participation of victims in this early phase. It is not clear why he did not do so but presumably it is because he came from a civil law jurisdiction and is familiar with early victim participation in a national setting. Instead, the ad hoc Defense counsel focused his response on challenging the individual applications for not meeting the required criteria and for vagueness. On 15 August 2005 the Prosecutor filed a motion to oppose the victim applications, arguing that the Statute did not envision victim participation at such an early stage.[75] He further argued that the objectively of the proceedings could be placed in jeopardy, as well as the integrity of the Prosecutor's office if the Court were to allow a third party to intervene so early in the process.[76]

In addressing the arguments in a terminological, contextual and teleological approach, Pre-Trial Chamber I looked at a number of different issues when making its decision. First, the judges examined whether the Statute, Rules and Regulations of the Court allow for early victim participation. The Court first looked to Rule 68(3) and determined that although Article 68(3) is located in the "Trial" section of the Statute, because it does not specifically stipulate a stage of the proceedings for victim involvement, the Court decided participation can take place during the pre-trial stage before the identification of a suspect.[77] Despite the fact that the Prosecution argued that there is a clear distinction between court proceedings—as referred to in Article 68(3)—and the investigation stage of the process, the judges disagreed. In looking at the overall objectives of the Court, the judges concluded that early victim participation was a laudable goal of the drafters as evidenced by the Statute and Rules. The judges also used jurisprudence from the European Court of Human Rights and the Inter-American Court of Human Rights to bolster its decision allowing victims participatory rights prior to the naming of a suspect.[78]

The decision also examined whether the applications submitted by alleged victims could be granted victim status. To this end, the judges found that "the participation of victims during the stage of investigation of a situation does not *per se* jeopardize the appearance of integrity and objectivity of the investigation, nor is it inherently inconsistent with basic considerations of efficiency and security."[79] Instead, the judges found that the extent of participation may impact the investigation but not participation generally. Essentially, the Court concluded that the status of victim will be accorded to applicants who meet the definition of victim in relation to a relevant situation (if applying for participation in a situation) or to a relevant case (if applying for participation in a specific case) and demonstrate a causal link between the harm

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[74] See Defense Response to the Applications for Participation of Victims in the Proceedings, 11 August 2005, ICC-01/04-81-Conf; See also Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6; 17 January 2006, ICC-01/04-101-Corr.
[75] Prosecution's Reply on the Applications for Participation 01/04-1/dp to 01/04-6/dp, 15 August 2005, ICC-01/04-84-Conf.
[76] Jérôme de Hemptinne and Francesco Rindi, *ICC Pre-Trial Chamber Allows Victims to Participate in the Investigation Phase of Proceedings*, 4 Journal of International Criminal Justice 342, 343 (2006) [hereinafter Hemptinne].
[77] Rome Statute, *supra* note 1, Article 15(3); ICC Rules, *supra* note 4, 50(1), 50(3), 92(2) and 107(5).
[78] See 17 January 2006 Decision, para 51-53.
[79] also Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6; 17 January 2006, ICC-01/04-101-Corr, para 57.

suffered by an alleged victim and a crime falling within the jurisdiction of the Court that was committed in the relevant situation.[80] Once a case ensues from an investigation of a situation into a case, the Chamber will automatically address the question of whether a victim applicant meets the criteria in regards to a case.[81] There is no need for victims to reapply.

Finally, the judges determined what form of participation would be appropriate at the investigation stage of the DRC situation. In this regard, the Court authorized victims to be heard by the Chamber in order to present their views and concerns, to file documents pertaining to the relevant situation, to request the Pre-Trial Chamber to order special proceedings and to have notification rights. The Court limited the participatory rights of the victims by not giving them access ("for the time being") to any non-public document contained in the record of the situation in the DRC and not allowing them to attend confidential proceedings unless decided otherwise. The Prosecutor sought leave to appeal the decision. In reaction, the legal representative for the victims asked the Pre-Trial Chamber to reject the Prosecutor's application to appeal—which, to the detriment of the Court, it did.

b. Redactions in Victim Applications

Redactions in court documents are necessary in order to protect the safety and security of victim-applicants. They are used in every functioning international criminal tribunal as well as national jurisdictions. Redactions include any detail of the alleged incident which might lead to identification, details related to alleged events such as dates, locations, names of those involved, and type of treatment received. Most of the specific details of the alleged injury, loss or harm suffered are also redacted. One major obstacle encountered by both the Prosecution and defense counsel is the filing of informed replies under Rule 89(1) due to the numerous redactions throughout victim applications. This is a problem both during the investigation phase of a situation when victims first start applying for participation and during the prosecution phase of a case when victim-applicants hold the defendant personally responsible for their alleged harm.[82] Rather than being able to provide factual evaluations of the victim applications, the Prosecution and defense are limited to an analysis of legal texts and general comments.

The overuse of redactions affects both the OTP and defense. The OTP has argued that their replies to heavily redacted victim applications are incapable of assisting the Pre-Trial Chamber in making informed victim status determinations and fall short of allowing the OTP to be heard on the important issue of victim participation. Ad hoc defense counsels argue that they are unable to consult anyone about the facts laid out in the victim applications since there is not yet a suspect. Because of this, one ad hoc counsel submitted "it is in the interests of justice that at the trial stage, that is after the documents containing the charges have

[80] also Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6; 17 January 2006, ICC-01/04-101-Corr, para 81-94.
[81] also Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6; 17 January 2006, ICC-01/04-101-Corr, para 68.
[82] Although issues regarding redactions occur during both the investigation phase of a situation and the prosecution phase of a case, because they first arise during the investigation phase this paper will address the issue in this section.

been filed, that the accused person should, through their counsel, be allowed to file additional observations on the victim participation application."[83]

To make the problem worse, Court practice has been inconsistent on this issue. In the DRC situation and Lubanga case the Prosecution receives un-redacted victim applications.[84] In contrast, in the Uganda situation and Kony et al. case the Prosecution receives the same redacted victim applications as the ad hoc defense counsel. The single judge, Judge Politi, decided that both the Prosecution and Defense needed to work from the same documents in order to fully protect the safety and security of victims. And despite numerous attempts by the Prosecution to challenge this position the OTP in the Uganda situation and case has yet to receive un-redacted victim applications.

V. Pre-Trial Stage: The Prosecution Phase

Up until this point in the process, the prosecution phase of the pre-trial stage provides the most comprehensive procedural rights for victim participation. This comes as no surprise since the prosecution phase of the pre-trial stage envisions the naming of a suspect. The prosecution phase begins with the warrant of arrest or the summons to appear and only ends after the confirmation of charges and the setting of a trial date.

a. Warrant of Arrest and Summons to Appear

Warrants of arrest and summonses to appear before the Court are the two ways in which to inform a suspect of the pending charges against him. An arrest warrant issued on behalf of the Court authorizes the arrest and detention of an individual while a judicial summons is addressed to an individual suspected of crimes requesting his presence and surrender before the Court. At any time after the initiation of an investigation, the Prosecutor may initiate a prosecution by applying to the Pre-Trial Chamber for the issuance of an arrest warrant for an individual. The application for the arrest warrant must contain the name of the person, specific reference to the crimes under the Court's jurisdiction and a concise statement of the facts which are alleged to constitute the crimes, a summary of evidence and the reasons why the Prosecutor believes that an arrest is necessary.[85] The actual arrest warrant only needs to contain the first three requirements of the application.[86] Before issuing the arrest warrant, the Court must be satisfied there are reasonable grounds to believe that the person committed a crime within the jurisdiction of the Court and the arrest of the person appears necessary.[87] Necessity may stem from the assurance that the person

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[83] Defense observations on applications for participation in the proceedings a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, 5 March 2007, ICC-02/04-01/05-216-tEN, para 42.

[84] See Victims Rights Working Group, ICC Victim's Rights Legal Update, 11 September 2006, *available at* http://www.iccnow.org/documents/VRWG_LegalUpdate_Sept06.pdf, stating that at the end of July and early August, 41 victim-applicants filed confidentially and 43 victim-applicants filed ex parte requests to participate in the Lubanga case. The Prosecutor was given full copies of the applications and the defense received redacted versions. Both were given the same amount of time to present their observations on the applications to the Court.

[85] Rome Statute, *supra* note 1, Article 58(2).

[86] Rome Statute, *supra* note 1, Article 58(3).

[87] Rome Statute, *supra* note 1, Article 58(1).

will appear at trial, the assurance that the person will not obstruct or endanger the investigation or the prevention of the continuation of crimes by that individual.

As an alternative to an arrest warrant, the Prosecutor may also apply for the issuance of a summons to appear. As with the arrest warrant, the Pre-Trial Chamber must be satisfied that there are reasonable grounds to believe the person committed the crime(s) alleged and that a summons will sufficiently ensure the person's appearance. A number of victims' rights' groups were upset when the Prosecutor failed to request the Pre-trial Chamber to authorize the issuance of arrest warrants for Ahmad Harun and Ali Kushayb. Instead, the Prosecutor only requested orders to appear, which are usually used when the suspect is under the control of a state or when there is no danger that the suspect will go into hiding. This decision by the Prosecutor was more than likely politically motivated, highlighting the unique and challenging role of the Prosecutor to balance legal functions with political realities. The victims' groups, on the other hand, argue that arrest warrants bring much needed world attention to the situation and make those individuals who do not comply with the arrest warrant, international fugitives.

The arrest warrant issued for Thomas Lubanga Dyilo made no reference to the victims being heard in relation to the Prosecutor's application for the arrest warrant and because the arrest warrant was issued under seal it is unlikely that any victims participated in any hearing on the issue. Subsequently, when victims groups learned of the narrow charges found in the arrest warrant they were outraged that they did not have the opportunity to influence this aspect of the proceedings. All six of the victims granted participatory rights in the DRC situation were deprived of the opportunity to raise any concerns surrounding the arrest warrant. Moreover, some of those victims were deprived of the chance to raise these concerns in future hearings because the Pre-Trial Chamber determined that no sufficient causal link was established between the harm suffered by the victim participants of the situation and the crimes specified in the arrest warrant.[88]

b. Challenges to Jurisdiction and Admissibility

In the Statute and Rules there is a clear difference between jurisdiction and admissibility. Jurisdiction is whether the Court has legal competence over the acts in question. Admissibility "seeks to establish whether matters over which the Court properly has jurisdiction should be litigated before it."[89] Articles 17, 18 and 19 deal with admissibility and jurisdiction issues in regards to both situations and cases.[90]

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[88] Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case the Prosecutor v. Thomas Lubanga Dyilo, 29 June 2006, ICC-01/04-01/06-172.

[89] William A. Schabas, *An Introduction to the International Criminal Court,* 2nd ed., Cambridge (2004) p. 68.

[90] States Parties may challenge the jurisdiction of the Court during the investigative phase of the Pre-Trial stage; however, most challenges to jurisdiction and admissibility will arise during the prosecution phase once a suspect has been named. Therefore, this paper will discuss the issues surrounding victim participation and challenges to jurisdiction and admissibility during this phase. However, it is interesting to note that in the Darfur situation the ad hoc defense counsel, Maitre Haddi Shallluf, first attempted to challenge the Court's jurisdiction on 25 August 2006 when his mandate was only to offer observations concerning Amicus Brief on victim protection. After it was rejected by both the Pre-Trial and Appeals Chamber he requested the Court on 22 November to declare itself incompetent. Again, both his request and appeal were denied. Shalluf was later let go as ad hoc defense counsel.

Admissibility and jurisdiction questions are inherently connected to the principle of complementarity. The principle of complementarity obliges the Court to defer jurisdiction to a national authority unless that authority is unwilling or unable to investigate or prosecute a case.[91] Because a number of excellent books and articles have been written on the issue of complementarity at the ICC, this paper will only examine the issues of jurisdiction and admissibility as they pertain to victim participation.[92]

Persons charged or States that have jurisdiction may challenge the admissibility or jurisdiction of a case and victims have the right to express their views and concerns.[93] Under Article 19(3) victims are expressly authorized to participate in challenges to jurisdiction or the admissibility of a case. Article 19(3) reads as follows:

> The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have referred the situation under article 13, as well as victims, may also submit observations to the Court.

Rule 59, the counterpart to Article 19, provides that the Registrar shall notify victims or their legal representatives about challenges to jurisdiction. Those victims can then make observations in writing to the competent Chamber within time limits established by that Chamber. However, victims may not necessarily be limited to written observations if the Chamber seeks the view of victims under Rule 93 through oral submissions. Again, the amount of victim participation depends upon the discretion of the judges.

Article 18 deals with preliminary rulings regarding admissibility. Unlike Articles 15 and 19, which explicitly allow for early victim participation, Article 18 does not expressly allow for the involvement of victims. The absence of an express provision is due, in large part, to negotiations during drafting. Delegates expressed concern about giving victims too many opportunities to participate; thereby affecting the speed of the proceedings.[94] The drafting history supports the argument that victims are not permitted to participate in Article 18 proceedings concerning a State's challenge to admissibility and jurisdiction; however, some commentators suggest that Article 19(3) is written so broadly that it allows victims involvement even in Article 18 proceedings.[95] This argument is further supported by the general provisions in Article 68(3) and Rule 93. Ultimately, the judges will have to decide upon the scope and manner of victim involvement.

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[91] Rome Statute, *supra* note 1, Article 17(1).
[92] See Megan A. Fairlie, *Establishing Admissibility at the International Criminal Court: Does the Buck Stop with the Prosecutor, Full Stop?* 39 International Lawyer, No. 4, Winder (2005); See also Mireille Delmas-Marty, *Interactions between national and International Criminal Law in the Preliminary Phase of Trial at the ICC*, 4 Journal of International Criminal Justice, No. 1 (2005).
[93] Rome Statute, *supra* note 1, Article 19(2); A State from which acceptance of jurisdiction is required under Article 12 may also challenge the admissibility of a case.
[94] Stahn, *supra* note 20, at 231, citing Holmes, J.T. in Lee, note 35 at 343.
[95] Stahn *supra* note 20, at 231, citing Hall, C.K. in Triffterer, note 47 at 411.

Following his arrest, Lubanga's attorneys challenged the jurisdiction of the Court pursuant to Article 19(2)(a).[96] After receiving observations from victims, the DRC and the Prosecution, the Pre-Trial Chamber dismissed the defense challenge to jurisdiction,[97] to which the defense filed its notice of appeal and the representatives of the victims filed their observations in response to the appeal brief. It was during the appeal stage that a number of new issues arose as to victim participation.

The defense responded to the victims observations and raised three important points: (1) the victims representatives failed to request leave to send observations to the Appeals Chamber; (2) several of the arguments raised by the victims' representatives go beyond the scope of the issues which are the subject of the appeal filed by the Defense; and (3) victims' representatives filed their observations beyond the time limit provided for in the Regulations.[98] On 14 December 2006, the Appeals Chamber, after considering the observations from the DRC and victims' representatives, upheld Pre Trial Chamber I's decision rejecting Lubanga's challenge to jurisdiction and denying that abuse of process had taken place.[99] It is not surprising that the Appeals Chamber upheld the Pre-Trial Chamber's decision on jurisdiction. What is surprising was the fact that the Court found the victim submissions unacceptable since they were filed without leave of the Appeals Chamber but nonetheless accepted the observations from victims without them having first requested leave to do so and doing so beyond the time allotted by the Court. The observations of victims on this subject were viewed by the Court as so tantamount to the determination of the issue that their apparent disregard of procedures did not prevent their views and concerns from being heard. For obvious reasons this only increased tensions between participants and confused matters more.

c. Pre-Trial Detention and the Conditional Release of an Accused

During or just after the initial pre-trial proceedings a suspect is entitled to request interim release.[100] While this is not common in many civil law systems,[101] it is a fair trial right found in a number of human rights instruments and the Statute of the ICC.[102] Article 60(2) states that "[a] person subject to a warrant of arrest may apply for interim release pending trial." In line with the fundamental rights to individual liberty and the presumption of innocence, pre-trial detention is generally the exception

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[96] There was some confusion as to the legal basis upon which the defense originally argued lack of jurisdiction but after the Court ordered the defense on two occasions to clarify its arguments (29 May and 13 July) the defense explained its challenge under Article 19(2)(b), essentially asserting that the DRC had jurisdiction over Lubanga and was already investigating or prosecuting the case. The defense also made a challenge on the basis of *abuse of power* alleging arbitrary arrest and irregularities of detention.

[97] Decision on the Defense Challenge to the Jurisdiction of the Court pursuant to Article 19(2)(a) of the Statute, 3 October 2006, ICC-01/04-01/06-512.

[98] Defense Reply to the Observations of the Victims' Representatives, 28 November 2006, ICC-01/04-01/06-733.

[99] Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defense Challenge to the Jurisdiction of the Court pursuant to Article 19(2)(a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772.

[100] Rome Statute, *supra* note 1, Article 60; See also ICC Rule, *supra* note 4, 118(1).

[101] Pre-Trial Proceedings Before the International Criminal Court, Dr. Olympia Bekou; *available at* http://www.isrcl.org/Papers/2006/Bekou.pdf.

[102] See Article 9, International Covenant on Civil and Political Rights, and Article 5, European Convention on Human Rights.

rather than the rule. However, if the criteria found in Article 58(1) are satisfied then detention may continue.[103] These criteria include (i) concluding that there are reasonable grounds to believe that the person has committed a crime under the Court's jurisdiction; (ii) ensuring the person's appearance at trial; (iii) ensuring that the person does not obstruct or endanger the investigation or court proceedings; and (iv) preventing the person from continuing with the commission of that crime or a related crime falling within the jurisdiction of the Court.[104] While recognizing the seriousness of the crimes alleged against a suspect, the Court must balance the right of the suspected individual to be presumed innocent and therefore free from detention prior to trial with the interests of society to ensure the presence of that individual at trial.

If the Pre-Trial Chamber finds that the criteria of Article 58(1) are not satisfied than it may grant interim release, with or without conditions attached.[105] As a further safeguard against unreasonable detention, Article 60(4) states that "[t]he Pre-Trial Chamber shall ensure that a person is not detained for an unreasonable period prior to trial date to inexcusable delay by the prosecutor." Delays in general, those caused by defense, victims counsel or excusable delays caused by the Prosecutor, will not affect the Court's assessment of interim release. When deciding on the interim release of an individual Rule 119(3) specifically requires the Pre-Trial Chamber to seek the views of victims that have communicated with the Court on a particular case and with whom the Chamber considers at risk as a result of conditional release. Conditional release is of particular importance both to the victims and to suspects, who, theoretically, are presumed innocent.

In regards to Lubanga the Pre-Trial Chamber did an excellent job of following the laws laid out in the Statute and Rules. The warrant of arrest for Thomas Lubanga Dyilo was issued on 10 February 2006 by Pre-Trial Chamber I. He was already in custody in the DRC for over a year; therefore it was relatively easy to have him transferred to The Hague shortly after the issuance of the arrest warrant. On 20 September 2006 the Defense filed a motion requesting the interim release of Lubanga.[106] In response, the legal representatives for a/0001/06, a/0002/06 and a/0003/06 asked the Chamber to dismiss the Defense request for interim release.[107] Likewise, the Prosecution did the same.[108] Subsequently, the Pre-Trial Chamber rejected the Defense request for interim release and the Defense appealed.[109] On 13 February 2007, the Appeals Chamber confirmed the decision of the Chamber to reject the Defense request and the next day the Pre-Trial Chamber reviewed and sustained

[103] See Rome Statute, *supra* note 1, Article 58(1).
[104] Rome Statute, *supra* note 1, Article 58(1).
[105] Rome Statute, *supra* note 1, Article 60(2) and ICC Rule, *supra* note 4, 119.
[106] Request for Further Information Regarding the Confirmation Hearing and for Appropriate Relief to Safeguard the Rights of the Defense of Thomas Lubanga Dyilo, 20 September 2006, ICC-01/04-01/06-452.
[107] Observations des victims a/0001/06, a/0002/06 et a/0003/06 sur la demande de mise en liberté introduite par la Défense, 9 October 2006, ICC-01/04-01/06-530.
[108] Prosecution's Response to the Defense Request for Interim Release, 9 October 2006, ICC-01/04-01/06-531.
[109] See Decision on the Application for the interim release of Thomas Lubanga Dyilo, 18 October 2006, ICC-01/04-01/06-586-tEN; and Décision sur la demande de mise en liberté proviso ire de Thomas Lubanga Dyilo, 20 October 2006, ICC-01/04-01/06-594.

its decision.[110] In the meantime, the case was transferred to the Trial Chamber whereby the Trial Chamber issued a "Request for Review of Detention" pursuant to Article 60(3).[111] Article 60(3) provides that "the Pre-Trial Chamber shall periodically review its ruling on the release or detention of the person […]," and Rule 118 provides that "[t]he Pre-Trial Chamber shall review its ruling on the release or detention of a person in accordance with Article 60(3) at least every 120 days […]." The Pre-Trial Chamber once again found that Lubanga's continued detention was necessary. It is likely that the Court would have ruled the same way despite the observations put forward by the victims but symbolically, and importantly, the victims' observations may have influenced the Court in denying Lubanga's request for interim release. In the least, it allowed the victims the opportunity to express their views and concerns on the topic, which, had the Prosecution not also opposed, would not have been heard otherwise.

d. Confirmation of Charges Hearing

The confirmation of charges at the ICTY and ICTR differed greatly from ICC practice. At the ICTY and ICTR, once the prosecutor determined that sufficient evidence existed to indict a suspect, he would prepare an indictment and forward it to the Registry for confirmation by a judge. Once the indictment was confirmed, it was made public unless ordered by the judge to remain sealed. The indictment was then served on the suspect at the time of arrest. Notably, the confirmation of charges was, for the most part, an immaterial aspect of the proceedings. This has significantly changed at the ICC.

The purpose of a confirmation of charges hearing is to establish whether there is enough evidence to believe that a suspect committed the crimes found in the indictment. In many civil law systems, the confirmation of charges is an established procedure to oversee the investigating magistrate or prosecutor. In the words of the Court, "it is designed to protect the rights of the defense against wrongful or wholly unfounded allegations."[112] The Court may make one of several decisions following the confirmation hearing: (1) confirm the charges and send the case to trial; (2) refuse to confirm the charges, to which the Prosecutor may submit new charges based on additional evidence; (3) adjourn the hearing and request the Prosecutor to provide additional evidence or conduct further investigations; or (4) adjourn the hearing and request the Prosecutor to amend a charge to better reflect the evidence. While a confirmation hearing differs from other pre-trial hearings and the trial itself, victims will almost always have an interest in participating.[113] Although the Statute does not

[110] See Judgement on the appeal of Mr. Thomas Lubanga Dyilo against decision of Pre-Trial Chamber I entitled 'Décision sur la demande de mise en líberté proviso ire de Thomas Lubanga Dyilo,' 13 February 2007, ICC-01/04-01/06-824; The Chamber also reviewed the conditions under which victims may participate in Appeal proceedings. This falls outside the scope of this paper; however, it is important to note that this Appeals Chamber decision found that victims do not have an automatic right to participate in Appeal proceedings and therefore must file an application explaining how their personal interests are affected. Interestingly, the dissenting opinion of judge Sang Hyun Song argues that victims should not need to file an application to participate in Appeals because such a right is granted to all participants, including victims.

[111] Request for Review of Detention, 6 June 2007, ICC-01/04-01/06-921.

[112] Lubanga Case, 29 January 2007, Transcription No. ICC-01/04-01/06-T-48-EN.

[113] Stahn, notes that victims may be interested in requesting measures for the purpose of forfeiture pursuant to Article 57(3)(e). See also Bitti, G. and H. Friman in Lee, *supra* note 19, at 470.

explicitly state that victims have a right to participate in these types of hearings, other Rules support the argument in favor of participation.

Because Rules 89 to 91 apply to Article 61 proceedings there is a presumption in favor of participation and that the manner and scope of participation is left to the judges' discretion. Under Rule 92(3) the Court is required to notify victims of confirmation hearings so that they can submit applications for participation in accordance with Rule 89.[114] The Lubanga case illustrates the numerous issues surrounding victim participation and the confirmation of charges process. This process caused a great deal of conflict between the interests of all court actors, including, once again between the judges and the prosecution. Prior to the confirmation hearing, there were numerous filings by the Prosecution, Defense and victims' representatives concerning which victims could participate (if at all) and the arrangements for participation. Ultimately, the Pre-Trial Chamber determined that four victims could participate.[115]

In a decision from 22 September 2006, the Pre-Trial Chamber concluded that victims could participate in the confirmation of charges hearing.[116] The victims would have the opportunity to make opening and closing statements, pursuant to Rule 89(1) and the victims' representatives would be able to request leave to intervene in the proceedings. However, their participation would be limited to the charges brought against Lubanga.[117] The victims' participation was also limited to (i) access to only the public documents in the record of the case against Lubanga (and not in the DRC situation); and (ii) presence at only the public hearings due to the fact that the victims wanted to participate anonymously (including status hearings and the confirmation of charges hearing).[118] The Court found that the fundamental principle prohibiting anonymous accusations would be violated if the victims were permitted to add any point of fact or evidence to the Prosecution's case file. To this end, the victims were neither permitted to question witnesses pursuant to Rule 91(3) nor eligible to give evidence or call witnesses. The Court noted that only if the victims agreed to disclose their identities to the Defense would the Chamber consider broadening their participatory rights in the case against Lubanga.

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[114] Stahn, *supra* note 20, at 235.

[115] The first is a woman whose one son was killed by another militia and her other son and nephew enlisted into the Union of Congolese Patriots (UPC). The two children were 10 and 11 years-old respectively. Both boys are still alive. The second is a father whose son was abducted with several of his classmates when still in the fourth year of primary school. The father took him out of the training camp and he is still alive. The third is also a father whose son was abducted by the UPC at the age of 12. A short while later his son's body, riddled with bullets, was at lying in front of his home. The fourth and final victim participant was recruited and used as a child soldier in the Ugandan People's Defense Force (UPDF) and later in the UPC.

[116] Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, 22 September 2006, ICC-01/04-01/06-462-tEN.

[117] Victims a/0001/06, a/0002/06 and a/0003/06 were given permission to participate in 22 June 2006; See Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the case *The Prosecutor v. Thomas Lubanga Dyilo*. Then on 20 October 2006, the Court granted victim-applicant a/0105/06 the right to participate in the confirmation hearing on the same terms as those granted to the three previous victim-applicants. See Decision on applications for participation in proceedings a/0004/06 to a/0009/06, a/0016/06, a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 in the case of The Prosecutor v. Thomas Lubanga Dyilo, 20 October 2006, ICC-01/04-01/06-601-tEN.

[118] Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, 22 September 2006, ICC-01/04-01/06-462-tEN.

The confirmation hearing, itself, was extensive. Numerous participants attended or took part, including nine individuals for the Prosecution, six for the Defense (including the suspect), six for victims (two were unable to make it to the initial hearing but attended subsequent proceedings), three judges, and one for the Registrar—not to mention Court personnel, translators and press. The proceedings, a first in international criminal law, lasted from 9 November 2006 to 28 November 2006. The topics argued over covered diverse issues ranging from disclosure obligations, evidentiary concerns, equality of arms and most importantly the alleged individual criminal responsibility of Lubanga. On 29 January 2007, Pre-Trial Chamber I confirmed the charges against Lubanga, sending his case to trial. The Chamber found sufficient evidence establishing substantial grounds to believe he is criminally responsible as a co-perpetrator for all three charges brought against him. The decision was 134 pages in length—far more than anyone expected.

On 5 February 2007, the Prosecutor sought leave to appeal the confirmation of charges decision on the basis that the Pre-Trial Chamber had substituted "internal armed conflict" war crimes under Article 8(2)(e)(vii) with "international armed conflict" war crimes under Article 8(2)(b)(xxvii).[119] The OTP argued that by factually changing the charges the Court was affecting the fairness of the proceedings because the Prosecutors would have the burden of proving that the specific crimes with which Lubanga is charged with fit into the international legal framework outlined by the Pre-Trial Chamber. As Katy Glassborow notes, "Legal precedent does exists to suggest the conflict in Ituri had an international dimension,"[120] however, the documents supporting an international context detail massacres and killing, rather than the specific act of child recruitment. Additionally, the Prosecution has not denied the substantial involvement of foreign troops in Ituri but they argue they do not have evidence connecting the foreign troops to Lubanga.

Despite the fact that the defense agreed that the Chamber should have requested the Prosecutor to modify the charges pursuant to the Statute, rather than just confirming different ones, duty counsel argued that the parties had been aware of the Chamber's position regarding the qualification of the conflict in the DRC. Nonetheless, the defense also noted that despite the factual qualifications made by the Pre-Trial Chamber, the Trial Chamber is only bound by the facts described in the charges and not by the Pre-Trial Chamber's qualifications.[121] This remark highlights the somewhat flippant attitude towards Pre-Trial Chamber observations, which the Prosecution will be only too happy to ignore. While some court observers find the Pre-Trial Chambers distinctions immaterial since the charges are basically the same, other groups have supported the Prosecution and have spoken out against the ruling. Sylvia de Bertodano from the International Bar Association said that the role of the Pre-Trial Chamber is clear—they are "either to confirm or not confirm the charges,

[119] Application for leave to Appeal Pre-Trial Chamber I's 29 January 2007 'Décision sur la confirmation des charges,' 5 February 2007, ICC-01/04-01/06-806.
[120] Katy Glassborow, *ICC Prosecutors Appeal Lubanga Ruling*, Institute for War & Peace Reporting, TU No 490, 23 February 2007.
[121] See Réponse à la Requête du Procureur du 5 février 2007 en autorisation d'interjeter appel de la Décision de la Chambre préliminaire I du 29 janvier 2007, 22 May 2007, ICC-01/04-01/06-913.

but not to change them."[122] Unlike in civil law systems were Pre-Trial Chambers typically have the power to re-write indictments, this power is not found either in common law systems or in the Statute and Rules of the ICC.

The representative for victims filed observations in response to both the Prosecution and defense applications seeking leave to appeal, asking the Court to reject both of them. In their response to the parties requests for leave to appeal the victims recognized that the issues raised by the Defense *did not directly concern* victims' participation. Nonetheless, the victims made a relatively weak argument, stressing that the requests for leave to appeal slowed down the proceedings thereby prejudicing victims' interests that justice be done.[123] Like the defense, the victims stressed that Trial Chamber would be able to rectify mistakes by the Pre-Trial Chamber, correct potential violations of the rights of accused or errors in law. Again, this approach highlights the almost dismissive attitude towards Pre-Trial Chamber findings.

In accordance with the wishes of the victims' representatives, on 24 May 2006, Pre-Trial Chamber I rejected both the Prosecutor and Defense's requests to appeal the confirmation of charges. Despite the fact that the Chamber could have allowed for an appeal, the Chamber remarked that the Statute intentionally excluded a direct right to appeal decisions confirming charges. Additionally, the Chamber found that authorization of such an appeal would cause avoidable delay affecting the rights of the accused. With the requests for leave to appeal rejected, Lubanga's case was referred to the Trial Chamber. The Trial Chamber was constituted on 6 March 2007 and will likely start proceedings in the fall of 2007.

VI. Conclusion

The establishment of the ICC in 1998 and its coming into operation in 2002 have been hailed by many as a major breakthrough—particularly in regards to victims' rights. The Statute, Rules and Regulations of the Court attempt to combine the auxiliary role for victims, common in adversarial systems, with a more central role for victims, often found in inquisitorial systems.[124] Victims' rights groups, who were largely responsible for the changes, welcomed the decisions by the drafters of the Rome Statute and Rules to allow victims a central role throughout the criminal trial process. They hope that the changes will mark a positive step forward towards restorative justice. However, it is far from clear whether the structural innovations presented by active participation will benefit the victims, infringe upon the rights of accused, jeopardize prosecutorial discretion, or hamper the functioning of the Court.

For example, there are legitimate concerns that the Court's Statute and Rules create unreasonable expectations on the part of victims. With limited resources, it is uncertain whether the Court's unprecedented mandate for victims can be fulfilled. This paper recognizes the importance and complexity of implementing victim participation at the ICC, yet it is crucial that assessments be made. In terms of bottom-line results, the victim participation endeavor has been both a success—albeit

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[122] Katy Glassborow, *ICC Prosecutors Appeal Lubanga Ruling*, Institute for War & Peace Reporting, TU No 490, 23 February 2007.

[123] Réponse à la demande de la Défense en autorisation d'interjeter appel de la Décision de la Chambre Préliminiare I du 29 janvier 2007, 26 February 2007, ICC-01/04-01/06-839.

[124] Fernández de Gurmendi in Lee, *supra* note 19, at 256.

a qualified one, and a headache—albeit not a disaster. In reviewing the increasing number of motions and decisions dealing with victim participation a number of things are clear: (1) victims have the right to participate in all stages of proceedings including during the investigative phase of a situation; (2) for the time being, the Prosecution will continue to argue against victim participation during the investigation phase of a situation and fight to retain prosecutorial discretion; (3) the judges want to keep tight control over the proceedings; (4) the judges are not willing to let many of their novel decisions be reviewed by the Appeals Chamber much to the detriment of the development of international law;[125] and (5) the defense will struggle, even more than in previous tribunals, to devote enough resources to respond to victim participants. In addition to those five points, the pre-trial proceedings indicate that victims' rights found in the Statute and Rules have a variety of potential interpretations creating increased tensions between all participants.

At trial it is expected that there will be a great deal of confrontation between the Prosecutor and the defense. That is that nature of largely adversarial proceedings. However, now that the ICC has began to include more civil law elements in its proceedings new tensions are arising, namely between the Prosecutor and victims, the Prosecutor and the judges and the defense and victims. The pre-trial proceedings, themselves a product of civil law jurisdictions, have highlighted these new tensions.

Due to the novelty of the pre-trial stage at the international level it is not surprising that the judges were, to some extent, trying to flex their muscles in the new Court. They are in a position which sets the stage for future proceedings and they appear to recognize their increased powers in comparison to other tribunals. Some have commented that the increased power of judges comes from a decrease in powers of the Prosecutor. In response, former Pre-Trial Judge, Claudio Jorda, commented in an interview that "It is not a shift, but a rebalancing of power [between the Prosecution and Judges]. I would not say that the ICC prosecutor is supervised, but that his work is monitored."[126] In addition to his splitting of hairs, he further stated that the major innovation at the ICC lied in the role of the Pre-Trial judge, indicating awareness on the part of the judges of their increased authority.[127] While many important legal rights and limitations pertaining to victim participation were laid out in the Statute and Rules, implementing those provisions has proven a challenge for the young Court and for judges interpreting the provisions. Two of the most important implications of victim participation facing the Court are (1) the growing number of victim-applicants (over 400 have applied to participate), and (2) inconsistent rulings by various Pre-Trial Chambers.

In regards to the increasing number of applicants, Judge Pillay from the ICTY forewarned, "The Court is neither designed nor in a position to act as a public forum or claims commission for thousands of individual communications from victims of

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[125] See Decision on Defense Motion for Leave to Appeal, 18 August 2006, ICC-01/04-01/06-338; The Pre-Trial Chamber rejects the Defense application for leave to appeal the Pre-Trial Chamber's decision granting victims a/0001/06, a/0002/06 and a/0003/06 the right to participate in the Lubanga case and DRC situation despite the fact that the Prosecution supported the defense application to appeal.
[126] International Justice Tribune, ICC in 2006: Year One, [hereinafter Year One] ICT Series, p. 64.
[127] Year one, *supra* note 125, at 65.

each situation."[128] And yet, despite Pre-Trial Chamber decisions limiting participation, that is exactly what the Court must continue to guard against. Sam Garkawe comments, "the ICC must attempt to strike a balance between a number of legitimate objectives."[129] The fair trial rights of the accused, the right of victims to participate in proceedings where their personal views are affected and a workable court procedure are the objectives he outlines. Two ways for the Court to deal with increased victim participation is (i) to restrict the number of victim participants and (ii) to place limits on the degree or scope of participation. To date, the judges have done an excellent job of limiting the actual number of victim participants, taking care that their involvement does not disrupt the proceedings. Unfortunately, for participants the decisions handed down by the various Pre-Trial Chambers are not always consistent. The fact remains: different judges, from different backgrounds, must rule in different cases and situations on similar issues concerning victim involvement. It is inevitable that decisions will vary, but the Court should take care to minimize the differences wherever possible. One way in which to do this is to allow the parties to appeal novel or contentious decisions. The Appeals Chamber, arguably, is in a better position to ensure consistent decisions throughout the Court on major issues affecting victim participation.

Like the judges the Prosecution is also marking its territory. The prosecutor represents interests broader than those of the victim and at times this causes conflicts between the OTP and other participants. During this pre-trial stage there are two important implications for the Prosecution: (1) retaining prosecutorial discretion and (2) dealing with the practical realities of victim involvement. To this end, the OTP has shown continued reluctance in yielding to victim participation in a situation hoping that at least one Pre-Trial Chamber will side with its arguments. Nevertheless, the OTP has also continued to voice its support of victim participation.

While both the judges and prosecutors vie for authority the defense and victims continue to fight for their rights—which at times are competing. Barbara Bedont comments that, "It is no coincidence that Article 68 appears after the main article laying out the rights of the accused. The point is that the two considerations must be balanced in order to achieve a fair trial. A trial which re-traumatizes witnesses [and victims] and prevents a proper presentation of inculpatory evidence is just as unfair as a trial in which the accused is prevented from putting forward a proper defense. Thus the two articles 67 and 68 must be considered together."[130] The Pre-Trial Chamber, pursuant both to Article 68 and 67, attempts to provide equitable justice for all participants, but whether such equity can (or should) be achieved is yet to be seen.

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[128] Stahn, *supra* note 20, at 223; See on this issue a letter from the then President of the ICTR, Judge Navanethem Pillay, to the United Nations Secretary General addressing the issue of whether the task of processing and determining claims concerning the compensation of victims should not be left to international tribunals, where she stated that any such proposal 'would not be efficacious, would severely hamper the everyday work of the Tribunal and would be highly destructive to the principal mandate of the Tribunal' (annex to a letter of the UN Secretary General to the Security Council dated 14 December 2000, UN doc. S/2000/1198).

[129] Sam Garkawe, *Victims and the International Criminal Court: Three Major Issues*, 3 International Criminal Law Review, 345, 359 (2003).

[130] Donat-Cattin, *supra* note 21, at 877, citing Barbara Bedont, *Internal Report on the Diplomatic Conference of the International Center for Human Rights and Democratic Development*.

A fundamental issue facing defense teams is the lack of resources to conduct a proper defense. In addition to the usual budgetary concerns of a defense team, defense teams at the ICC must spend time and resources on observations of victim applications, preparation for victims' participation during proceedings and responses to every observation submitted by victim participants. In its response to victims' applications to participate in the appeal against the confirmation of charges in the Lubanga case, duty counsel, Annick Mongo, expressed real concern about the overly general nature of the requests to participate at all stages of proceedings. She cautioned against the Chambers allowing victims to intervene as third parties in the proceedings—a status not granted under the Statute. She argued that victims should be limited in the participation to concerns dealing with reparations. She further argued that since victims' interests only centered on reparations, and reparation issues only arise during the trial stage, victims' participation should not take place in the pre-trial stage and certainly not in an appeal at the pre-trial stage. Finally, she emphasized the fact that victim participation delayed proceedings and placed an additional burden on an understaffed and under-supported defense. And the number of participants is growing. The struggles to find time, resources and staff to deal with victim issues alone will severely damage the functioning of a defense team; not to mention to actual work of mounting a defense in an international criminal court.

How can the inherent problems of victim participation at this early stage be dealt with? Jérôme de Hemptinne and Francesco Rindi conclude that the many drawbacks of early victim participation could be curtailed if the Pre-Trial Chamber were vested with effective investigative powers as those found in most civil law jurisdictions.[131] They correctly note that "the question of victims' participation in the investigation stage is intrinsically intertwined with the powers of the Pre-Trial Chamber vis-à-vis those of the Prosecutor," and argue that if the investigative powers of the Pre-Trial Chamber increased the participation of victims would become more easily controlled.[132] They assert that when the judges collect the evidence themselves they automatically become better suited to knowingly access the relevance of the victims' participation. This line of reasoning, however, only highlights a number of problems. First, it suggests that the Prosecutor's representations to the Court are in the least unreliable and at the most untrustworthy—and that only judges can truly be independent. Second, it places far too much control in the hands of international judges, for which there is little evidence that they have the competence or the independence to carry out such oversight. Finally, it overlooks the basic set up of the "balance" of power between the judges and the Prosecutor at the Court. The best way to ensure a clear framework of victim participation that is understood and acceptable to all participants is to allow more novel decisions concerning victim participation to reach the Appeals Chamber. The Appeals Chamber is in a better position to make consistent and persuasive rulings. The expectations around the Court are immense. The Court must do a better job at addressing the tensions between participants and issues arising from victim participation if this endeavor is to prove viable.

[131] Hemptinne, *supra* note 76, at 349.
[132] Hemptinne, *supra* note 76, at 349.

Joint criminal enterprise responsibility as a means to address collective criminality: problems and prospects

Mikaela Heikkilä*

1. Introduction: Collective Criminality and the Special Problems This Type of Criminality Poses to Criminal Justice Systems

International crimes, such as genocide, crimes against humanity and war crimes, represent a special kind of criminality. These crimes are often committed as part of collective endeavors, by members of organizations or groups. The societal background of the crimes is generally armed conflicts or totalitarian societies. State involvement in or condoning of the crimes is not unusual.

The fact that the international crimes often are committed through organized structures of power, such as the police and the military,[133] poses special problems for criminal law. First, when crimes are committed by members of collectivities, the attribution of individual criminal liability is often difficult. The crime may be the result of numerous individual contributions. The tasks may be divided both *horizontally* between peers and *vertically* between superiors and subordinates. For example, when there is a persecutory campaign against a minority group, it is common to find both high- and mid-level political and military leaders who have initiated and coordinated the persecution and low-level, hands-on criminals who *de facto* have committed assaults and other crimes against individual members of the persecuted group. For criminal law, the challenge is to find a theory of liability that can *connect* the various individual participants to the crime and *accurately capture the role* of individual participants in the crime commission.[134] The difficulty lies often in connecting influential leaders to the crime.

The second major challenge of international criminal law is the lack of timely collected, forensic evidence. State involvement in the crimes and the societal chaos situations in which the crimes are committed usually mean that evidence has not been secured by crime scene investigators immediately after the crimes have been committed. Evidence by victims and other eye witnesses therefore plays a special role in international criminal trials. Due to the collective nature of the crimes, evidence on the distribution of tasks and hierarchical structures is also needed. This type of evidence can be very difficult to obtain, especially if no members of the collectivities agree to share light on the structures. It should also be noted that especially in network-type of collectivities, the connections between various individuals can be highly informal and unsystematic.[135] Formal chains of command may be lacking, as

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[133] Olásolo & Pérez Cepeda 2004, p. 475.

[134] Gustafson 2007, p. 136.

[135] Osiel 2005b, p. 1834.

well as explicit orders.[136] In these situations, it may even be difficult for members of the collectivity to define the exact role of other members, let alone for outsiders.

When criminal courts deal with cases of international crimes, they thus usually face the strenuous task of trying to establish the role played by an individual in a collective action with deficit evidence. The challenges faced by the international criminal tribunals are especially significant, as these tribunals try to establish the criminal responsibility of the "most serious-level persons accused of the most serious crimes"[137] with various financial and temporal limitations. The International Criminal Tribunal for the Former Yugoslavia (hereinafter, Yugoslavia Tribunal), for example, has been criticized for its expensive, time-consuming trials, which has led to the adoption of a completion strategy for the tribunal. The tribunal is supposed to finish all trial activities at first instance by the end of 2008 and all of its work in 2010.[138] Taking into account the type of cases the international criminal tribunals deal with, the length or costs of the trials are, however, not that surprising.

In this paper, the way in which the Yugoslavia Tribunal has used the doctrine of joint criminal enterprises (JCE) as a means to tackle the special challenges posed by the special characteristics of international crimes will be investigated and evaluated. Participation in a joint criminal enterprise has by the tribunal been identified as a possible *mode to commit the international crimes*, that is, the tribunal has used the doctrine to attribute criminal responsibility to individuals. The doctrine has been praised for its ability to connect remote leaders with physical perpetrators, as well as for the way in which the doctrine illuminates the collective nature of the crimes prosecuted.[139] At the same time, however, the doctrine has been criticized for conflicting with central criminal law principles, such as the principle of individual culpability. According to the principle of individual culpability, for criminal responsibility to be justified an individual must generally have behaved unlawfully either intentionally or recklessly. What is required is thus both a certain blameworthy (a) behavior and (b) state of mind. The principle of individual culpability means that individuals should only be held criminally responsible for their own doings and not-doings. For example, guilt by association is incompatible with the principle of individual culpability.

More concretely, the paper is structured so that the background and current case law on the joint criminal enterprise doctrine will be presented in the following two chapters. Due to the limited scope of the paper, the background part of the chapter will be very short and the case law part limited only to the case law of the Yugoslavia Tribunal. It should, however, be noted that judgments and/or indictments issued by,

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[136] It has been noted that in some organizations *influence* is more significant than explicit *power*. Lippens 2001, p. 320 (referring to Heckscher). In this regard, Osiel has observed that: "[..., The] nominal commander greatly influences the behavior of others without completely controlling it. This is especially true when he offers them incentives rather than punishment, carrots rather than sticks, as by tacitly authorizing looting and pillaging. Control can be highly fluid. It ebbs and flows over time, between one location and another, depending on many factors, not least the degree to which combat with adversaries disrupts lines of authority and communication." Osiel 2005, p. 795.
[137] UN Doc. A/61/271, p. 3.
[138] See e.g., UN Doc. S/2002/678 and UN Doc. S/RES/1503 (2003).
[139] E.g., Gustafson 2007, pp. 137 and 139, and van der Wilt 2007, p. 92.

for example, the International Criminal Tribunal for Rwanda,[140] the Special Court for Sierra Leone[141] and the Special Panel for Serious Crimes of the District Court of Dili, East Timor[142] have contained references to the doctrine. After the presentation of the doctrine, its usefulness and flaws will be discussed. As the theme of the workshop is the issue of gravity in international criminal law, some thoughts will also be put forward regarding gravity considerations and enterprise responsibility.

2. Various Modes of Participation in International Crimes and Traditional Means to Address Complex Cases

It is not only international crimes that are committed by members of collectivities. Criminal cliques rob jeweler's shops, youth gangs commit assaults, etc. Criminal law is thus not unfamiliar with multiple participants in crimes. In these crimes with multiple participants, all participants may play the same role in the crime commission or there may be a division of labor between the different participants. The various legal systems in the world, however, differ in how they label and categorize the participants with different roles. In this regard, a difference is often made between legal systems that adhere to the unitary perpetrator model and systems that apply to the differential participation model.

In the *unitary perpetrator model* (or the *equivalence theory*), every person who contributes to the carrying out of a crime in whatever way and degree is regarded as a perpetrator or principal, that is, no distinctions are made between different types of actors at the judgment stage.[143] This does not, however, mean that all participants are sentenced equally. In legal systems that apply the *differential participation model*, on the other hand, a difference is made between different types of actors already at the judgment stage. The central distinction is often that between perpetrators and accomplices. For accomplice responsibility to actualize, the criminal act of the accomplice must be connected to the principal act of the perpetrator(s), that is, accomplice responsibility is by its nature *derivative* or *secondary* liability.[144] The rationale behind this model is that the causal contributions of different individuals can be so different in weight and closeness to the accomplishment of the crime that it would be unjust to treat all persons involved in the same way. In practice, the employment of the differential participation model is therefore usually reflected in that different modes of participation are sanctioned differently.[145] It can be said that international criminal law mainly follows the differential participation model, as a

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[140] E.g., *Karemera et al*. Decision on Jurisdictional Appeals: Joint Criminal Enterprise (12 April 2006), *Mpambara* Trial Judgment (11 September 2006), par. 13-15, *Ntakirutimana & Ntakirutimana* Appeal Judgment (13 December 2004), par. 468 and 484, *Rwamakuba* Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide (22 October 2004) and *Simba* Judgment (13 December 2005), par. 385 ff.

[141] E.g., *Fofana & Kondewa* Judgment (2 August 2007), par. 206-219 and *Sesay, Kallon & Gbao* Indictment (2 August 2006), p. 8.

[142] E.g., *De Deus* Judgment (12 April 2005), p. 13 and *Perreira* Judgment (27 April 2005), pp. 19-20.

[143] E.g., Eser 2002, p. 781, Fletcher 1998, p. 189 and Olásolo & Cepeda 2004, p. 482. Olásalo and Cepeda mention as examples of this model Italy and Austria. Olásolo & Cepeda 2004, p. 482.

[144] See, e.g., Eser 2002, p. 783 and Fletcher 1998, p. 194. E.g., Germany and Spain apply the differential participation model. Vogel observes that the distinction between perpetrators and accomplices has traditionally been based on subjective elements (e.g., the intention). He notes that today more and more objective criteria are used. (e.g., the significance of the contribution and the individual position of the contributor). Vogel 2002.

[145] Eser 2002, p. 782.

difference is made between various participation modes in the crimes. The Statute of the Yugoslavia Tribunal, for example, makes a difference between those who plan, instigate, order, commit or otherwise aid and abet the planning, preparation or execution of a crime (Article 7(1)). In the case law of the tribunal, a difference is also often made between perpetrators and accomplices. No explicit sentencing ranges are, however, connected to the different perpetration or participation modes.[146]

In comparison to most domestic legal systems, the system of attribution of criminal liability in international criminal law is not very refined.[147] Due to the special characteristics of international crimes, the theories used in domestic settings are furthermore often not directly applicable at the international arena. Ambos has, for example, noted that the crime elements of the international crimes require that both a context element and the underlying offense are attributed to an individual.[148] As regards the different modes of participation, the legal elements of certain participation forms are rather straightforward (for example, the legal meaning of "physically committing" or "ordering"). In practice, the international criminal tribunals that mainly deal with high-level accused persons are, however, often barred from using this kind of "simple" participation modes due to the circumstances of the cases. In many cases, there is no evidence that the defendants have themselves physically committed the crimes, nor that they have given explicit orders to do so (hereinafter, "complex cases"). The traditional[149] means of international criminal law to address this kind of complex cases have been: (1) conspiracy liability; (2) liability for membership in a criminal organization; and (3) superior responsibility. When individuals are convicted according to these liability theories, they are convicted as *perpetrators*. According to customary international criminal law, it may also be possible to convict participants in international crimes as aiders and abettors, that is, as *accomplices*. As accomplice liability, however, according to the differential participation model, is a secondary participation form that should yield milder sentences, this liability form has not been found suitable to deal with non-physical perpetrators, who have been influential for the crime commission. Aid and abettor

[146] See e.g., Cassese 2003, p. 180 and Eser 2002, p. 788. Interesting to note is that Judge Schomburg has argued: "On a more general note, I wish to point out that it would have been possible to interpret Article 7(1) of the Statute as a monistic model of perpetration (*Einheitstäterschaft*) in which each participant in a crime is treated as a perpetrator irrespective of his or her degree of participation. Such an approach would have allowed the Prosecution to plead Article 7(1) of the Statute in its entirety without having to choose a particular mode of participation. In that case, the Judges would have been able to assess the significance of an accused's contribution to a crime under the Statute at the sentencing stage, thereby saving the Tribunal the trouble of developing an unnecessary participation doctrine. Unfortunately, the Tribunal's jurisprudence has come to distinguish on a case by case basis between the different modes of liability." *Simić* Appeal Judgment (28 November 2006), Dissenting Opinion of Judge Schomburg, par. 11.

[147] E.g., Ambos 2006, p. 660.

[148] See Ambos 2006, pp. 662-664. In genocide, for example, the context element is that the underlying offense is committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. The underlying offense can be, for example, killing members of the group.

[149] The word "traditional" here primarily refers to the war crime trials following World War II. The Statute of the International Military Tribunal at Nuremberg (hereinafter "Nuremberg Tribunal") e.g. put forward that: "Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan" (Article 6). The statute also declared membership in a criminal organization criminal (Article 10).

responsibility is thus thought to understate the degree of criminal responsibility in these cases.[150]

In a *conspiracy*, it must be shown that several individuals have agreed to commit a certain crime. The central element of this form of liability is thus the agreement to commit the crime. In common law legal systems, where conspiracy is regarded as an inchoate crime, the crime itself must not materialize. In civil law legal system, on the other hand, mere agreements to commit crimes are very rarely criminalized. Generally, the materialization of the crime itself is required for criminal responsibility.[151] In international criminal law, the conspiracy provisions have been construed narrowly by the post-World War II tribunals, which *de facto* required that the crimes in question had been committed,[152] and more broadly by the Yugoslavia and Rwanda Tribunals, which have followed the common law approach to conspiracy.[153] It should, however, be noted that it is only in relation the crime of genocide that conspiracy liability today is found applicable. The abandonment of a general conspiracy liability is probably due to the civil law lawyers' great suspicion towards the common law conspiracy doctrine. Especially in situations where the conspiracy liability has been broadened to cover all reasonably foreseeable crimes that fall within the scope of the conspiracy (the Pinkerton doctrine), the liability for making a criminal agreement can be very extensive. The survival of the conspiracy liability in relation to genocide, on the other hand, can be explained with the explicit criminalization of such conspiracies in the *Convention on the Prevention and Punishment of the Crime of Genocide.*[154]

Article 10 in the Charter of the Nuremberg Tribunal established that: "In cases where a group or organization is declared criminal by the Tribunal, the competent national authority [...] shall have the right to bring individual to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned." This criminal responsibility for *membership in a criminal organization* was from the outset controversial.[155] Read literally, the provision would have permitted the conviction of large segments of the population with mere evidence on membership. The Nuremberg Tribunal itself recognized this and noted that the application of the provision may produce great injustice unless properly safeguarded.[156] The Tribunal therefore concluded that:

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[150] E.g., *Tadić* Appeal Judgment (15 July 1999), par. 192. See also e.g., Osiel 2005, p. 806.
[151] E.g., Cassese 2003, p. 197 and Schabas 2000, pp. 259-260.
[152] E.g., Cassese 2003, p. 197 (referring to *Göring and Others* and *Alstötter and Others*) and Schabas 2000, p. 262 (referring to *France et al. v. Goering et al.*)
[153] The Yugoslavia Tribunal, e.g., *Milutinović et al.* Appeal Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise (21 May 2003), par. 23. The Rwanda Tribunal, e.g., *Musema* Trial Judgment (27 January 2000), par. 190-194
[154] Convention on the Prevention and Punishment of the Crime of Genocide, Article 3(b), ICTY Statute, Article 4(3)(b) and ICTR Statute, Article2(3)(b). The ICC Statute does not contain the liability form of complicity in genocide. See e.g., Mettraux 2005, pp. 202-203 and 252-254, and Schabas 2000, p. 259-266.
[155] E.g., Schick 1947, p. 787.
[156] Nuremberg Judgment 1946, p. 250 (in the reprint in the *American Journal of International Law*, Volume 41, Issue 1).

> A criminal organization is analogous to a criminal conspiracy in that the essence of both is cooperation for criminal purposes. There must be a group bound together and organized for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the Charter. Since the declaration with respect to the organizations and groups will [...] fix the criminality of its members, that definition should exclude persons who had no knowledge of the criminal purposes or acts of the organization and those who were drafted by the State for membership, unless they were personally implicated in the commission of acts declared criminal [...] as members of the organization. Membership alone is not enough to come within the scope of these declarations.[157]

The tribunal's criminalization of membership in Gestapo therefore, for example, excluded persons employed by the Gestapo for purely clerical, stenographic, janitorial and similar unofficial routine tasks, and it required that the members that could be convicted became or remained members of the organization with knowledge that it was being used for the commission of acts declared criminal by the Nuremberg Charter or were personally implicated as members of the organizations in the commission of such crimes.[158] The Nuremberg Tribunal thus rejected a broad membership liability, and replaced it with a more limited one. Despite this, liability for membership in a criminal organization is generally regarded as a form of guilt by association, and it is as such found to violate the principle of individual culpability of criminal law.

Finally, the rationale behind *superior responsibility* is that superiors have an obligation to act in certain situations, and if they do not, they may be punished for their *omission*. For a superior to be criminally responsible for crimes perpetrated by his subordinates, three requirements must be met: (1) there must exist a superior-subordinate relationship; (2) the superior knew or had reason to know that the superior was about to commit such crimes or had done so; and (3) the superior failed to take the necessary and reasonable measures to prevent such crimes or to punish the perpetrators thereof.[159]

Of the three traditional means to address complex cases, conspiracy and membership in a criminal organization have been found problematic due to wide nets of criminal responsibility they cast and have for this reason largely been abandoned in modern international criminal law. The doctrine of superior responsibility has survived, but it is a doctrine with strict requirements and hence limited applicability. The doctrine is, for example, completely unsuitable for addressing crimes committed by members of non-vertical organizations or organizations with no clear command structures.[160] Faced with the need to find an alternative attribution theory for complex cases, which would result in *perpetrator* responsibility, the Yugoslavia Tribunal turned towards the post-World War II and national war crimes case law and argued for the existence of a responsibility based on *participation in a joint criminal enterprise*. In essence, the joint criminal enterprise doctrine is therefore an attribution theory *deduced* by the

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[157] Nuremberg Judgment 1946, p. 251.
[158] Nuremberg Judgment 1946, pp. 261-262.
[159] E.g. *Aleksovski* Appeal Judgment (24 March 2000), par. 72.
[160] O'Rourke 2006, p. 310.

Yugoslavia Tribunal from a series of *ad hoc* decisions. The precedence value of some of these cases has been put in question,[161] but the Yugoslavia Tribunal has systematically upheld its view that the international and national case law support the existence of its joint criminal enterprise doctrine. According to the tribunal, joint criminal enterprise responsibility is a responsibility form clearly distinguishable from conspiracy responsibility and membership in a criminal organization responsibility.[162] Some scholars have, however, underlined that this theory strongly resembles the above mentioned theories,[163] and hence is plagued with the same type of problems as its predecessors. The content of the joint criminal enterprise doctrine and its problems will be addressed below.

3. The Yugoslavia Tribunal's Case Law on Joint Criminal Enterprise Responsibility

3.1. The Ground-Breaking Appeal Judgment in the *Tadić* Case

The *Tadić* Appeal Judgment from July 1999 is generally regarded as the starting-point of the Yugoslavia Tribunal's extensive joint criminal enterprise case law, even though some indications of the tribunal's recognition of the doctrine's existence can be seen in earlier cases.[164] In the *Tadić* case, it was evident that the accused, Duško Tadić, had participated in a raid, which resulted in the killing of the five men from Jaskići. There was, however, no evidence that he had personally killed any of them. The central question the Appeals Chamber wanted to answer was therefore whether the acts of one person can give rise to the criminal culpability of another where both participate in the execution of a common criminal plan.[165]

With references to international and domestic case law, the object and purpose of the tribunal's statute,[166] and the nature of the international crimes,[167] the Appeals Chamber concluded that participation in a joint criminal enterprise is an internationally established mode of participation in international crimes.[168] More concretely, the tribunal viewed participation in a joint criminal enterprise as a form of

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[161] E.g., Marston Danner & Martinez 2005, pp. 110-112, Ohlin 2007, pp. 75-76, Powles 2004, pp. 615-617 and Ramer 2007, pp. 55-56.

[162] *Milutinović et al.* Appeal Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise (21 May 2003), par. 23 and 25-26.

[163] E.g., Ambos 2007, p. 168, Bogdan 2006, pp. 112-115 and van der Wilt 2007, p. 97.

[164] Regarding the early case law, see *Čelebici* Trial Judgment (16 November 1998), par. 322 and 328, *Čelebici* Appeal Judgment (20 February 2001), par. 366 and *Furundžija* Trial Judgment, (10 December 1998), par. 216.

[165] *Tadić* Appeal Judgment (15 July 1999), par. 185.

[166] Here, it is interesting to note that the Appeals Chamber in a later case has argued: "[The] Appeals Chamber rejects the teleological argument by the Prosecution that the Tribunal should endorse the doctrine of joint criminal enterprise because it would allow the Tribunal "to prosecute and punish those who participate in international crimes as leaders and not only as subordinates." [...] Such policy considerations are inapposite as a basis for a theory of individual criminal responsibility." *Brđanin* Appeal Judgment (3 April 2007), par. 421.

[167] E.g., Ohlin has criticized the idea that the doctrine of joint criminal enterprise can be deduced from the nature of the criminal activity. Ohlin 2007, p. 74.

[168] *Tadić* Appeal Judgment (15 July 1999), par. 189, 191,193, 220, 224 and 226. The *Tadić* Appeal Chamber also made references to the *International Convention for the Suppression of Terrorist Bombing* and the *Statute of the International Criminal Court*, which include provisions on responsibility for contribution to the commission of one or more offences by a group of persons acting with a common purpose. *Tadić* Appeal Judgment (15 July 1999), par. 221-222.

committing the crime, which in Article 7(1) of the tribunal's statute is mentioned as a punishable form of perpetrating the crimes.[169]

Besides identifying the sources of the doctrine, the Appeals Chamber also in detail put forward the elements of the doctrine. More concretely, the Appeals Chamber identified three different forms of joint criminal enterprise participation and put forward the legal elements of these enterprise participation forms. The three joint criminal enterprise forms the Appeals Chamber identified are generally called: (1) the basic form/JCE I; (2) the systemic form/JCE II; and (3) the extended form/JCE III. These enterprise forms will below be analyzed one by one, so that the common objective/*actus reus* elements of all three enterprise forms will be analyzed first.

3.2. The Objective Elements of the Joint Criminal Enterprise Responsibility

In the *Tadić* case, the Appeals Chamber put forward that the objective elements of joint criminal enterprise responsibility are: (1) a plurality of persons; (2) the existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the statute; and (3) participation of the accused in the common design.[170] All three objective elements have been reaffirmed in numerous later cases.[171]

As regards the requirement of a *plurality of persons*, the Appeals Chamber has established that this plurality need not be organized in a military, political or administrative structure.[172] In order to show that there is such a plurality of persons, it must simply be shown that there are two or more individuals, who share a *common purpose* and *act together or in concert with each other* to implement this purpose.[173] In relation to this, the Trial Chamber in the *Krajišnik* case notes that: "a common objective alone is not always sufficient to determine a group, as different and independent groups may happen to share identical objectives."[174] The fact that also collective *action* is required is also underlined by the fact that for joint criminal enterprise responsibility convictions, a crime must in fact have been committed.[175] Regarding the plurality of persons it should, however, be noted that whereas some judgments and decisions of the tribunal suggest that the identities of the other enterprise participants should *if possible* be identified,[176] generally the case law of the

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[169] *Tadić* Appeal Judgment (15 July 1999), par. 188. See also e.g., *Milutinović et al.* Appeal Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise (21 May 2003), par. 31

[170] *Tadić* Appeal Judgment (15 July 1999), par. 227.

[171] E.g., *Kvočka et. al.* Appeal Judgment (28 February 2005), par. 81, *Stakić* Appeal Judgment (22 March 2006), par. 64 and *Vasiljević* Appeal Judgment (25 February 2004), par. 100.

[172] *Tadić* Appeal Judgment (15 July 1999), par. 227. The relationship between the individuals may thus be both horizontal and vertical. Cf. *Stakić* Trial Judgment (31 July 2003), par. 552. In this respect, joint criminal enterprise responsibility diverges from superior responsibility, which requires a vertical relationship between the superior and the subordinate.

[173] *Stakić* Appeal Judgment (22 March 2006), par. 69. See also *Krajišnik* Trial Judgment (27 September 2006), par. 884.

[174] *Krajišnik* Trial Judgment (27 September 2006), par. 884.

[175] *Milutinović et al.* Appeal Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise (21 May 2003), par. 23.

[176] *Brđanin* Appeal Judgment (3 April 2007), par. 430, *Krnojelac* Appeal Judgment (17 September 2003), par. 116 and *Simić* Appeal Judgment (28 November 2006), par. 22. See also *Krnojelac* Decision on Form of Second Amended Indictment (11 May 2000), par. 16, *Talić* Decision on Objections by

tribunal has not required the identification of other members of the plurality,[177] including the physical perpetrator of the crime. In fact, it is even not a requirement of joint criminal enterprise responsibility that the *physical perpetrator* is a member of the enterprise. In the *Brđanin* case, the Appeals Chamber namely argues that: "what matters [...] is not whether the person who carried out the *actus reus* of a particular crime is a member of the JCE, but whether the crime in question forms part of the common purpose"[178] According to the Appeals Chamber, to hold a member of a enterprise responsible for crimes committed by non-members, it has to be shown that the crime can be imputed to one member of the enterprise, and that this member – when using a principal perpetrator – acted in accordance with the common plan.[179]

The central characteristic of joint criminal enterprise responsibility is, however, the *common plan, design or purpose* (hereinafter "common purpose"), which knits together the different actors in the crime. This common purpose does not have to be previously arranged or formulated.[180] It may materialize extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.[181] In some cases, the question has been actualized whether the arrangement or understanding has to amount to an *agreement*, or more specifically, an *express agreement to commit a specific crime*. Some judgments of the Yugoslavia Tribunal suggest the existence of such a requirement,[182] but the Appeals Chamber has rejected this additional requirement.[183] It is thus enough that the individual crimes form part of the common criminal purpose (the extended enterprise form excluded).[184]

When joint criminal enterprise responsibility is applied, a central question is therefore how the enterprise is defined, that is, which crimes form part of the enterprise and which do not. In the *Tadić* case, the Appeal Chamber concluded that the common

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Momir Talić to the Form of the Amended Indictment (20 February 2001), par. 21 and *Brđanin* Trial Judgment (1 September 2004), par. 346.

[177] Haan 2005, p. 182. See also e.g., *Krajišnik* Trial Judgment (27 September 2006), par. 1086.

[178] *Brđanin* Appeal Judgment (3 April 2007), par. 410. The Appeals Chamber further argues that: "In cases where the principal perpetrator of a particular crime is not a member of the JCE, this essential requirement may be inferred from various circumstances, including the fact that the accused or any other member of the JCE closely cooperated with the principal perpetrator in order to further the common criminal purpose. In this respect, when a member of the JCE uses a person outside the JCE to carry out the *actus reus* of a crime, the fact that the person in question knows of the existence of the JCE – without it being established that he or she shares the *mens rea* necessary to become a member of the JCE – may be a factor to be taken into account when determining whether the crime forms part of the common criminal purpose. However, this is not a *sine qua non* for imputing liability for the crime to that member of the JCE." *Brđanin* Appeal Judgment (3 April 2007), par. 410. Earlier case law of the tribunal, however, seems to establish that, in the basic form of enterprises, the accused person and the physical perpetrator must share the same criminal intent. E.g., *Krnojelac* Appeal Judgment (17 September 2003), par. 83-84, *Tadić* Appeal Judgment (15 July 1999), par. 220 and *Vasiljević* Trial Judgment (29 November 2002), par. 64 and 68.

[179] *Brđanin* Appeal Judgment (3 April 2007), par. 413.

[180] *Tadić* Appeal Judgment (15 July 1999), par. 227.

[181] *Tadić* Appeal Judgment (15 July 1999), par. 227.

[182] E.g., *Brđanin* Trial Judgment (1 September 2004), par. 344 and 347. See also e.g., *Krnojelac* Trial Judgment (15 March 2002), par. 80 and *Vasiljević* Trial Judgment (29 November 2002), par. 66 and 208.

[183] *Brđanin* Appeal Judgment (3 April 2007), par. 418 and *Krnojelac* Appeal Judgment, par. 96-97 (regarding the systematic form of enterprises). See also e.g., *Kvočka et. al.* Appeal Judgment (28 February 2005), par. 118. The express agreement requirement has also been criticized by legal scholars. E.g., Gustafson 2007, pp. 134 and 145.

[184] *Brđanin* Appeal Judgment (3 April 2007), par. 418.

purpose must amount to or involve the commission of a crime.[185] In practice, the enterprise may be identical to the *actus reus* of a single international crime or wider.[186] In many cases before the Yugoslavia Tribunal, the common criminal purpose has been defined in terms of persecution and/or forcible transfer of certain segments of the population in/from a certain region[187] or the running of camps in which atrocities have been committed.[188]

In the legal doctrine, it has been found problematic that the enterprises can be defined in so many different ways, and that the enterprises may be everything from small-scale mob violence to nation-wide genocides.[189] Furthermore, legal certainty is reduced due to the frequent possibility to identify more than one enterprise simultaneously. For example, the Nazi regime may be defined as a joint criminal enterprise and a concentration camp as a subsidiary enterprise to this large enterprise.[190] Depending on how the enterprise is defined in a case, the numbers of criminally liable participants in the enterprise may vary considerably. The Yugoslavia Tribunal has, however, *not* wanted to limit the enterprises to, for example, small-scale enterprises only.[191] The only limitation the Appeal Chambers has been willing to adopt is that the definition of common purpose should be *strict*.[192] More concretely, the chambers should specify the common criminal purpose in terms of both the criminal goal intended and its scope, that is, for example, the temporal and geographic limits of this goal, and the general identities of the intended victims.[193] In this context, the Appeals Chamber has argued that accepting large enterprises does not increase the risk of guilt by association, as responsibility pursuant to enterprise doctrine does always require *participation* by the accused.[194]

The third objective element of the joint criminal responsibility is thus *participation* of the accused in the common purpose.[195] This participation need not involve commission of a specific crime, but may take the form of assistance in, or contribution to, the execution of the common plan or purpose.[196] The required degree of participation is somewhat unsettled in the case law of the tribunal. The Appeals Chamber has noted that not every type of conduct would amount to a significant

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[185] *Tadić* Appeal Judgment (15 July 1999), par. 227.
[186] Haan 2005, p. 181.
[187] E.g., *Martić* Trial Judgment (12 June 2007), par. 442, *Simić, Tadić & Zaric* Trial Judgment (17 October 2003), par. 984 and 987, *Stakić* Appeal Judgment (22 March 2006), par. 73 and 78, *Tadić* Appeal Judgment (15 July 1999), par. 230. In the *Martić* case, the Trial Chamber noted that: "[...] The Trial Chamber considers that [..., the] objective [...] to unite with other ethnically similar areas, in and of itself does not amount to a common purpose within the meaning of the law on JCE [...]. However, where the creation of such territories is intended to be implemented through the commission of crimes within the Statute this may be sufficient to amount to a common criminal purpose." *Martić* Trial Judgement (12 June 2007), par. 442.
[188] E.g., *Kvočka et. al*. Trial Judgment (2 November 2001), par. 319.
[189] E.g., Marston Danner & Martinez 2005, pp. 134-135 and van Sliedregt 2007, p. 200.
[190] *Kvočka et. al*. Trial Judgment (2 November 2001), par. 307.
[191] *Brđanin* Appeal Judgment (3 April 2007), par. 424. See also *Krajišnik* Trial Judgment (27 September 2006), par. 876. The *Brđanin* Trial Chamber, however, wanted to limit enterprise responsibility only to smaller enterprises. *Brđanin* Trial Judgment (1 September 2004), par. 355.
[192] *Krnojelac* Appeal Judgment (17 September 2003), par. 116.
[193] E.g., *Brđanin* Appeal Judgment (3 April 2007), par. 430 and *Simić* Appeal Judgment (28 November 2006), par. 22.
[194] *Brđanin* Appeal Judgment (3 April 2007), par. 424.
[195] *Tadić* Appeal Judgment (15 July 1999), par. 227.
[196] *Tadić* Appeal Judgment (15 July 1999), par. 227.

enough contribution,[197] but it has not wanted to uphold the suggested requirement of a substantial contribution.[198] It is, however, clear that there are *no* requirements that participant in the enterprise physically commits part of the *actus reus* of a crime,[199] that the participation amounts to a *conditio sine qua non* for the crime commission;[200] nor that the accused is present in the joint criminal enterprise at the time the crime is committed by the principal offender.[201]

In relation to the requirement of participation, it should be noted that the Yugoslavia Tribunal has been criticized for sometimes conflating *personal conduct* with *organizational role, function or position*. In this connection, Ambos has noted that: "Culpability implies personal conduct, which finds expression in individual contributions to the enterprise, contributions that do not necessarily correspond to the function assigned to the accused in the enterprise."[202] That the Yugoslavia Tribunal, especially in the systemic cases of enterprise responsibility, sometimes has given much attention to the accused person's position of employment is exemplified by the *Kvočka* case, where the Appeals Chamber observes that: "A position of authority [...] may be relevant evidence for establishing the accused's awareness of the system, his participation in enforcing or perpetuating the common criminal purpose of the system, and, eventually, for evaluating his level of participation for sentencing purposes."[203]

3.3. The Subjective Elements of Joint Criminal Enterprise Responsibility

In the *Tadić* Appeal Judgment, the Yugoslavia Tribunal identified three different joint criminal enterprise forms and argued that the *mens rea* element differs according to the category of common design under consideration.[204]

The *basic form* of joint criminal enterprises (JCE I) is characterized by the *shared intent* of the participants to advance the goal of the enterprise, that is, to commit the commonly intended crimes.[205] There may be a division of labor between the different

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[197] *Brđanin* Appeal Judgment (3 April 2007), par. 427. For example, mere membership is not "participation" enough. E.g., *Brđanin* Trial Judgment (1 September 2004), par. 263

[198] *Kvočka et. al.* Appeal Judgment (28 February 2005), par. 97, 104 and 187. The contrary view is expressed by the Trial Chamber: "The Trial Chamber wishes to stress that this does not mean that anyone who works in a detention camp where conditions are abusive automatically becomes liable as a participant in a joint criminal enterprise. The participation in the enterprise must be significant. By significant, the Trial Chamber means an act or omission that makes an enterprise efficient or effective; e.g., a participation that enables the system to run more smoothly or without disruption. Physical or direct perpetration of a serious crime that advances the goal of the criminal enterprise would constitute a significant contribution. In general, participation would need to be assessed on a case by case basis, especially for low or mid level actors who do not physically perpetrate crimes. [...]". *Kvočka et. al*. Trial Judgment (2 November 2001), par. 309. See also par. 310-312 and *Brđanin* Appeal Judgment (3 April 2007), par. 430.

[199] E.g., *Brđanin* Appeal Judgment (3 April 2007), par. 427, *Krnojelac* Appeal Judgment (17 September 2003), par. 81 and *Kvočka et. al.* Appeal Judgment (28 February 2005), par. 99.

[200] *Kvočka et. al.* Appeal Judgment (28 February 2005), par. 98.

[201] *Krnojelac* Appeal Judgment (17 September 2003), par. 81.

[202] Ambos 2007, pp. 173-174.

[203] *Kvočka et. al.* Appeal Judgment (28 February 2005), par. 101.

[204] *Tadić* Appeal Judgment (15 July 1999), par. 228. See also e.g., *Stakić* Appeal Judgment (22 March 2006), par. 65.

[205] *Tadić* Appeal Judgment (15 July 1999), par. 220 and 228. In the *Brđanin* Appeal Judgment, the tribunal noted that the criminal purpose should not merely be the *same*, but *common* to all of the persons acting together within the enterprise. *Brđanin* Appeal Judgment (3 April 2007), par. 430. In

participants, but they all intend the same result. The basic form of joint criminal enterprise responsibility is therefore a form of *co-perpetration*.[206] The shared intent is often inferred from knowledge of the common purpose and participation in its advancement.[207] This inference must be "the only reasonable inference on the evidence."[208] The shared intent does not require the participant's personal satisfaction or enthusiasm or his personal initiative in contributing to the enterprise.[209]

The *systemic form* (JCE II) of joint criminal enterprises, on the other hand, requires personal *knowledge of the nature of the system of ill-treatment* and *intent to further this system* (common purpose).[210] In cases concerning the systemic form of enterprise responsibility, the existence of a system of ill-treatment, such as, a detention or prison camp in which atrocities are committed, must first be proven.[211] Only after this, can the accused person's knowledge of the system and intent to further it be established. The knowledge may be proven by direct evidence or be inferred from the accused person's position of authority or duties in the system.[212] Especially when the duties have been performed during a longer period of time, may the knowledge be inferred from the participation.[213] Also the intent may be inferred from such indicia.[214]

Finally, in the *extended form* of joint criminal enterprise responsibility (JCE III) a person is held responsible for crimes that go beyond the common purpose, but which are its natural and foreseeable consequences. More specifically, this enterprise responsibility form requires: (a) the intention to take part in a joint criminal enterprise and to further the criminal purposes of that enterprise; and (b) the *foreseeability* of the possible commission by other members of the group of offences that do not constitute the object of the common criminal purpose.[215] Furthermore, the Appeals Chamber in the *Tadić* case argued that what is required is a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless *willingly took that risk*.[216] This mental state is in many legal systems called either *dolus eventualis* or advertent recklessness.[217]

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some cases, the Yugoslavia Tribunal has not made a clear distinction between crimes that are intended (shared intent) and part of the enterprise, and crimes that are not intended by all enterprise participants and which thus are not part of the enterprise. For example, in the *Babić* case, the Appeals Chamber makes the following point: "Under these circumstances, the Trial Chamber was right to imply that the Appellant's guilt is not "lessened by the fact that he did not intend the commission of the murders as such but was merely aware that murders were being committed as part of the [joint criminal enterprise, ...]" *Babić* Judgment on Sentencing Appeal (18 July 2005), par. 28.

[206] *Tadić* Appeal Judgment (15 July 1999), par. 220.

[207] *Kvočka et. al*. Trial Judgment (2 November 2001), par. 271.

[208] *Brđanin* Appeal Judgment (3 April 2007), par. 429.

[209] *Krnojelac* Appeal Judgment (17 September 2003), par. 100. See also e.g., *Kvočka et. al.* Appeal Judgment (28 February 2005), par. 106.

[210] *Tadić* Appeal Judgment (15 July 1999), par. 220.

[211] *Stakić* Appeal Judgment (22 March 2006), par. 65.

[212] *Tadić* Appeal Judgment (15 July 1999), par. 228. See also e.g., *Stakić* Appeal Judgment (22 March 2006), par. 65.

[213] *Krnojelac* Appeal Judgment (17 September 2003), par. 111.

[214] *Tadić* Appeal Judgment (15 July 1999), par. 203.

[215] *Tadić* Appeal Judgment (15 July 1999), par. 206, 220 and 228.

[216] *Tadić* Appeal Judgment (15 July 1999), par. 220 and 228.

[217] *Tadić* Appeal Judgment (15 July 1999), par. 220. Here, it should be noted that Fletcher and Ohlin argue that there is a difference between *dolus eventualis* and recklessness. They argue that recklessness focuses on the *risk* that the perpetrator is willing to take, whereas *dolus eventualis* is about the *attitude*

In the *Kvočka* case, the Appeals Chamber emphasized that it is the *accused person's knowledge* that is central, that is, what was natural and foreseeable to this person. More specifically, the Appeals Chamber argued that:

> Nonetheless, the Appeals Chamber wishes to affirm that an accused may be responsible for crimes committed beyond the common purpose of the systemic joint criminal enterprise, if they were a natural and foreseeable consequence thereof. However, it is to be emphasized that this question must be assessed in relation to the knowledge of a particular accused. This is particularly important in relation to the systemic form of joint criminal enterprise, which may involve a large number of participants performing distant and distinct roles. What is natural and foreseeable to one person participating in a systemic joint criminal enterprise, might not be natural and foreseeable to another, depending on the information available to them. Thus, participation in a systemic joint criminal enterprise does not necessarily entail criminal responsibility for *all* crimes which, though not within the common purpose of the enterprise, were a natural or foreseeable consequence of the enterprise. A participant may be responsible for such crimes only if the Prosecution proves that the accused had sufficient knowledge such that the additional crimes were a natural and foreseeable consequence to him. [218]

This mixture of *knowledge/awareness* and *foreseeability* required for extended enterprise responsibility has been criticized by Ambos, who argues that:

> Either an accused knows that a certain result will occur or this result is foreseeable to him; both at once are logically impossible. In fact, knowledge is a standard for intent crimes [...], while foreseeability belongs to the theories of recklessness or negligence. The only way out of this impasse is to construe foreseeability as an objective requirement (in the sense of a reasonable man standard), leaving the knowledge standard as the (only) subjective or mental requirement of liability. [...] As a consequence, JCE III responsibility presupposes, first, the objective foreseeability of crimes that went beyond the object of the enterprise [...] and, second, the knowledge of the concrete participant with regard to this (objective) foreseeability. [219]

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of the actor. The punishable attitude is one of approval and identification with the evil result. Fletcher & Ohlin 2005, p. 554

[218] *Kvočka et. al.* Appeal Judgment (28 February 2005), par. 86. Likewise *Limaj et al*. Trial Judgment (30 November 2005), par. 512.

[219] Ambos 2007, p. 175. See also *Krajišnik* Trial Judgment (27 September 2006), par. 882. Also Cassese notes that the foreseeability standard is an *objective* one (what a person ought to have foreseen/reasonable man standard), and not a *subjective* one (what the person actually foresaw). Cassese 2007, pp. 122-123. See also Schabas 2003, p. 1033. In an appeal decision, the Rwanda Tribunal, however, seems to suggest a subjective test. See also *Karemera et al.* Decision on Jurisdictional Appeals: Joint Criminal Enterprise (12 April 2006), par. 17: "In certain circumstances, crimes committed by other participants in a large-scale enterprise will not be foreseeable to an accused".

This lower mental state requirement for the secondary crimes has been justified with the fact that in this form of responsibility, the actor already possesses the intent to participate and further the common criminal purpose of a group.[220]

3.4. Concluding Remarks

Joint criminal enterprise responsibility is often found to be the most complicated responsibility form in international criminal law.[221] Despite this, the responsibility form has become extremely popular. International prosecutors today frequently apply this responsibility form in their *indictments*. Marston Danner and Martinez, for example, note that the first indictment that relied explicitly on enterprise responsibility was confirmed by the Yugoslavia Tribunal in June 2001 and that between 25 June 2001 and 1 January 2004 over 60 % of the indictments relied explicitly on the enterprise doctrine.[222] The popularity of the enterprise doctrine among the international prosecutors has many probable causes. First, by applying the enterprise doctrine the international prosecutors are able to *underline the collective dimension of many international crimes*. In this context, Piacente observes that many indictments issued before 2001 give the impression that the accused person's committed their crimes in isolation or only with a few co-perpetrators, who often were not even mentioned.[223] Second, there is a clear *symbolic dimension* in convicting a person for having participated in a criminal enterprise.[224] The concept of a "criminal enterprise" indicates that the criminal behavior has been organized and large-scale. Third, and probably most importantly, *the doctrine allows the attribution of criminal responsibility in situations where other attribution theories have difficulties*. As noted, the international crimes often have many remote participants. Especially, the leaders seldom physically commit any crimes. The international crimes are furthermore often not explicitly agreed, but rather are the result of "risky projects". For example, the forced removal of population groups often results in killings and the illegal detention to physical and/or sexual abuse. It is often impossible to convict remote participants for non-agreed crimes based on liability theories generally used in criminal law. Especially, in situations where it is difficult to collect good evidence.[225] To do this, the prosecutors thus need their "magic bullet",[226] the joint criminal enterprise doctrine.

The *trial chambers* facing allegations of criminal enterprises and participation therein have, according to Haan, responded to these allegations in two different ways. She

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[220] *Blaskić* Appeal Judgement (29 July 2004), par. 33. See also *Babić* Judgment on Sentencing Appeal (18 July 2005), par. 27.
[221] E.g., Kwon 2007, p. 362 and Marston Danner & Martinez 2005, p. 103.
[222] Marston Danner & Martinez 2005, p. 107. In the early joint criminal enterprise cases, enterprise responsibility was not explicitly pleaded in the indictments. This can largely be explained with the lacking maturity of international criminal law at that point of time. As international criminal law, including the joint criminal law doctrine, has settled, the question whether the Prosecutor must explicitly plead joint criminal enterprise responsibility has become topical. The case law on the questions seems to be somewhat unsettled, but it seems that at least the extended form of the enterprise responsibility must today be explicitly pleaded for in order that the tribunal will consider it. See e.g., *Krnojelac* Appeal Judgment (17 September 2003), par. 144 and *Kvočka et. al.* Appeal Judgment (28 February 2005), par. 42-43 and 54.
[223] Piacente 2004, pp. 448-449.
[224] Marston Danner & Martinez 2005, p. 145.
[225] Marston Danner & Martinez 2005, p. 133.
[226] Schabas 2003, p. 1032.

argues that some chambers fully approve the enterprise doctrine and have therefore tended to interpret the doctrine extensively, whereas other chambers have been more critical towards the doctrine and have tried to restrict its application.[227] The case law of the Yugoslavia Tribunal is indeed to a certain degree contradictory. As a whole, the present author, however, finds that the Yugoslavia Tribunal, and especially its Appeals Chamber, has been very favorable to the doctrine and have in most cases elected the most expansive interpretation of the doctrine.[228] This approach has resulted in a broad liability theory, which has received much criticism. This criticism, including the present author's own thoughts about the doctrine's problems, will be elaborated in the next chapter.

4. The Problems of the Prevailing Joint Criminal Enterprise Doctrine

4.1. Too Wide a Net of Criminal Responsibility

A central criminal law principle is that criminal responsibility requires *individual guilt*. The principle, among other things, signifies that collective responsibility or guilt by association is unacceptable. An individual should thus only be punished for his/her individual *choice* to engage in wrongdoing.[229] For this reason, criminal acts should generally be intentional.

The joint criminal enterprise has been criticized for conflicting with this principle of individual guilt by casting a too wide a net of criminal responsibility. This criticism can generally be categorized into two sub-groups. First, some think that the joint criminal enterprises are defined too broadly, which results in numerous individuals and crimes being part of the enterprises. Second, some think that the level of participation required is too low, which also results in too many enterprise participants.

As noted, the *enterprise size* affects both which *individuals* and which *crimes* come within the ambit of the enterprise. For most scholars, the use of the enterprise doctrine to mob-type of criminality (for example, the *Tadić* case) is relatively unproblematic. In these situations, the non-physical and physical perpetrators know each other and the enterprise participants are usually aware of the various crimes that are committed within the enterprise. Most scholars also think that it is justified to use the enterprise doctrine to slightly larger enterprises, such as prison and concentration camps.[230] When, however, enterprise responsibility is used to prosecute loosely knit network (such as, al-Qaeda terrorists)[231] or nation-wide genocides, some scholars, however, feel that there is a great danger for guilt by association judgments.[232] A central

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[227] Haan 2005, p. 175. One of the strongest critics of the joint criminal enterprise doctrine has been Judge Per-Johan Lindholm. See *Simić, Tadić & Zaric* Trial Judgment (17 October 2003), Separate and Partly Dissenting Opinion of Judge Per-Johan Lindholm, par. 2-5.

[228] Likewise Marston Danner & Martinez 2005, p. 142.

[229] Marston Danner & Martinez 2005, p. 134.

[230] E.g., Marston Danner & Martinez 2005, pp. 134-135.

[231] Osiel 2005, pp. 799-800.

[232] E.g., van Sliedregt 2007, p. 200. Some scholars have argued that especially large enterprises are, in fact, *legal fictions*, as the members of these enterprises do not usually identify themselves as members the defined enterprise. E.g., Olásolo 2007, p. 158 and Osiel 2005, p. 800. As a parenthesis, it may be noted that Fletcher and Ohlin argue that the nature of genocide makes it problematic that the international criminal courts usually focus on smaller collectivities, and not on whole nations. According to them: "Although the criminal planning envisioned by the Rome Statute may occur at the

element of the joint criminal enterprise responsibility doctrine is namely that *every member* of the enterprise is criminally liable for *all* crimes committed within the enterprise (hereinafter, the principle of equal culpability or guilt). Applying this principle to large-scale enterprises comprising of numerous underlying crimes leads to a situation where numerous individuals are accountable for numerous crimes. For individual members of the enterprise this can signify that they are held responsible for a number of crimes they did not know of, physically committed by individuals they are unfamiliar with. Furthermore, the natural and foreseeable consequences of large-scale enterprises can be more or less unlimited. This kind of extensive criminal responsibility is generally (morally) accepted when the accused person is a high-level leader with influence over the functioning of the enterprise. In contrast to the theory of superior responsibility, the theory of enterprise responsibility does not, however, distinguish between different participants in the crime depending on their control over other participants. For this reason, it has been argued that the theory entails a risk of an unacceptable extension of criminal liability for low-level perpetrators and mid-level superiors.[233]

In the *Brđanin* case, the Trial Chamber responded to this kind of criticism by limiting the applicability of the joint criminal enterprise doctrine to: (1) small-scale enterprises only; and (2) by requiring a specific agreement to commit a crime between the non-physical and physical perpetrators.[234] This Trial Chamber judgment was, however, not well received, as it was pointed out that these kinds of limitations made it impossible to convict structurally remote political and military leaders and that it was precisely these leaders that the doctrine was developed for.[235] It is, for example, highly unlikely that high-level politicians make explicit agreements with low-level perpetrators.[236] The limitations of the enterprise doctrine suggested by the *Brđanin* Trial Chamber were later rejected by the Appeals Chamber in the same case.[237] In the recent *Krajišnik* case, a Trial Chamber even argued that the joint criminal enterprise doctrine is well suited to cases in which "numerous persons are all said to be concerned with the commission of a large number of crimes."[238] As noted earlier, it seems that the only factors the chambers must take into consideration when they define criminal enterprises is that: (a) the enterprise must amount to or involve the commission of a crime;[239] and (b) the definition must have a certain strictness, that is, include the

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level of active military operations, through a joint criminal enterprise by military officers and militia leaders, the ethnic hatred at the heart of genocide stems from the intent of nations." Fletcher & Ohlin 2005, p. 548 (see also p. 547).

[233] Olásolo 2007, p. 158.

[234] *Brđanin* Trial Judgment (1 September 2004)), par. 347 and 355.

[235] E.g., Gustafson 2007, p. 149, O'Rourke 2006, pp. 307 and 323 and van der Wilt 2007, p. 99.

[236] E.g., Gustafson 2007, pp. 153-154 and O'Rourke 2006, p. 323.

[237] *Brđanin* Appeal Judgment (3 April 2007), par. 418 and 425. Also the Appeals Chamber of the Rwanda Tribunal has expressed the view that the joint criminal enterprises may very well be of a vast scope. *Karemera et al.* Decision on Jurisdictional Appeals: Joint Criminal Enterprise (12 April 2006), par. 16 and *Rwamakuba* Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide (22 October 2004), par. 25. Also the *Krnojelac* Appeals Chamber has rejected an express agreement requirement. *Krnojelac* Appeal Judgment (17 September 2003), par. 97.

[238] *Krajišnik* Trial Judgment (27 September 2006), par. 876.

[239] *Tadić* Appeal Judgment (15 July 1999), par. 227.

criminal goal intended, the temporal and geographic limits of this goal, and the general identities of the intended victims.[240]

In *Kvočka et al.* case, the Trial Chamber tried to tightening up the joint criminal enterprise doctrine another way, namely by requiring that a participant in the enterprise makes a *substantial contribution* to the enterprise's functioning or endeavors,[241] that is, carries out acts that substantially assist or significantly effect the furtherance of the goals of the enterprise.[242] The Trial Chamber furthermore noted that: "The level of participation attributed to the accused and whether that participation is deemed significant will depend on a variety of factors, including 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."[243] This kind of a substantial contribution or participation requirement has received some support among legal scholars.[244] The Appeals Chamber in that same *Kvočka et al*. case, however, rejected the existence of a general requirement of substantial contribution.[245] In the *Krajišnik* case, the Trial Chamber instead seemed to suggest a requirement of *concerted action*, namely that the person in a criminal enterprise must be shown to act together or in concert with each other members of the enterprise in the implementation of a common objective.[246] And, in the *Brđanin* Appeal Judgment, the Appeals Chamber noted that it considers that not every type of conduct would amount to a significant enough contribution.[247]

The present author finds that if joint criminal enterprise responsibility is to have any significance in international criminal law, it cannot be limited to mob-violence situations only, nor to situations of explicit agreements between physical and non-physical perpetrators. The right way to limit the scope of enterprise responsibility is therefore not to put strict conditions on the common purpose element, even though

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[240] *Brđanin* Appeal Judgment (3 April 2007), par. 430 and *Krnojelac* Appeal Judgment (17 September 2003), par. 116.
[241] *Kvočka et al*. Trial Judgment (2 November 2001), par. 310.
[242] *Kvočka et al*. Trial Judgment (2 November 2001), par. 312. The Rwanda Tribunal has suggested that also omissions can constitute participation: "Involvement in a joint criminal enterprise may also be proven by evidence characterized as an omission. The objective element of participation is satisfied as long as the accused has "committed an act or an omission which contributes to the common criminal purpose". Although it is hard to imagine that total passivity could demonstrate the requisite intent for co-perpetratorship, an omission in combination with positive acts might have great significance." *Mpambara* Trial Judgment (11 September 2006), par. 24. See also *Kvočka* Appeal Judgment (28 February 2005), par. 195-196.
[243] *Kvočka et al*. Trial Judgment (2 November 2001), par. 311.
[244] E.g., Cassese 2007, pp. 109 and 127-128, Marston Danner 2004, p. 188, Marston Danner & Martinez 2005, p. 150 and Ramer 2007, p. 110
[245] *Kvočka et al*. Appeal Judgment (28 February 2005), par. 97: "The Appeals Chamber notes that, in general, there is no specific legal requirement that the accused make a substantial contribution to the joint criminal enterprise. However, there may be specific cases which require, as an exception to the general rule, a substantial contribution of the accused to determine whether he participated in the joint criminal enterprise [e.g., opportunistic visitors]. In practice, the significance of the accused's contribution will be relevant to demonstrating that the accused shared the intent to pursue the common purpose."
[246] *Krajišnik* Trial Judgment (27 September 2006), par. 884.
[247] *Brđanin* Appeal Judgment (3 April 2007), par. 427.

this element is the "glue" between the different actors. Instead, more attention should be given to evaluating the role of the accused person in the enterprise.[248] An evaluation of the *significance of the participation*, which takes into account the size of the enterprise and the accused person's position and functions, is absolutely necessary, if enterprise responsibility is expected to adhere to the criminal law principle of individual culpability. A low-level participant with no influence over the over-all functioning of a large-scale enterprise cannot be held responsible for *all* crimes committed within that enterprise even though he shares the common intent. In criminal law, mere thoughts or intentions are namely rarely criminalized. A person who is convicted for a crime must in some way have influenced the crime commission, that is, the fact that harm has occurred.[249] The present author therefore finds that the principle of equal guilt of all enterprise participants should be abandoned at least in large-scale enterprises, where the division of labor between the participants is so significant that it becomes absurd to claim that all participants are equally guilty.

In practice, an investigation into the significance of the participation would, at least in large- and mid-scale enterprises, bring joint criminal enterprise responsibility closer to superior responsibility with its effective control requirement. In the case of enterprise responsibility, where the relationship between the participants may be both vertical and horizontal, the focus can, however, not in the same way be on direct control over *others*. In non-hierarchical, network-type of organizations *influence* is namely more important than traditional power or control.[250] When a person is convicted for crimes physically committed by others in a large-scale enterprise, the convicted person should thus be one who can be said to significantly influence the functioning of that enterprise. He or she may have direct control over the physical perpetrators (that is, be a "traditional leader") or his/her influence may be more indirect, so that he/she controls the enterprise ("the organizational apparatus"), which through its functioning produces the willing executors.[251] This kind of a significant/substantial participation requirement, which already has been suggested by some Trial Chambers of the Yugoslavia Tribunal, may not have its legal basis in customary international law, but its introduction as a limitation of the criminal responsibility is clearly justified by the culpability principle of criminal law, that is, by fairness considerations.

4.2. Extended Enterprise Responsibility and the Requirement of Natural and Foreseeable Consequences

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[248] An opposite view is expressed by, for example, Haan and van Sliedregt, who find that the Yugoslavia Tribunal has given too little attention to the agreement/shared intent requirement and too much attention to the participation requirement. Haan 2005, pp. 195-196 and van Sliedregt 2007, p. 201.

[249] Common law conspiracy, which does not require that a crime *de facto* has been committed, is for this reason found problematic.

[250] Lippens 2001, p. 320 (referring to Heckscher).

[251] Cf. the so-called the theory of control of the act by virtue of a hierarchical organization. E.g., Ambos 2007, pp. 181-182. See also the dissenting opinion of Judge Schomburg, who argues for the acceptance of coperpetratorship as a mode of committing international crimes: "Coperpetratorship in general requires "*joint functional* control over a crime". Coperpetrators must pursue a common goal, either through an explicit agreement or silent consent, which they can only achieve by coordinated action and shared control over the criminal conduct. Each coperpetrator must make a contribution essential to the commission of the crime." *Simić* Appeal Judgment (28 November 2006), Dissenting Opinion of Judge Schomburg, par. 15.

In the extended form of enterprise responsibility, an individual may be held responsible for crimes that do not form part of the common purpose, but which are natural and foreseeable consequence of this purpose. The individual may thus be held responsible for crimes he/she did not *intend* to commit. The extended form of responsibility is instead based on *foresight* and *voluntary assumption of risk*.[252]

The extended joint criminal enterprise responsibility has been much criticized.[253] It has been pointed out that this extended form of enterprise responsibility entails the acceptance of a significantly lower *mens rea* standard for *perpetrator* responsibility.[254] As noted earlier, joint criminal enterprise responsibility, including its extended form, is regarded as a form of *committing* a crime.[255] Enterprise participants are thus treated as principal perpetrators, and not as accomplices. In fact, according to the equality principle of enterprise responsibility, individuals convicted for extended enterprise responsibility are viewed as equally guilty to the crimes as those who intentionally commit the non-agreed crimes.

The extended form of enterprise responsibility is also plagued by the vagueness of the foreseeability standard. Fletcher and Ohlin argue that: "As any good lawyer knows, virtually any consequence can be characterized as foreseeable."[256] The Yugoslavia Tribunal has developed certain criteria for distinguishing foreseeable and non-foreseeable additional crimes,[257] but despite this it is a very open standard with much leeway for interpretations. Taken into consideration that international criminal law seems to accept very large-scale enterprises, the natural and foreseeable consequences of certain enterprises can be innumerable.[258]

The present author agrees that it is unacceptable that the extended form of enterprise responsibility is treated as a form of committing a crime. Taken into consideration the fact that the natural and foreseeable consequences of joint criminal enterprises in international criminal law can be very serious (for example, tortures and killings) and numerous, it is acceptable that the risk-taking (that is, the participation in a criminal enterprise with a high risk for extra crimes) is condemned and the participant is blamed for certain incidental crimes. The risk-taking should, however, not be equated with intentional commission of the additional crimes. Once again the present author finds the equal guilt principle of enterprise responsibility to be problematic. The extended enterprise responsibility should be regarded as a less blameworthy participation form than commission.

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[252] Cassese 2007, p. 113.
[253] E.g., Ambos 2006, pp. 672-673, Ohlin 2007, p. 76 and van der Wilt 2007, p. 101.
[254] E.g., Ohlin 2007, p. 83 and Ramer 2007, p. 59.
[255] Powles notes that it is difficult to see how someone who is held responsible for a crime he/she did not necessarily know about through extended enterprise responsibility, could be said to have "committed" the crime. Powles 2004, p. 611.
[256] Fletcher & Ohlin 2005, p. 550.
[257] The crimes have, for example, been viewed as foreseeable if the common plan was executed in circumstances which invited and provoked the infliction of further violence, such as lack of shelter, the density of the crowds, the vulnerable condition of the refugees, the presence of many regular and irregular military and paramilitary units in the area and the sheer lack of sufficient numbers of UN soldiers to provide protection. *Krstić* Trial Judgment (2 August 2001) par. 616.
[258] Ohlin has, however, noted that if the enterprises are defined very broadly, almost all crimes fall within the enterprise and the resort to the concept of foreseeability becomes unnecessary. Ohlin 2007, pp. 81-82.

4.3. "Whoops, I Committed Genocide!"[259]: Too Little Attention Given to Intent?

Finally, the Yugoslavia Tribunal's case law has been criticized for giving scarce attention to the subjective (mental) elements in joint criminal enterprise cases. More concretely, it has been put forward that the possibility to *infer intent from participation* has lead to a situation where not much is required of the prosecutor to satisfy the mental elements of enterprise responsibility.[260] For example, when an individual participates in a system of ill-treatment, and does so with a certain position of authority, he/she is usually *presumed* to have the required knowledge and intent.[261] Haan has called this "an objectification of the subjective requirements" and has noted that the tribunal in practice has shifted the burden of proof with regard to knowledge and intent in the systemic joint criminal enterprise cases.[262] While there is some merit in Haan's criticism, the present author, however, believes that it in many cases would be difficult for the international criminal courts to establish intent from other factors than the behavior and position of the accused.

A more serious intent-problem is that the extended form of enterprise responsibility, which does not require the establishment of intent, has been used as a basis for convictions for crimes that require so-called *specific intent*. In these crimes, the criminalized act or omission must be done to with a certain outcome in mind, that is, the intention must extend beyond the prohibited act or omission.[263] In international criminal law, the crime of genocide and persecution represent special intent crimes. For example in genocide, the underlying crimes must be committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. The specific intent is usually regarded as a factor that aggravates the crimes.

The case law of the Yugoslavia Tribunal has been inconsistent as regards the possibility to convict individuals for specific intent crimes based on extended enterprise responsibility. For example, the Trial Chamber in the *Stakić* case argued that "the application of a mode of liability can not replace a core element of a crime", that is, that the natural and foreseeable requirement of the extended form of enterprise responsibility is not reconcilable with the specific intent requirement of genocide.[264] This also seems to be the view hold by the majority of legal scholars.[265] The Appeals Chamber has, however, stipulated that extended enterprise responsibility means that criminal liability can attach to an accused for *any crime* that falls outside of an agreed upon joint criminal enterprise, and that it is wrong to conflate the *mens rea*

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[259] Nersessian 2006, p. 81.
[260] van Sliedregt 2007, p. 201.
[261] Cf. *Kvočka et. al*. Trial Judgment (2 November 2001), par. 278. Also so-called specific intent (e.g., discriminatory intent for persecution) has been inferred from participation in the functioning of an enterprise. See e.g., *Kvočka et al.* Trial Judgment (2 November 2001), par. 201 and *Simić, Tadić & Zaric* Trial Judgment (17 October 2003), par. 51.
[262] Haan 2005, p. 190 (see also p. 199). For this reason, the replacement of the systemic form of enterprise responsibility with the basic form has been suggested, as the shared intent in the basic form is not simply a rebuttable presumption. Haan 2005, pp. 190. The Yugoslavia Tribunal has itself numerous times called the systemic form of responsibility a variant of the basic form. *Tadić* Appeal Judgment (15 July 1999), par. 203 and 228.
[263] Duff 1990, p. 38 (referring to H. L. A. Hart).
[264] *Stakić* Trial Judgment (31 July 2003), par. 530 (see also par. 558). Likewise, e.g., *Brđanin* Decision on Motion for Acquittal Pursuant to Rule 98 *Bis* (28 November 2003) , par. 57.
[265] E.g., Badar 2006, p. 302, Cassese 2007, pp. 121-122, Haan 2005, p. 200, Marston Danner & Martinez 2005, p. 151, Nersessian 2006, pp. 92-93 and Ramer 2007, p. 114.

requirement of the crime with the mental requirement of the mode of liability.[266] In the *Stakić* Appeal Judgment, the Appeals Chamber lately concluded "that it is now clear that the third category of joint criminal enterprise and the crime of genocide are indeed compatible."[267] In practice, the Appeals Chambers approach to extended enterprise responsibility and specific intent crimes means that it is not only the *acts* of one enterprise participant that are attributed to another, but also his/her *thoughts*.[268]

As noted earlier, extended enterprise responsibility is a form of *perpetrator* responsibility. To hold a person responsible as a perpetrator for specific intent crimes based on mere foresight is not acceptable. The specific intent element of the crime is aimed at underlining the *special culpability* of the individuals committing these crimes. In order to label fairly the culpability of those held responsible under the extended enterprise theory, extended enterprise responsibility should be regarded as a form of secondary or accessory liability. If the extended enterprise responsibility in this way would be made less stigmatizing, it would be more acceptable that the mental element requirements for special intent crimes have been lowered. The same idea is put forward by van Sliedregt, who argues that:

> To express the difference in culpability, and to further draw on the analogy with aiding and abetting, it is proposed here that participants in a Third Category JCE should be held responsible for participating in genocide, which attracts a lower sentence than committing genocide as a participant in a First, or Second Category JCE. Third category JCE liability would, however, still be higher on the scale of culpability than aiding and abetting genocide.[269]

It is generally held that joint criminal enterprise responsibility, including its extended form, should be regarded as a more serious mode to participate in an international crime than aiding and abetting, which at present is viewed the only secondary mode of participation in international criminal law. This greater seriousness of the enterprise responsibility is due to the *common purpose element*, which also those held responsible under the extended form must fulfill.

5. The Joint Criminal Enterprise Doctrine and Issues of Gravity
5.1. Introduction

In this paper, it has been put forward that the extended form of enterprise responsibility should not be regarded as a form of perpetration and that equal guilt principle of the joint criminal enterprise doctrine is problematic. Both these arguments essentially hinge upon the idea that it is crucial that the *blameworthiness* of a certain behavior is correctly reflected in the outcome of the proceedings. The *gravity* of the wrongdoing should thus affect both the judgment and the sentence handed down.

In relation to the enterprise doctrine, gravity considerations have furthermore actualized in cases where it has been unclear whether the accused person's behavior

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[266] *Brđanin* Decision on Interlocutory Appeal (19 March 2004), par. 9-10. See also e.g., *Stakić* Appeal Judgment (22 March 2006), par. 38.
[267] *Stakić* Appeal Judgment (22 March 2006), par. 38.
[268] Ramer 2007, p. 114.
[269] van Sliedregt 2007, p. 205.

should be characterized as perpetration (enterprise responsibility) or as aiding and abetting. This delimitation will be elaborated below, as will in more detail the equal culpability.

5.2. Joint Criminal Enterprise Responsibility vs. Aiding and Abetting

In the *Vasiljević* case, the Appeals Chamber outlined the difference between joint criminal enterprise responsibility and aiding abetting in the following way:

> Participation in a joint criminal enterprise is a form of "commission" under Article 7(1) of the Statute. The participant therein is liable as a co-perpetrator of the crime(s). Aiding and abetting the commission of a crime is usually considered to incur a lesser degree of individual criminal responsibility than committing a crime. In the context of a crime committed by several co-perpetrators in a joint criminal enterprise, the aider and abettor is always an accessory to these co-perpetrators, although the coperpetrators may not even know of the aider and abettor's contribution. Differences exist in relation to the *actus reus* as well as to the *mens rea* requirements between both forms of individual criminal responsibility:
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> (i) The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime [...] and this support has a substantial effect upon the perpetration of the crime. By contrast, it is sufficient for a participant in a joint criminal enterprise to perform acts that in some way are directed to the furtherance of the common design.
>
> (ii) In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal. By contrast, in the case of participation in a joint criminal enterprise, i.e. as a co-perpetrator, the requisite *mens rea* is intent to pursue a common purpose.[270]

In short, in joint criminal enterprise responsibility the essence of the wrongdoing lies in the *shared intent*, whereas in aiding and abetting the focus is on the *participation*. Ambos has in this context noted that it is rather odd that the required participation for the aider and abettor (that is, an accomplice) is greater than for the enterprise participator (that is, a perpetrator).[271]

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[270] *Vasiljević* Appeal Judgment (25 February 2004), par. 102. See also e.g., *Furundžija* Trial Judgment (10 December 1998), par. 249, *Kvočka* Appeal judgment (25 February 2005), par. 90 and *Tadić* Appeal Judgment (15 July 1999), par. 229. In some cases, it has been suggested that it is possible to aid and abet a criminal enterprise. *Kvočka et. al*. Trial Judgment (2 November 2001), par. 283. This proposition has, however, been rejected by the Appeals Chamber, which has noted that joint criminal enterprise is simply a *means* of committing a crime, not a crime in itself and that it for this reason would be inaccurate to refer to aiding and abetting a joint criminal enterprise. *Kvočka et. al.* Appeal Judgment (28 February 2005), par. 91. See also *Krajišnik* Trial Judgment (27 September 2006), par, 886 and *Milutinović et al.* Appeal Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise (21 May 2003), par. 44.

[271] Ambos 2007, p. 171.

Even if it, in theory, is relatively easy to distinguish between joint criminal enterprise responsibility and aiding abetting, in practice, it has in a number of cases been so that the Trial Chamber has labeled the participation as enterprise responsibility and the Appeals Chamber has reversed it to aiding and abetting,[272] and sometimes *vice versa*.[273] The present author believes that this has to do with the way in which the shared intent generally is proven. Often substantial participation is used as a factor from which shared intent is inferred. The crucial question thus often becomes whether the participation of an accused is significant enough to prove shared intent. In practice, it may thus be difficult to clearly distinguish the subjective (intent) and objective (participation) elements from each other. In this context it is interesting to note that Schabas has put forward that: "In the case of a principal perpetrator, courts, including the ICTY, generally presume that absent evidence to the contrary a person is deemed to intend the consequences of his or her acts. But in the case of secondary offenders or accomplices, the acts of assistance are often quite ambiguous, and it is not as easy to simply presume the guilty mind from the physical act."[274] Likewise, in joint criminal responsibility cases, the participation may be of such a character that its interpretation is difficult, and two reasonable triers of fact may reach contradicting conclusions whether it can be said to prove the required intent or not.

For an individual person that is convicted by an international tribunal, it is, however, significant whether his/her participation is labeled as enterprise participation or as aiding and abetting. In the *Kvočka* case, the Appeals Chamber noted that: "the distinction between these two forms of participation is important, both to accurately describe the crime and to fix an appropriate sentence. Aiding and abetting generally involves a lesser degree of individual criminal responsibility than co-perpetration in a joint criminal enterprise".[275]

5.3. The Principle of Equal Culpability

When an individual is convicted for joint criminal enterprise responsibility, he/she is, based on the principle of equal culpability of enterprise responsibility, convicted as a *perpetrator* for *all* the crimes committed within the enterprise and, in cases of extended responsibility, also for the natural and foreseeable crimes. This principle was noted already by the Appeals Chamber in the *Tadić* case, which observed that: "Although only some members of the group may physically perpetrate the criminal act [...], the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less - or indeed no different - from that of those actually carrying out the acts in question."[276] This principle of equal culpability is primarily justified with the shared intent to commit the crimes. As it furthermore

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[272] E.g., *Krstić* Appeal Judgment, par. 138, *Simić* Appeal Judgment (28 November 2006), par. 233 and 265, and *Vasiljević* Appeal Judgment (25 February 2004), par. 149. Judge Shahabuddeen, however, dissented in the *Vasiljević* case. *Vasiljević* Appeal Judgment, Separate and Dissenting Opinion of Judge Shahabuddeen (25 February 2004), par. 45.

[273] *Krnojelac* Appeal Judgment (17 September 2003), par. 113.

[274] Schabas 2003,p. 1019.

[275] *Kvočka et. al.* Appeal Judgment (28 February 2005), par. 92 (see also par. 182). See also *Krnojela*c Appeal Judgment (17 September 2003), par. 75, *Simić* Appeal Judgment (28 November 2006), par. 265 and *Vasiljević* Appeal Judgment (25 February 2004), par. 102

[276] *Tadić* Appeal Judgment (15 July 1999), par. 191. Likewise e.g., *Krnojelac* Trial Judgment (15 March 2002), par. 82 and *Vasiljević* Appeal Judgment (25 February 2004), par. 111.

often is difficult to prove the exact role played by the various participants in the international crimes, it may be practical to view all participants as equally guilty.[277]

Possible distinctions between enterprise participants are instead made at the sentencing stage.[278]
According to the case law of the Yugoslavia Tribunal, the sentence should, however, primarily reflect the gravity of the crime.[279] Other relevant considerations include the particular circumstances of the case, the form and degree of the participation of the accused in the crime, the number of victims, the suffering of the victims, and the defendant's cooperation with the prosecution.[280] The mode of participation and the individual's personal contribution to the crime are thus only two of *numerous factors* that the ultimate sentence reflects.[281] Important to note is also that the sentence does not only reflect the gravity of the convicted person's wrongdoing. Factors, such as the defendant's admission of guilt, cooperation with the prosecutor and expression of remorse are also taken into consideration.

In practice, the equal guilt principle results in the consideration of the blameworthiness of the behavior at a too late stage of the proceedings. Even though the individual contribution is taken into consideration at the sentencing stage, the following problems namely remain: (1) the judgments do not provide an accurate account of individual participants' roles in the relevant crimes, which erases the moral distinctions between, for example, influential leaders and peripheral followers.[282] This frustrates the transitional justice goals of international criminal law[283] and compromises its historical legacy.[284] Especially in extended enterprise cases, where the convicted person has not committed the crime with intent, the individual's personal guilt is wrongly presented. (2) the stigma of criminal convictions is itself significant, independent of the punishments;[285] and (3) the principle of equal guilt makes one see the enterprise as some kind of "group person" whose internal structure is morally irrelevant.[286] The present author therefore believes that it would be important to introduce: (1) the suggested requirement of substantial participation for all forms of enterprise responsibility;[287] and (2) the re-categorization of the extended

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[277] See e.g., "In any effective enterprise, there is generally a climate of shared commitment to its purposes, a feeling of voluntary spontaneity, effacing the difference–as much as possible–between leaders and followers. There is an élan, a sense of "one for all and all for one." Leaders "coordinate" rather than "control." In such organizations, we can still distinguish between those with greater and lesser degrees of influence over events and fellow participants. But we do so now at the punishment stage of the proceeding. Since such distinctions are no longer part of determining liability, it is not a question that must be answered with a yes or no." Osiel 2005, p. 797.
[278] *Brđanin* Appeal Judgment (3 April 2007), par. 432. Likewise e.g., *Krajišnik* Trial Judgment (27 September 2006), par. 886.
[279] E.g., *Aleksovski* Appeal Judgment (24 March 2000), par. 182.
[280] E.g., *Aleksovski* Appeal Judgment (24 March 2000), par. 182, *Babić* Judgment on Sentencing Appeal (18 July 2005), par. 39, *Simić* Appeal Judgment (28 November 2006), par. 300, *Vasiljević* Appeal Judgment (25 February 2004), par. 182
[281] Cf. Marston Danner & Martinez 2005, pp. 141-142.
[282] Fletcher & Ohlin 2005, p. 550.
[283] Marston Danner & Martinez 2005, p. 142.
[284] Schabas 2003, p. 1034.
[285] Ohlin 2007, p. 88.
[286] Ohlin 2007, p. 77.
[287] The contrary view is expressed by Gustafson, who argues that: "They argue that [...] the prosecution should be required to prove that the defendant has made a substantial contribution to the JCE. In my view, [...] their proposed approach is problematic because it seems to result in a need to differentiate

form of enterprise responsibility as a form of secondary responsibility. These changes would give gravity considerations more weight in the enterprise doctrine.

6. Concluding Remarks

It has been noted that as a judicial norm, the development of enterprise doctrine is closely connected with the specific case constellations tried before the Yugoslavia Tribunal and with specific problems of attributing individual criminal responsibility the tribunal has faced.[288] The doctrine is today the main instrument of international criminal law to tackle complex cases, as the doctrine's predecessors conspiracy liability and membership in a criminal organization have been found to conflict with central criminal law principles, and alternative theories have been found to lack support in customary international law. For example, in the *Stakić* case, the Trial Chamber tried to introduce coperpetratorship as an alternative participation mode.[289] The Appeals Chamber, however, noted that:

> The introduction of new modes of liability into the jurisprudence of the Tribunal may generate uncertainty, if not confusion, in the determination of the law by parties to cases before the Tribunal as well as in the application of the law by Trial Chambers. To avoid such uncertainty and ensure respect for the values of consistency and coherence in the application of the law, the Appeals Chamber must intervene to assess whether the mode of liability applied by the Trial Chamber is consistent with the jurisprudence of this Tribunal. If it is not consistent, the Appeals Chamber must then determine whether the Trial Chamber's factual findings support liability under another, established mode of liability, such as joint criminal enterprise.[290] [...]
>
> Upon a careful and thorough review of the relevant sections of the Trial Judgement, the Appeals Chamber finds that the Trial Chamber erred in conducting its analysis of the responsibility of the Appellant within the framework of "co-perpetratorship". This mode of liability, as defined and applied by the Trial Chamber, does not have support in customary international law or in the settled jurisprudence of this Tribunal, which is binding on the Trial Chambers. By way of contrast, joint criminal enterprise is a mode of liability which is "firmly established in customary international law" and is routinely applied in the Tribunal's jurisprudence. [...] This invalidates the decision of the Trial Chamber as to the mode of liability it employed in the Trial Judgement.[291]

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between the criminal liability of the various members of a JCE, since only those members who have substantially contributed to the JCE would be liable for the crimes. However, the very nature of JCE liability is that [...] a group acts as a collective to perpetrate crimes with the result that each member of the JCE is equally responsible for these crimes." Gustafson 2007, p. 155.

[288] Haan 2005, p. 167.

[289] *Stakić* Trial Judgment (31 July 2003), par. 438 and 440

[290] *Stakić* Appeal Judgment (22 March 2006), par. 59

[291] *Stakić* Appeal Judgment (22 March 2006), par. 62. A contrary view is expressed by Judge Schomburg in the *Simić* Appeal Judgment. Judge Schomburg was the presiding judge in the *Stakić* Trial Judgment. *Simić* Appeal Judgment (28 November 2006), Dissenting Opinion of Judge Schomburg, par. 23.

The introduction of alternative liability modes is thus difficult,[292] which means that enterprise responsibility (and superior responsibility) are the available instruments when prosecutors want to pursue complex cases in international criminal law. As an attribution theory, the enterprise theory has many merits. It, among other things, clearly takes into consideration the collective element of most international crimes. Extensively construed, it, however, conflicts with the central individual culpability principle of criminal law. For this reason, the doctrine must be tightened up to preserve the legitimacy of international criminal law.

[292] A suggested alternative or complement has been, besides coperpetratorship, e.g. functional perpetration. van der Wilt 2007, p. 103.

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The Oddity that is the Hariri Tribunal

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1 Introduction

This article analyzes the nascent Special Tribunal for Lebanon, recently established by the UN Security Council to try those responsible for the assassination of the former Lebanese Prime Minister, Mr. Rafik Hariri. This Tribunal is deserving of scrutiny not simply because it is new, but also because it is rather unique among its siblings, the other international criminal courts and tribunals, in several respects.

First, the circumstances of Hariri Tribunal's creation are, to put it mildly, somewhat out of the ordinary. It has been established to try the perpetrators of a single murder (and certain related crimes), while all other international criminal tribunals were created to try perpetrators of mass atrocities. Furthermore, even though the Tribunal was originally meant to be an 'internationalized', hybrid criminal court, akin to the Special Court for Sierra Leone (SCSL) or the Extraordinary Chambers in the Courts of Cambodia (ECCC), it was in fact created by the Security Council by a resolution passed under Chapter VII of the UN Charter,[293] due to the inability of the Lebanese government to ratify the treaty establishing the Tribunal for internal political reasons. Probably acting out of a desire to keep appearances, however, the Council decided to promulgate into force that same unratified treaty by its resolution, instead of opting for a somewhat clearer solution of a UN court as the Council's subsidiary organ, as it did in the cases of the tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR).

In Section 2, the article tries ascertain how the Council's decision fits within its framework of the UN Charter, and analyzes the issue of the Tribunal's legality, which will undoubtedly be raised by defence counsel in a future case. Section 2 also explores how the Council's unorthodox approach reflects on the law of treaties.

The second distinctively odd thing about the Hariri Tribunal is the untidy assortment of substantive and procedural law that it will be applying. First of all, even though the Report on the creation of the Tribunal by the UN Secretary-General, prepared by the UN Legal Counsel,[294] entertained the possibility that the assassination of Mr. Hariri satisfied the customary requirements for a crime against humanity, i.e. a crime against international law, the final Statute of the Tribunal as adopted by the Council does not make that qualification. Consequently, the Tribunal is the first international criminal court which will try persons who are accused solely for violating domestic, not international criminal law. Indeed, Article 2 of the Tribunal's Statute prescribes that the source of substantive criminal law that the Tribunal will be

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Note: early draft, please do not cite without permission.

[293] Resolution 1757 (2007).

[294] Report of the Secretary-General on the establishment of a special tribunal for Lebanon, UN Doc. S/2006/893, 15 November 2006, hereinafter the UNLC Report.

applying is the Lebanese Criminal Code. In another odd development, however, Article 3 of the Statute applies to these crimes forms of individual criminal responsibility which are almost uniquely international in character, such as common purpose liability (joint criminal enterprise) and superior (command) responsibility.

In Section 3, the paper attempts to establish whether this poses any *nullum crimen sine lege* problems in the Tribunal's operation. The Tribunal, moreover, introduces some significant characteristics of civil law systems, most notably trials *in absentia*, for the first time in international judicial practice. These are also addressed in Section 3, while Section 4 provides some concluding remarks.

2 Establishment of the Tribunal

A *Brief Background*

Rafik Hariri was one of Lebanon's most powerful politicians, and of its richest businessmen. He served as Lebanese Prime Minister for some ten years, and was widely credited for bringing Lebanon back up to its feet after the end of its violent civil war. Hariri's final term ended with his resignation on 20 October 2004. His resignation was precipitated by a then ongoing political crisis surrounding the controversial three-year extension of the term of the Lebanese President, Mr. Emile Lahoud, who is generally thought to be an exponent of Syria's interests in Lebanon. Hariri actively opposed the extension of Lahoud's term, in which he finally acquiesced under intense Syrian pressure, tendering his resignation afterwards.

Hariri was assassinated on 14 February 2005, most likely by a suicide bomber, in an explosion which took the lives of more than twenty other people and injured a hundred more. Several other prominent public figures were also murdered in the next few months. As Syria was perceived to be implicated in Hariri's murder,[295] since it were its interests that Hariri had actively fought, the assassination produced strong anti-Syrian sentiment in Lebanon, leading to massive demonstrations against Syria and its allies in the so-called Cedar Revolution. Under concentrated pressure from the international community and from within Lebanon, Syria was forced to withdraw its substantial armed and intelligence forces from Lebanon, pursuant to UN Security Council Resolution 1559 (2004). After decades of occupation and territorial pretensions against Lebanon, the Syrian withdrawal was completed on 26 April 2005. Meanwhile, the pro-Syrian government of Lebanon was toppled, and after democratic elections substituted by a new government led by Mr. Fouad Siniora, a Hariri ally, in June 2005.

One day after Hariri's death, the UN Security Council issued a presidential statement condemning Hariri's killing as a terrorist act.[296] A fact-finding mission was dispatched to Lebanon, led by Mr. Peter FitzGerald, which concluded, *inter alia*, that the Lebanese authorities (then led by pro-Syrian parties) were unable to conduct an effective investigation of the assassination, that 'the Lebanese security services and the Syrian Military Intelligence bear the primary responsibility for the lack of security, protection, and law and order in Lebanon' and that the 'Government of the Syrian Arab Republic bears primary responsibility for the political tension that

[295] See, e.g., O. Raad, 'Connecting the dots in Lebanon', *Ya Libnan*, 2 December 2006, available at http://yalibnan.com/site/archives/2006/12/connecting_the.php.
[296] Statement by the President of the Security Council, UN Doc. S/PRST/2005/4, 15 February 2005.

preceded the assassination of former Prime Minister, Mr. Hariri.'[297] Upon examining the FitzGerald report and receiving the approval of the Lebanese Government, the Council adopted Resolution 1595 (2005) on 7 April 2005, thereby creating the Independent International Investigation Commission (IIIC), with a full mandate to investigate the circumstances of Hariri's killing. Chaired by Mr. Detlev Mehlis, the IIIC produced its first report in October 2005,[298] which stated that

> There is probable cause to believe that the decision to assassinate former Prime Minister Rafik Hariri could not have been taken without the approval of top-ranked Syrian security officials and could not have been further organized without the collusion of their counterparts in the Lebanese security services.[299]

The report also established that:

> Building on the findings of the Commission and Lebanese investigations to date and on the basis of the material and documentary evidence collected and the leads pursued until now, there is converging evidence pointing at both Lebanese and Syrian involvement in this terrorist act. It is a well-known fact that Syrian military intelligence had a pervasive presence in Lebanon at the least until the withdrawal of the Syrian forces pursuant to resolution 1559 (2004). The former senior security officials of Lebanon were their appointees. Given the infiltration of Lebanese institutions and society by the Syrian and Lebanese intelligence services working in tandem, it would be difficult to envisage a scenario whereby such a complex assassination plot could have been carried out without their knowledge.[300]

For its part, Syria has consistently denied any involvement in the assassination.[301]

Taking note of these conclusions of the IIIC, as well as its conclusion that certain Syrian officials actively obstructed the investigation, the Security Council adopted Resolution 1636 (2005), in which it, for the first time, made the determination that Hariri's assassination and its consequences constitute a threat to international peace and security. Acting under Chapter VII of the UN Charter, the Council imposed sanctions on individuals implicated in the assassination, and extended the IIIC's mandate to Syria, ordering it to cooperate fully with the investigation. The resolution was passed unanimously. Even though some member states of the Council objected to certain parts of the resolution, none objected to the Council's characterization of the situation as a threat to international peace and security, or to the consequent activation of the Council's Chapter VII powers.[302]

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[297] Report of the Fact-finding Mission to Lebanon inquiring into the causes, circumstances and consequences of the assassination of former Prime Minister Rafik Hariri, UN Doc. S/2005/203, 24 March 2005, paras. 60-61.
[298] Report of the International Independent Investigation Commission established pursuant to Security Council resolution 1595 (2005), UN Doc. S/2005/662, 20 October 2005.
[299] Ibid., para. 124.
[300] Ibid., para. 216.
[301] See 'Hariri panel 'has found suspects'', *BBC News*, 13 July 2007, available at http://news.bbc.co.uk/2/hi/middle_east/6896822.stm.
[302] UN Doc. S/PV.5297, 31 October 2005.

Following the adoption of Resolution 1636, the IIIC submitted its second report in December 2005, which affirmed the findings of the previous one.[303] In another major development, the Council also received a letter from the new Lebanese government, which asked the Council to 'establish a tribunal of an international character to convene in or outside Lebanon, to try all those who are found responsible for the terrorist crime perpetrated against Prime Minister Hariri.'[304] The Council then adopted Resolution 1644 (2005), in which it reaffirmed its earlier determination that the situation constitutes a threat to the peace, and again acting under Chapter VII, extended the IIIC's mandate and acknowledged Lebanon's request for the creation of a tribunal, directing the Secretary-General to provide the needed assistance and report back to the Council. This resolution was also passed unanimously.[305]

While Mr. Serge Brammertz, a deputy prosecutor of the International Criminal Court, replaced Mr. Mehlis as head of the IIIC, the UN Secretary-General dispatched his Legal Counsel, Mr. Nicolas Michel, to Lebanon to discuss possible avenues of international assistance for the prosecution of those responsible for the attack on Mr. Hariri. The Secretary-General reported that

> [I]t became clear from our consultations with the Lebanese authorities that the creation of an exclusively international tribunal would remove Lebanese responsibility for seeing justice done regarding a crime that primarily and significantly affected Lebanon. Therefore, it appears that the establishment of a mixed tribunal would best balance the need for Lebanese and international involvement in the work of the tribunal. That balance would be determined by such important characteristics as the tribunal's founding instrument, jurisdiction, applicable law, location, composition and financial arrangements.[306]

As in the case of the Special Court for Sierra Leone, such a mixed tribunal would be established by an agreement between Lebanon and the UN. Based on the Secretary-General's report, the Security Council adopted Resolution 1664 (2006), again unanimously,[307] directing the Secretary-General to initiate negotiations on the agreement and statute for the new tribunal with the Lebanese government. After six months of negotiations, in November 2006, the UN Legal Counsel produced a draft agreement and statute of the new Special Tribunal for Lebanon,[308] which was duly signed by Lebanon on 23 January 2007 and by the UN on 6 February 2007.

The signing of the agreement by Lebanon was only the first step in the Tribunal's creation, as the agreement needed to be ratified according to Lebanon's internal constitutional provisions. Such ratification never came to pass. While all major political factors in Lebanon generally expressed themselves to be in favour of the creation of a tribunal (or at least did so publicly), the ratification issue soon became mired in the morass of the Lebanese political scene.

Ever since the Cedar Revolution, a political and institutional crisis in Lebanon simmered, and it intensified in no small part due to the Israel-Hezbollah conflict

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[303] Second Report of the International Independent Investigation Commission established pursuant to Security Council resolutions 1595 and 1636 (2005), UN Doc. S/2005/775, 10 December 2005.
[304] UN Doc. S/2005/783, 13 December 2005.
[305] UN Doc. S/PV.5329, 15 December 2005.
[306] Report of the Secretary-General pursuant to paragraph 6 of resolution 1644 (2005), UN Doc. S/2006/176, 21 March 2006, para. 6.
[307] UN Doc. S/PV.5401, 29 March 2006.
[308] See UNLC Report, *supra* note XX.

which erupted in July 2006. In late 2006, Shi'a ministers withdrew from the Siniora government, demanding to have a minority veto power within the government and thereby compromising the country's complex power-sharing arrangement between the various sectarian blocs. Moreover, the (pro-Syrian) Lebanese president, Emile Lahoud, and the speaker of the Lebanese parliament, himself a Shi'a, refused to present the tribunal agreement for ratification to the parliament, in which Siniora's allies still had a controlling majority.

After several unsuccessful attempts to resolve the impasse,[309] Prime Minister Siniora informed the Security Council on 14 May 2007 that 'for all practical purposes the domestic route to ratification had reached a dead end, with no prospect for a meeting of parliament to complete formal ratification' and therefore asked the Council to put the Tribunal into effect by its own binding decision.[310] One day later, President Lahoud responded by telling the Council that 'approval of the Tribunal directly by the Security Council would constitute a transgression of the constitutional mechanism that had been completely ignored' by the Siniora government, which lacked constitutional legitimacy.[311]

On 30 May 2007, by 10 votes in favour and 5 abstentions,[312] the Council adopted Resolution 1757 (2007), thereby creating the Special Tribunal for Lebanon. In the resolution's first operative paragraph, the Council '[d]ecide[d], acting under Chapter VII of the Charter of the United Nations, that: (a) The provisions of the annexed document [the Agreement between the UN and Lebanon], including its attachment [the Statute of the new Tribunal], on the establishment of a Special Tribunal for Lebanon shall enter into force on 10 June 2007, unless the Government of Lebanon has provided notification under Article 19 (1) of the annexed document before that date.' In other words, the Council nominally gave Lebanon a window of ten days in which to ratify the treaty, which would otherwise enter into force solely under the Council's own Chapter VII authority. The various Lebanese parties were predictably unable to reach an accord, and the treaty, or 'treaty', between the UN and Lebanon entered into force as provided for by the Council.

So came into being the newest international criminal tribunal, designed as a mixed court, but born as a Chapter VII court, imposed on Lebanon at the request of its own government, yet opposed by its other constitutional branches. The article now turns to examining several legal issues raised by the establishment of the Tribunal in this manner.

B *An international tribunal for common murder, not a mass atrocity: is that even legal?*

The scope of the new Tribunal's jurisdiction is defined by a very complex provision found in Article 1 of both the Agreement and the Statute, which reads:

> The Special Tribunal shall have jurisdiction over persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime

[309] See, e.g., P. Heinlein, 'UN Chief Sends Top Lawyer to Lebanon to Break Hariri Tribunal Impasse', *VOA News,* 14 April 2007, available at http://www.voanews.com/english/archive/2007-04/2007-04-14-voa2.cfm?CFID=114905276&CFTOKEN=47239092.
[310] UN Doc. S/2007/281.
[311] UN Doc. S/2007/286.
[312] In favor were Belgium, Congo, France, Ghana, Italy, Panama, Peru, Slovakia, the United Kingdom and the United States. Abstaining were China, Indonesia, Qatar, Russian Federation and South Africa. See UN Doc. S/PV.5685, at 5-6.

> Minister Rafiq Hariri and in the death or injury of other persons. If the Tribunal finds that other attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005, or any later date decided by the Parties and with the consent of the Security Council, are connected in accordance with the principles of criminal justice and are of a nature and gravity similar to the attack of 14 February 2005, it shall also have jurisdiction over persons responsible for such attacks. This connection includes but is not limited to a combination of the following elements: criminal intent (motive), the purpose behind the attacks, the nature of the victims targeted, the pattern of the attacks (modus operandi) and the perpetrators.

Therefore, the principal crime over which the Tribunal has jurisdiction is the Hariri assassination itself, but the Tribunal's jurisdiction is not confined solely to that crime. Other attacks may also fall within the Tribunal's jurisdiction, (a) if they were committed within the specified period of time; (b) if they have a nexus with the Hariri assassination; and (c) if they are of comparable nature and gravity to the Hariri assassination. Furthermore, the UN Legal Counsel's Report on the Tribunal specifies a list of 14 attacks committed in the relevant period,[313] and the nexus requirement itself will have to be met to the satisfaction of the Tribunal's judges on a case by case basis.

Pursuant to Article 1 of the Statute, the Tribunal's jurisdiction *ratione personae* is not limited by nationality, and therefore also extends to any Syrian nationals implicated in Hariri's murder, regardless of whether they were at any time directly present in Lebanon. Since one of the principal reasons for the Tribunal's existence in the first place is the probable Syrian involvement in the assassination of Mr. Hariri,[314] the Tribunal's jurisdictional provision makes perfect sense. That does not mean, however, that Resolution 1757 imposes any obligation on Syria to cooperate with the new Tribunal. Only Lebanon has such an obligation, according to Article 15 of the Agreement unilaterally enacted by the Council. If Syria proves to be recalcitrant and fails to cooperate with the new Tribunal, as it said it would not,[315] the Council would have to pass another Chapter VII resolution to mandate Syria's compliance.[316] This is in stark contrast to previous Chapter VII courts, the ICTY and the ICTR, with which all states had an obligation to cooperate, and which were both given primacy over *any* domestic jurisdiction,[317] while the Hariri Tribunal has primacy only over *Lebanese* courts.[318] Of course, this is a consequence of the original design of the Tribunal as a mixed, not a Chapter VII court. It will be interesting to see whether any further action by the Council in this regard will take into account Syria's asserted willingness to try any of its nationals involved in Hariri's assassination.

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[313] UNLC Report, *supra* note XX, at 34. It is also possible that the Security Council will extend the Tribunal's mandate to deal with subsequent assassinations, for instance that of Mr. Walid Eido in June 2007. The Council already did so in respect of the IIIC. See, e.g., 'Security Council asks independent commission to probe bombing in Beirut', *UN News Centre*, 18 June 2007, at http://www.un.org/apps/news/story.asp?NewsID=22944&Cr=leban&Cr1= .

[314] See *supra*.

[315] See 'Fingers point towards Damascus', *Guardian Unlimited*, 22 May 2007, available at http://www.guardian.co.uk/syria/story/0,,2085168,00.html.

[316] See also UNLC Report, supra note, para. 53.

[317] See UNSC Resolution 827 (1993) creating the ICTY, op. para. 4, and Resolution 955 (1994) establishing the ICTR, op. para. 2, as well as ICTY Statute Art. 9 and ICTR Statute Art. 8, which deal with concurrent jurisdiction and primacy over the national courts of all states.

[318] See Article 4 of the Hariri Tribunal Statute.

The most distinctive thing about the Hariri Tribunal is that it is the only international court which was set up to try those responsible for a crime which cannot qualify as a mass atrocity, or for that matter, as a crime against international law, as we will see in more detail below. While all of the other international and hybrid tribunals, from the ICTY and the ICTR, to the SCSL and the EEEC, have been dealing with crimes which took tens or even hundreds of thousands of human lives, all of the attacks for which the Hariri Tribunal will potentially have jurisdiction combined did not claim more than 50 lives. It is of course rather sordid to rely solely on the number of deaths to assess the gravity of any crime. There was furthermore nothing 'common' about Hariri's murder, in that was the quintessential political, or indeed terrorist crime, which had enormous consequences for Lebanon. However, the fact that the Hariri Tribunal was established for a relatively minor crime when compared to those over which the other international courts have jurisdiction is not just a matter of idle curiosity, since it will almost certainly be relied upon by defendants before the Tribunal to challenge its legality and legitimacy.

Namely, every international tribunal so far was faced with challenges to their own authority. At Nuremberg, the challenge was not so much legal – indeed, the Charter of the International Military Tribunal prohibited defendants from mounting such a challenge[319] – as it was an attack against the *legitimacy* of the whole process.[320] The legality of the ICTY, however, was challenged by Dusko Tadic, the first defendant to appear before that court.

The *Tadic* case raised two separate issues. One was whether the ICTY's creation by the Council acting under Chapter VII was lawful under the Charter, while the other was whether the first question was at all justiciable, either generally, for instance before the ICJ, or before the ICTY itself. As is well known, in *Tadic* the Trial Chamber initially ruled that it had no authority to pronounce on its own legality, and that the Council's decision to establish the ICTY was unreviewable.[321] The Appeals Chamber, however, held that the issue of the ICTY's legality was an integral part of its jurisdiction to decide on its own jurisdiction, or *compétence de la compétence*, and concluded that the ICTY was lawfully established by the Council, in accordance with the rules of the Charter.[322] A similar challenge to the ICTR's legality was also rejected.[323] The authority of the Security Council to establish international criminal

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[319] Charter of the International Military Tribunal, 82 UNTS 280 (1951), Article 3 of which reads: 'Neither the Tribunal, its members nor their alternates can be challenged by the prosecution, or by the Defendants or their Counsel. Each Signatory may replace its members of the Tribunal or his alternate for reasons of health or for other good reasons, except that no replacement may take place during a Trial, other than by an alternate.'

[320] See, e.g, Hermann Goering's speech at 22 *Nuremberg Trial Proceedings* 366, available at http://www.yale.edu/lawweb/avalon/imt/proc/08-31-46.htm.

[321] See *Prosecutor v. Tadic*, IT-94-1, Decision on the Defence Motion on Jurisdiction in the Trial Chamber of the International Tribunal, 10 August 1995, esp para. 5:

> T]his International Tribunal is not a constitutional court set up to scrutinise the actions of organs of the United Nations. It is, on the contrary, a criminal tribunal with clearly defined powers, involving a quite specific and limited criminal jurisdiction. If it is to confine its adjudications to those specific limits, it will have no authority to investigate the legality of its creation by the Security Council.

[322] See *Prosecutor v. Tadic*, IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, esp. paras. 9-48.

[323] See *Prosecutor v. Kanyabashi*, ICTR-96-15, Decision on Jurisdiction, 18 June 1997. The Special Court for Sierra Leone was also unsuccessfully challenged, though its legality was not disputed under international law as an excess of authority by the Security Council, since the defendants alleged that the

jurisdictions was finally affirmed by the Rome Statute of the International Criminal Court (ICC), which was drafted with the participation of the vast majority of states.[324] Article 13(b) of the Rome Statute allows the Council to refer a case to the ICC, acting under its Chapter VII powers under the UN Charter, even when the case involves a state which is not a party to the Rome Statute. The Council did in fact avail itself of this power when it referred the Darfur situation to the ICC by Resolution 1593 (2005).

Accordingly, the authority of the Security Council to establish criminal jurisdictions under Chapter VII is unquestionable, at least in principle. One limit on that power is whether a situation truly amounts to a threat (or a breach of) international peace and security, pursuant to Article 39 of the UN Charter. Even if this determination by the Council is reviewable by a court, even an extremely deferential one – and that is a big if[325] – a challenge against the Hariri Tribunal on this ground has extremely low chances of succeeding, despite the relatively small scale of the crimes when compared to other international tribunals. Namely, as previously recounted, the Council made a determination that the situation caused by Hariri's murder constituted a threat to international peace and security as early as October 2005, by unanimously passing Resolution 1636, and then affirming this determination by Resolution 1644 (2005), again unanimously. The Council members were obviously in complete agreement that even if Hariri's killing was not an international crime, and even though there was no armed conflict in Lebanon, the situation should still be qualified of a threat to the peace, especially due to the potential involvement of actors outside Lebanon, Syria in particular. Indeed, the latest report of the IIIC, its eighth, explicitly states that Hariri's assassination was in all likelihood motivated by the circumstances surrounding the implementation of the Council's own Resolution 1559 (2004), which mandated Syria's withdrawal from Lebanon.[326]

If the Council's determination that the situation in Lebanon was a threat to international peace did not raise any eyebrows, neither did its assessment that an international criminal tribunal would be an appropriate measure to deal with this threat. The proposal for a tribunal was backed by both the Siniora government and its political opposition in Lebanon, as well as by a unanimous Council in Resolution 1664 (2006). Of the five states who abstained from voting for Resolution 1757 (2007) which created the Tribunal, namely Qatar, Indonesia, South Africa, Russia and China, none disputed that the Special Tribunal was either necessary or appropriate. The only overt dispute among the Council's member states was in the use of Chapter VII itself, in what was seen as an excessive intervention in internal Lebanese politics and a circumvention of its domestic constitutional processes.[327] That, however, would

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creation of the court via an agreement between the UN and Sierra Leone violated Sierra Leone's own constitution. See *Prosecutor v. Kallon et al.* (RUF Case), Decision on constitutionality and lack of jurisdiction, SCSL-04-15-PT-059, 13 March 2004.

[324] See Schabas, *supra* note, at 53.

[325] See Dapo Akande, 'The International Court of Justice and the Security Council: Is there room for judicial control of decisions of the political organs of the United Nations', 46 *ICLQ* (1997) 309. See also J.G. Merills, *International Dispute Settlement*, 3rd ed., Cambridge University Press, Cambridge, 2004, at 249-252.

[326] See the Eighth report of the International Independent Investigation Commission established pursuant to
Security Council resolutions 1595 (2005), 1636 (2005), 1644 (2005), 1686 (2006) and 1748 (2007), UN Doc. S/2007/424, 12 July 2007, para. 50.

[327] For instance, the ambassador of Qatar stated that: 'The State of Qatar supports the establishment of the tribunal to punish the perpetrators of that outrageous crime… We are simply apprehensive that the adoption of the draft resolution under Chapter VII will not serve to bring stability to [Lebanon].' S/PV.5685, at 3. The ambassador of South Africa likewise asserted that: 'South Africa fully supports

qualify as the quintessential political dispute, which would hardly be reviewable by any international court, least of all the Special Tribunal itself.

The legality of the Tribunal, therefore, will and should be upheld, not just because the Tribunal's judges would be loath to deny themselves the privileges of their office, but also because Resolution 1757 simply falls within the boundaries drawn by the now settled interpretative practice of the Charter. Unfortunately, the problem of legality will recur, as we shall later see, in the substantive law that the Tribunal will be applying.

C *The treaty that is not a treaty, and a Chapter VII court that is not a UN court*

Though the Security Council cannot be said to have exceeded its authority in creating the Hariri Tribunal, the exact route that the Council chose is somewhat troubling. Namely, when it created the ICTY, the Council simply 'decide[d] … to establish an international tribunal', acting under Chapter VII of the Charter.[328] The Council did the same in respect of the ICTR,[329] even though it did not formally have to utilize its Chapter VII powers, since, unlike with the widely diverging views among the successor states of the fragmented former Yugoslavia, Rwanda actually asked the Council to establish that tribunal.[330]

With the Hariri Tribunal, however, the Council, instead decided that the *Agreement* that the UN Legal Counsel had previously negotiated with the Lebanese government 'shall enter into force', despite that government's inability to effect a ratification of that Agreement in accordance with its own domestic law.[331] What we have, therefore, is an agreement to which only one side expressed its consent to be bound pursuant to the applicable rules of the law of treaties, yet which is now in force by virtue of the Council's resolution. Does this mean that the Council has now appropriated for itself the power to unilaterally enact *treaties*,[332] even if it is accepted that there is no problem in principle of it making binding law?[333]

The Council likely opted for this solution for two separate reasons. The first would be purely technical, as it allowed the Council to avoid redrafting the Agreement into a full-fledged resolution. The second, however, is far more important – it allowed the Council to create the illusion that, despite the fact that the Tribunal was created unilaterally, nothing really changed in respect of the Tribunal's legal nature and its mixed character, particularly when it comes to Lebanese 'ownership' of the Tribunal. In other words, members of the Council wanted to use Chapter VII, but to later pretend that this never happened. Regardless of the potential merits of this diplomatic ploy, it is impossible but to conclude that the promulgation of the Tribunal Agreement by Resolution 1757 fundamentally changed its legal nature. The

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the establishment of the tribunal and expects it to operate with impartiality and in accordance with Lebanese law and the highest international standards of criminal justice… We maintain that it is not appropriate for the Security Council to impose such a tribunal on Lebanon, especially under Chapter VII of the Charter of the United Nations.' Ibid., at 4.

[328] Resolution 827 (1993).

[329] Resolution 955 (1994).

[330] UN Doc. S/1994/1115, 29 September 1994, at 4.

[331] See *supra*

[332] The author would like to express his thanks to Professor Vera Gowland-Debbas for first pointing out this problem.

[333] See, for example, the Council's Resolution 1373 (2001), through which the Council basically acted as a legislator in imposing specific obligations in combating terrorism on all states.

Agreement may still be *called* an agreement, but it is *no longer* an agreement, since consent of all parties is the single defining characteristic of any treaty.[334]

Therefore, whether judges of Lebanese nationality participate in the Tribunal or not, and regardless of whether large parts of Lebanese society and institutions actually wanted the Tribunal, it was nonetheless created not by consensus, but by compulsion. Despite the language that the Council used, the Hariri Tribunal cannot be said to be a treaty-based court. It also seems clear that the Council did not make a claim to some extraordinary power to unilaterally enact treaties, in total violation of every principle of the law of treaties, but was in fact merely making a purely political manoeuvre in using the language that it did. Thus, when it comes to its legal nature, the Hariri Tribunal is much more akin to the ICTY and the ICTR than to the SCSL.

In yet another oddity, both the ICTY and the ICTR are subsidiary organs of the UN, specifically of the Security Council. Their staff are UN staff, remunerated according to the UN salary grades, the tribunals are funded both directly from the UN budget and by voluntary contributions, and they fly the UN flag in front of their premises. The Hariri Tribunal, on the other hand, was designed, just like the SCSL, to be an organization affiliated to the UN, but still apart from it.[335] But now, however, that the Security Council has unilaterally created the Tribunal, we have the first Chapter VII court which is not, at the same time, a subsidiary organ of the Council.

3 Peculiarities of the Tribunal's Substantive and Procedural Law

A *Not an International Crime*…

Of greater practical importance than the peculiarities surrounding the establishment of the Hariri Tribunal are those found in its substantive and procedural law. Most significantly, the Tribunal is the first international criminal court which will be trying individuals accused of violating only municipal, not international, criminal law. As provided by Article 2 of the Tribunal's Statute

> The following shall be applicable to the prosecution and punishment of the crimes referred to in article 1, subject to the provisions of this Statute:
> (a) The provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crimes and offences, including the rules regarding the material elements of a crime, criminal participation and conspiracy; and
> (b) Articles 6 and 7 of the Lebanese law of 11 January 1958 on "Increasing the penalties for sedition, civil war and interfaith struggle".

The source of substantive criminal law that the Tribunal will be applying is, therefore, solely the Lebanese Criminal Code. As Hariri and others were not assassinated during an armed conflict, these murders cannot be war crimes, i.e. violations of international

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[334] See, e.g, the second preambular paragraph of the Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations (1986), 25 ILM 543, with states '[*r*]*ecognizing* the consensual nature of treaties.' Indeed, two of the abstaining members of the Security Council made remarks regarding the obvious change in the legal nature of the Tribunal Agreement - see S/PV.5685, at 3 (Indonesia) 'On the draft resolution, my delegation considers that it has changed the legal nature of article 19 of the agreement'; and at 5 (Russia) 'The treaty between the two entities — Lebanon and the United Nations — by definition cannot enter into force on the basis of a decision by only one party'.

[335] See the UNLC Report, *supra* note XX, para. 6.

humanitarian law. Their scale moreover strongly suggests that they are also not crimes against humanity, even if this category of crimes no longer requires a nexus with an armed conflict. In his report, the UN Legal Counsel did entertain the possibility that the attacks could be qualified as crimes against humanity, but that option was discarded as unacceptable to certain members of the Council.[336] Under the Statute as adopted by the Council, the Tribunal itself has no authority to make such a determination.[337] Furthermore, even though Article 2 of the Statute refers to 'acts of terrorism', terrorism as such is (still) not a discrete crime under international law, i.e. an illicit act for which an individual can incur criminal responsibility at the international level regardless of municipal law, when it fulfils neither the requirements for a war crime nor those for a crime against humanity.[338]

It is not unusual for hybrid tribunals to apply rules of municipal law – that is, after all, one of the reasons for them being 'hybrid'. It should, of course, be noted that the various mixed or hybrid tribunals can be roughly divided according to whether the respective court is truly international in character, or is in fact a part, albeit an unorthodox one, of a state's domestic judicial system. Only the SCSL and now the Hariri Tribunal clearly belong to the former category, while the tribunal for Cambodia (ECCC), the tribunals in Kosovo and East Timor set up by the UN administrations there, and the State Court of Bosnia and Herzegovina belong to the latter. The tribunals in the second category generally apply domestic law, yet the crimes in question are generally still international crimes as they are incorporated into the

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[336] UNLC Report, *supra* note XX, paras. 23-25:

> 23. In keeping with the Security Council mandate requesting the Secretary-General to establish a tribunal of an international character and in the circumstances of Lebanon where a pattern of terrorist attacks seems to have emerged, it was considered whether to qualify the crimes as crimes against humanity and to define them, for the purpose of this statute, as murder or other inhumane acts of similar gravity causing great suffering or serious injury to body or to mental health, when committed as part of a widespread or systematic attack directed against the civilian population.
> 24. Mindful of the differences in scope and number of victims between the series of terrorist attacks committed in Lebanon and the killings and executions perpetrated on a large and massive scale in other parts of the world subject to the jurisdiction of any of the existing international criminal jurisdictions, it was nevertheless considered that the 14 attacks committed in Lebanon could meet the prima facie definition of the crime, as developed in the jurisprudence of international criminal tribunals. The attacks that occurred in Lebanon since 1 October 2004 could reveal a "pattern" or "methodical plan" of attacks against a civilian population, albeit not in its entirety. They could be "collective" in nature, or "a multiple commission of acts" and, as such, exclude a single, isolated or random conduct of an individual acting alone. For the crime of murder, as part of a systematic attack against a civilian population, to qualify as a "crime against humanity", its massive scale is not an indispensable element.
> 25. However, considering the views expressed by interested members of the Security Council, there was insufficient support for the inclusion of crimes against humanity within the subject matter jurisdiction of the tribunal. For this reason, therefore, the qualification of the crimes was limited to common crimes under the Lebanese Criminal Code.

[337] Indeed, the Legal Counsel himself has officially stated that 'The text of the statute, the language of the report, the preparatory work and the background of the negotiations clearly demonstrate that the tribunal will not be competent to qualify the attacks as crimes against humanity.' Statement by Mr. Nicolas Michel, Under-Secretary-General for Legal Affairs, the Legal Counsel, at the informal consultations held by the Security Council on 20 November 2006, UN Doc. S/2006/893/Add.1, at p. 2.

[338] See generally Ben Saul, *Defining Terrorism in International Law*, Oxford University Press, Oxford, 2006, esp. Chapter IV, but see A. Cassese, 'The Multifaceted Criminal Notion of Terrorism in International Law', 4 *Journal of International Criminal Justice* (2006) 933.

respective domestic criminal codes. Sometimes, however, these national, though mixed, courts are also given jurisdiction over common domestic crimes.

For instance, besides genocide, war crimes, and crimes against humanity, the ECCC also has jurisdiction over the crimes of homicide, torture and religious persecution under the Cambodian Penal Code,[339] while the special panels in East Timor also have jurisdiction over common murder and sexual offences.[340] Likewise, in addition to crimes against international law set out in Articles 2-4 of its Statute, the SCSL also has jurisdiction over two groups of crimes against Sierra Leonean law, namely arson and sexual abuse of children, under Article 5 of the SCSL Statute.[341] It is therefore not unprecedented for the Hariri Tribunal to have jurisdiction over purely domestic crimes. What is unprecedented is that the Tribunal does not have jurisdiction over *any* international crimes.

B ...*Yet With International Forms of Responsibility?*

To this list of unique things about the Hariri Tribunal we must regrettably add, the fact that the Tribunal's Statute surprisingly attaches distinctively international forms of responsibility to the purely domestic crimes over which it has jurisdiction, in what might be the Tribunal's most grave legal defect. Namely, Article 3 of the Statute, titled 'individual criminal responsibility', allows individual responsibility to accrue not just on grounds of liability common to all legal systems, such as commission and complicity, but also for common purpose responsibility/joint criminal enterprise (JCE) and superior (command responsibility).[342] Since both JCE

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[339] See Article 5 of the Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), available at http://www.eccc.gov.kh/english/cabinet/law/4/KR_Law_as_amended_27_Oct_2004_Eng.pdf.

[340] UNTAET Regulation No. 2000/15, 6 June 2000, available at http://www.pict-pcti.org/courts/pdf/eastimor/200015.pdf.

[341] As well noted by Professor Schabas, the inclusion of these crimes into the SCSL Statute is of purely theoretical interest, as no indictment has been filed on those counts. See Schabas, *supra* note, at 152.

[342] In full, Article 3 reads as follows:

> 1. A person shall be individually responsible for crimes within the jurisdiction of the Special Tribunal if that person:
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> (a) Committed, participated as accomplice, organized or directed others to commit the crime set forth in article 2 of this Statute; or
>
> (b) Contributed in any other way to the commission of the crime set forth in article 2 of this Statute by a group of persons acting with a common purpose, where such contribution is intentional and is either made with the aim of furthering the general criminal activity or purpose of the group or in the knowledge of the intention of the group to commit the crime.
>
> 2. With respect to superior and subordinate relationships, a superior shall be criminally responsible for any of the crimes set forth in article 2 of this Statute committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
>
> (a) The superior either knew, or consciously disregarded information that clearly indicated that the subordinates were committing or about to commit such crimes;
>
> (b) The crimes concerned activities that were within the effective responsibility and control of the superior; and
>
> (c) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

and command responsibility generally do not exist in domestic criminal law for common crimes, this creates a potentially serious problem of legality, a violation of the *nullum crimen sine lege* maxim, which is a fundamental principle of both international human rights law [343] and criminal law,[344] and is now firmly based in customary international law.[345]

In other words, the Tribunal's Statute, which designates the Lebanese Criminal Code as the sole source of crimes, appears to allow punishment for these crimes pursuant to theories of responsibility which are, to our knowledge, not recognized in that same Code. This violation of legality would exist regardless of the otherwise firm grounding of both JCE and command responsibility in international criminal law, where both doctrines relate solely to international crimes.

This violation of legality would be particularly egregious when it comes to command responsibility, since this doctrine developed in the context of armed conflict, specific to international humanitarian law. It is above all the rigid, highly disciplined structure of the military, coupled with unique characteristics of system criminality at the international level when it comes to mass atrocities perpetrated in wartime, that allowed for the development of a culpability doctrine that extends criminal responsibility to commanders who fail to exercise control over their subordinates for crimes committed by them, under a standard which is akin to criminal negligence. Only gradually did this doctrine of command responsibility, as expressed in international case-law and Additional Protocol I to the Geneva Conventions, expand to cover superiors who are not a part of the military hierarchy, and for international crimes which do not require a direct nexus with armed conflict, such as crimes against humanity. It should also be noted, though, that even so, a successful prosecution under a theory of command responsibility is rather difficult, and that it most often happens in the traditional setting of a military commander failing to properly supervise his soldiers.[346] Additionally, the Rome Statute of the ICC in Article 28 distinguishes between the superior responsibility of military commanders, and that of other, civilian superiors, for which somewhat more stringent standards are imposed. Indeed, Article 3(2) of the Hariri Tribunal Statute is a word for word reproduction of Article 28(b) of the Rome Statute, which sets out the superior responsibility standard for non-military commanders.

But therein lies the problem – command responsibility as such simply does not exist in municipal criminal law, except (depending on the particular system) for incorporated international crimes, which Hariri's assassination, again, is not. That is not to say that municipal law does not have concepts which are *similar* to command responsibility, principally specific crimes which punish the failure to exercise due diligence or control over subordinates in a variety of situations. This is actually precisely how some municipal criminal systems, such as the German and the

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> 3. The fact that the person acted pursuant to an order of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Special Tribunal determines that justice so requires.

[343] See, e.g., Article 11(2) of the Universal Declaration of Human Rights and Article 15 of the ICCPR.
[344] See Article 22 of the Rome Statute of the ICC.
[345] See generally S. Lamb, '*Nullum crimen, nulla poena sine lege* in International Criminal Law', in A. Cassese et al (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, Oxford, 2002, at 733, 735-742.
[346] See more Beatrice I. Bonafé, 'Finding a Proper Role for Command Responsibility', 5 *Journal of International Criminal Justice* (2007) 599.

Canadian one, have incorporated command responsibility for international crimes into their own law.[347]

What municipal systems generally do *not* have, however, is command responsibility as precisely that – a vicarious form of criminal responsibility for crimes perpetrated by others.[348] An official or an employer, for example, are usually not directly criminally responsible for a murder committed by a subordinate, if they only had reason to know that the subordinate is about to commit the crime. To take an example pertinent for the Hariri Tribunal, the Syrian President Bashir al-Assad would in all likelihood not be responsible for homicide under the Lebanese Criminal Code if a subordinate of his was involved in the Hariri assassination, and it could only be proven that Assad 'consciously disregarded information that clearly indicated' that his subordinates were involved in the plot, not that he had either intent or actual knowledge. Under the Tribunal's Statute, however, Assad could be held responsible, even if it politically seems rather unlikely that either the IIIC or the Tribunal would go that high up the Syrian food chain.

The inclusion of common purpose responsibility/JCE into the Tribunal's Statute poses a somewhat lesser *nullum crimen* problem than that of superior responsibility. Although JCE is also firmly based in system criminality, or at the very least collective criminality at the international level, similar modes of responsibility exist in many municipal systems of criminal law.[349] However, the devil, as they say, is in the details – common purpose or common design criminality involving a plurality of persons is dealt with in domestic legal systems in a wide variety of different ways.[350] Many domestic legal systems also do not recognize the most controversial, 'extended' form of JCE, or JCE3,[351] as a mode of liability which allows for the punishment of a defendant who had no knowledge or intent regarding a specific crime committed by some other member of the JCE, that crime not being a part of the agreed upon common purpose, but its commission being foreseeable by the defendant.[352] Furthermore, as with superior responsibility, the Hariri Tribunal Statute's provision on JCE, Article 3(1)(b), appears to be based on that of the Rome Statute, specifically Article 25(3)(d).[353] Yet, it is not even clear that the text of the

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[347] See Schabas, *supra* note, at 319.
[348] Ibid., at 315.
[349] See, e.g., Schabas, *supra* note, at 310;
[350] See, e.g., Kai Hamdorf, 'The Concept of a Joint Criminal Enterprise and Domestic Modes of Liability for Parties to a Crime: A Comparison of German and English Law', 5 *Journal of International Criminal Justice* (2007) 208.
[351] Tadic, elements, three categories etc

[352] See Allison Marston Danner and Jenny S. Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law', 93 *California Law Review* (2005) 75, at 109.
[353] Which reads:

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

Rome Statute actually allows for JCE3, even though it is to be expected that the ICC will conclude that it does.[354]

Indeed, when reviewing domestic criminal systems in *Tadic*, the ICTY Appeals Chamber expressly stated that:

> It should be emphasised that reference to national legislation and case law only serves to show that the notion of common purpose upheld in international criminal law has an underpinning in many national systems. By contrast, in the area under discussion, national legislation and case law cannot be relied upon as a source of international principles or rules, under the doctrine of the general principles of law recognised by the nations of the world: for this reliance to be permissible, it would be necessary to show that most, if not all, countries adopt the same notion of common purpose. More specifically, it would be necessary to show that, in any case, the major legal systems of the world take the same approach to this notion. The above brief survey shows that this is not the case.[355]

The situation with the Hariri Tribunal is exactly the opposite from that in *Tadic*. From the standpoint of the principle of legality, the only pertinent legal system is the Lebanese one, as the crimes at hand are solely crimes against Lebanese law, while international rules and principles regarding JCE are simply irrelevant – if it were not for the fact that the Security Council apparently made them relevant by the inclusion of common purpose liability into the Statute.

Unlike with superior responsibility the Rome Statute's definition of common purpose responsibility is not reproduced verbatim.[356] In fact, the definition of common purpose from Article 3(1)(b) of the Hariri Tribunal Statute rather seems to be based on the one from Article 2(3)(c) of the 1997 International Convention for the Suppression of Terrorist Bombing, which itself served as a model for Article 25(3)(d) of the Rome Statute.[357] The definition of common purpose adopted in the Hariri Tribunal Statute differs from that of the Rome Statute in that the latter requires that the defendant to act 'with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a

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(ii) Be made in the knowledge of the intention of the group to commit the crime.

[354] Since the drafting of the Rome Statute preceded the ICTY's extensive jurisprudence on JCE initiated in *Tadic*, it will be necessary to await the ICC's first cases to see how the interpretation of Article 25(3)(d) unfolds in the light of the three distinct categories of JCE elaborated on by the ICTY. This author, at least, shares the view of Professor Cassese that this provision should and will be interpreted expansively to allow for JCE3, but that some of the elements of JCE3 can and should be more clearly defined – see more A. Cassese, 'The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise', 5 *Journal of International Criminal Justice* (2007) 109, esp. at 132.

[355] *Tadic*, para. 225.

[356] Article 3(1)(b) reads:

> Contributed in any other way to the commission of the crime set forth in article 2 of this Statute by a group of persons acting 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.

[357] See A. Esser, 'Individual Criminal Responsibility', in A. Cassese et al, *supra* note, at 767, 802.

crime within the jurisdiction of the Court', while that in the Hariri Tribunal Statute requires him to act 'with the aim of furthering the general criminal activity or purpose of the group.' The Hariri Tribunal Statute is therefore less strict or specific than the Rome Statute of the ICC when it comes to defining the criminal common purpose of the JCE.

Why was this done? There seem to be two possible answers. Firstly, since the Hariri assassination arguably qualifies as a terrorist bombing within the meaning of Article 2 of the 1997 Convention, the drafters of the Statute might have thought that this would obviate any problems of legality. Unfortunately, it would not, since the 1997 Convention, like many similar instruments, obliges states parties to criminalize the acts it prohibits within their own domestic criminal law and sets out various modes of interparty cooperation, but it does not by itself create individual criminal responsibility either at the international or at the domestic level. Only if Lebanon had indeed incorporated the JCE provision from the Convention into its own Criminal Code would the *nullum crimen* problem be prevented, and to our knowledge, Lebanon has not done so.

Secondly, the drafters of the Statute perhaps wanted to avoid a significant limitation on JCE which flows from international case law. Namely, one of the great advantages JCE has for prosecutors is that the they have a large margin of discretion in formulating the common purpose behind a JCE. Especially if using JCE3, the net of culpability that the prosecutor can cast may be quite wide.[358] One limitation on this discretion of the prosecutor, however, has been consistently applied by international tribunals, and that is that the stated common purpose of the JCE must be (1) (internationally) criminal and that (2) it must amount to or involve the commission of crimes over *which the particular tribunal in question has jurisdiction*, not just any other serious crimes.[359] This is indeed how the common purpose is defined in Article 25(3)(d)(i) the Rome Statute, and it is precisely this requirement which was omitted from Article 3(1)(b) of the Hariri Tribunal Statute.

To put this in more practical terms, the common purpose of the JCE the *Tadic* case, for example, was 'a policy to commit inhumane acts against the non-Serb civilian population of the territory in the attempt to achieve the creation of a Greater Serbia.'[360] In other words, there was a 'common criminal purpose to rid the Prijedor region of the non-Serb population, by committing inhumane acts.'[361] Likewise, Slobodan Milosevic was charged with participation in a JCE the goal of which was 'the expulsion of a substantial portion of the Kosovo Albanian population from the territory of the province of Kosovo in an effort to ensure continued Serbian control over the province.'[362] As well explained by Professor Schabas, the common purpose at hand in those cases could not just have been 'the creation of a Greater Serbia' or 'continued Serbian control over Kosovo' as neither of these goals is by itself an international crime.[363] The only admissible common purpose would have been one which necessarily involved the commission of international crimes to achieve these goals, and that is how both Milosevic and Tadic were charged.

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[358] This is one of the reasons for the unease (generally not shared by this author) that many eminent scholars have with the concept of JCE. See, e.g., H. van der Wilt, 'Joint Criminal Enterprise Possibilities and Limitations', 5 *Journal of International Criminal Justice* (2007) 91.
[359] See *Tadic*, para. 227. See also Schabas, *supra* note XX, at
[360] *Tadic*, para. 230.
[361] *Tadic*, para. 231.
[362] Cited according to Schabas, *supra* note, at 312.
[363] Ibid.

That this is in fact a significant limitation on how a prosecutor may charge JCE is well shown by the recently handed down first trial judgment of the SCSL in the so-called AFRC case.[364] In that case the prosecutor charged the three defendants for sharing 'a common plan, purpose or design (joint criminal enterprise) which was to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas.'[365] The SCSL Trial Chamber correctly rejected this indictment as pleaded, since it concluded that the stated common purpose of gaining control over Sierra Leone did not qualify as an international crime, there being no rule against rebellion in international law,[366] and that furthermore a JCE must be inherently criminal from its inception, requiring an agreement to commit crimes within the scope of the SCSL Statute.[367] This is, again, the same requirement which was incorporated into Article 25(3)(d) of the Rome Statute, which mandates that the common purpose 'involve[] the commission of a crime within the jurisdiction of the Court.' The Trial Chamber also emphasized that the prosecution must plead all the necessary elements of the JCE, as well as provide all the material facts in the indictment itself for it to be without defect.[368] The Trial Chamber therefore decided not to consider JCE as a mode of criminal responsibility in the AFRC case,[369] though it did convict the defendants for their personal involvement in specific crimes.[370]

This is relevant for the Hariri Tribunal because, even if an indictment pursuant to a JCE theory was admissible and was not a violation of the principle of legality, the requirement of specificity dramatically reduces the utility of the concept of JCE to the future prosecutor of the Tribunal. JCE is the prosecutor's darling precisely because it allows for the punishment of several categories of defendants, above of all high-ranking officials, who had no actual knowledge of any specific crime, on the grounds that they participated in a common criminal plan of which these specific crimes were a natural consequence. By way of example, it is unlikely that Milosevic knew the details of the 'ethnic cleansing' of any particular village in Kosovo, but he would still be responsible for all of these specific crimes, since he was a member of a JCE with the purpose of forcibly expelling a large section of the ethnic Albanian population from Kosovo. However, such culpability is only possible because this overall goal of mass expulsion was in of itself criminal under the ICTY Statute.

When we transpose this to the context of the Hariri Tribunal, it is clear that, under international jurisprudence, it would not be possible for the prosecutor to charge JCE with a broad common purpose such as that of maintaining Syrian influence in Lebanon, since, though that might have been the motive for Hariri's

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[364] *Prosecutor v. Brima, Kamara and Kanu*, SCSL-2004-16-PT, Judgment, 20 June 2007, available at http://www.sc-sl.org/AFRC.html.
[365] Ibid., para. 60.
[366] Ibid., para. 67.
[367] Ibid., paras. 73-76.
[368] Ibid., paras. 71, 77-85.
[369] Ibid., para. 85.
[370] The defective nature of the JCE pleaded by the SCSL prosecutor in the AFRC indictment was well noted by Professor Schabas – see Schabas, supra note XX, at 312. He also cautions that the Trial Chamber's decision in the AFRC may have fatal consequences for the prosecution's case against Charles Taylor, as not only is that case going to be decided by the same Trial Chamber, but also because the prosecution pleaded JCE against Taylor in the same manner as in the AFRC trial. See W. Schabas, 'Special Court for Sierra Leone Rejects Joint Criminal Enterprise', *Trial of Charles Taylor Blog*, at http://charlestaylortrial.org/expert-commentary/professor-william-schabas-on-afrc-decision/ .

murder,[371] it is not by itself a crime within the jurisdiction of the Tribunal. The narrowest possible common purpose that the prosecutor could charge would be the one of preserving Syria's influence by killing Rafik Hariri, the basic crime over which the Tribunal has jurisdiction. However, that very narrowly defined common purpose would practically reduce JCE to regular complicity, and there would be little added utility in using the concept, since the prosecution would have to prove for each and every defendant that he or she shared the purpose of killing Hariri. If the prosecution can really manage to prove *that*, it really does not need JCE.

The only possible benefit that the prosecution could have by using JCE is an easy one: while there might only have been intent to kill Hariri, it was still foreseeable that in any bombing a number of bystanders would die (in this case, more than twenty), and that therefore, under JCE3, those who conspired to kill Hariri would be responsible for these deaths as well. However, this eventuality is probably already covered by Lebanese law, through a regular theory of complicity and wilful or reckless assumption of risk.

On the other hand, probably the broadest common purpose that that prosecutor could permissibly plead would be something in the vein of 'maintaining Syrian influence in Lebanon, by committing terrorist bombings against senior political opponents of the Syrian presence therein.' Such a JCE purpose would allow for the conviction of those members of the JCE who did not know the details of any or some of the 14 specific attacks that the Hariri Tribunal will have jurisdiction over, in addition to Hariri's assassination,[372] for all of these attacks. Whether such a prosecution strategy would be successful of course depends entirely on the available facts and the evidence, on which we can only speculate.

This unfortunately brings us back to the fundamental problem of legality that any prosecution under a JCE theory would run afoul of. As explained above, because the various assassinations within the Tribunal's jurisdiction were crimes solely under Lebanese law, it would be a manifest violation of the principle of legality to punish anyone for these crimes who could not be punished under Lebanese law. The most natural thing that should have been done when the Statute was drafted was to apply domestic Lebanese law both when it comes to the definition of crimes and for accomplice liability and other forms of criminal participation. Somewhat bizarrely, Article 2 of the Statute does make applicable the provisions of the Lebanese Criminal Code on 'criminal participation',[373] yet it is unclear what this was meant to achieve, since Article 3 is the one which deals with forms of criminal responsibility.

That this would have been the appropriate course of drafting the Hariri Tribunal Statute is actually well shown by the example of the first hybrid tribunal, the Special Court for Sierra Leone. As previously noted, in addition to international crimes (Articles 2-4), the SCSL Statute also puts within the court's jurisdiction two groups of crimes against Sierra Leonean law (Article 5). However, the provision on individual criminal responsibility, found in Article 6 of the SCSL Statute, clearly distinguishes between international and domestic crimes, since it prescribes that '[i]ndividual criminal responsibility for the crimes referred to in article 5 [i.e. crimes against Sierra Leonean law] shall be determined in accordance with the respective laws of Sierra Leone,' while international forms of responsibility are reserved solely for international crimes.

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[371] See *supra* IIIC reports.
[372] *Supra* note
[373] *Supra* note

Could it be that no thought was given to this problem during the drafting of the Hariri Tribunal Statute? That it is certainly a possibility to be considered, since legislative inertia, redundancy and wholesale copy/paste jobs are nothing new in the drafting of legal instruments, including international ones.[374] Or, the Statute's drafters might have been fully aware of the legality problem with including JCE and superior responsibility into the Statute, but thought that applying Lebanese law would be insufficient, and would allow certain (probably high-ranking) defendants to slip through the net – the fact that the JCE provision in the Statute was actually modelled on the UN Convention on the Suppression of Terrorist Bombings, and not on the ICC Statute, would probably point in that direction. We, however, have no way of knowing, especially since the explanatory report of the UN Legal Council is rather rudimentary on these issues. All it says is that

> Under article 3, paragraph 1, of the statute, all those who committed, participated as accomplice, organized or directed others to commit the crime, or otherwise contributed to the commission of the crime, shall be individually responsible. This is a reflection of the Lebanese Criminal Code and general criminal law principles, evidenced, inter alia, by article 2, paragraph 3, of the International Convention for the Suppression of Terrorist Bombings of 1997 (General Assembly resolution 52/164, annex). Article 3, paragraph 2, reflects the principle of command responsibility both under international law and national criminal and military codes as more fully articulated in article 28, subparagraph (b), of the Statute of the International Criminal Court. Under article 3, paragraph 3, obedience to superior order is no defence, but may be considered in mitigation of punishment.[375]

The report therefore provides no explanation to the fundamental question as to why anything *other* than the Lebanese Criminal Code, particularly the international forms of criminal responsibility, should be at all relevant for assessing the responsibility of perpetrators of domestic crimes.

Since the drafting of the Statute is now done, what would then be an acceptable way out of the legality problem? The wisest course of action would be for the new Hariri Tribunal prosecutor to exercise his or her discretion and not charge any defendant under strictly international forms of criminal liability, superior responsibility in particular. The prosecutor's decision would probably made easier by the fact that superior responsibility has, even for international crimes, proven less useful in obtaining convictions than was originally hoped for, except in the very

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[374] For instance, Section 14 on modes of individual responsibility of the Regulation creating the special panels in East Timor simply reproduces word for word Article 25 of the Rome Statute, and does not distinguish between the international and common crimes within the special panels' jurisdiction – *supra* note XX. Another good example would be the drafting of the ICTY and ICTR Statutes, when Articles II and III of the Genocide Convention (defining the crime of genocide and other prohibited acts) were copied and pasted to Articles 4 and 2 of the ICTY and ICTR Statute respectively, while at the same time including a general provision on accomplice liability in Articles 7(1) and 6(1) of the Statutes which also applied to genocide. This then led to widely conflicting case-law within the ICTY and the ICTR when it came to distinguishing complicity in genocide from aiding and abetting genocide, with some Chambers concluding that there is an overlap between complicity in genocide and aiding and abetting genocide, and others attempting to manufacture a distinction. See Schabas, *supra* note, at 183, as well as C. Eboe-Osuji, ''Complicity in Genocide' versus 'Aiding and Abetting Genocide' Construing the Difference in the ICTR and ICTY Statutes,' 3 *Journal of International Criminal Justice* (2005) 56-81.

[375] UNLC Report, *supra* note XX, para. 26.

traditional, military-type setting.[376] Also, as explained above, even JCE would not have the same appeal for the prosecution in this context that it does when it comes to mass international crimes. In other words, not only would using this forms of responsibility violate the principle of legality, it also would not be of much help in convicting anyone who could already not be convicted using only Lebanese law.

If the prosecutor does, regrettably, decide to indict someone under either superior responsibility or JCE, the Tribunal would find itself in quite a bind. On the one hand, a straightforward textual interpretation of the Statute would show that the Security Council did intend to allow the prosecutor to rely on these forms of criminal responsibility. Any rejection by the Tribunal of an indictment based on such a theory would therefore be an implicit exercise of judicial review of the Council's decision. On the other hand, a court should not impute to the Council an intention to depart from basic principles of human rights law and criminal law in absence of an explicit statement to that effect, even assuming that the Council had the power to do so. Indeed, the Council's intent seems to have been just the opposite, as it was asked – and it obliged – to establish a tribunal 'based on the highest international standards of criminal justice.'[377] Furthermore, concerns over judicial review of Council decisions are more appropriate in the arena of the legality of the establishment of the tribunals themselves, where, as argued, even if such review is permissible, the Council's assessment would be deserving of utmost deference.[378] Here, on the other hand, a criminal tribunal would be dealing with the principle of legality as one of the fundaments of criminal law.[379]

The jurisprudence of the other *ad hoc* tribunals is instructive in solving this dilemma. While it is true that defendants' challenges pursuant to the *nullum crimen* principle have been fairly consistently unsuccessful,[380] international tribunals have also, equally consistently, allowed defendants to make these challenges, even if the respective statutes did not expressly incorporate the principle of legality.[381] Indeed, the ICTY Appeals Chamber entertained such a challenge precisely against JCE liability in the *Milutinovic* case, where it remarked that

> [T]here is no reference in the Report of the Secretary-General limiting the jurisdiction *ratione personae* of the International Tribunal to forms of liability as provided by customary law. However, the principle of legality demands that the Tribunal shall apply the law which was binding upon individuals at the time of the acts charged. And, just as is the case in respect of the Tribunal's jurisdiction *ratione materiae*, that body of law must be reflected in customary international law.[382]

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[376] See Schabas, *supra* note, at 324.
[377] Resolution 1757 (2007), fourth preambular paragraph.
[378] See *supra*
[379] See also Gallant, *supra* note XX, at 9.
[380] See Schabas, *supra* note XX, at 65.
[381] Statutes of all the ad hoc tribunals incorporated Article 14 of the ICCPR, which prescribes basic rights of the accused in criminal proceedings – see Article 21 ICTY Statute, Article 20 ICTR Statute, Article 17 SCSL Statute, and now Article 16 of the Hariri Tribunal Statute. None of them, however, include 15 of the ICCPR, which provides for the principle of legality, and only the Rome Statute of the ICC contains such a provision (Article 22). The hybrid courts in Kosovo, East Timor and Cambodia do explicitly mandate respect for the *nullum crimen* principle – see also Gallant, *supra* note XX, at 14-16.
[382] *Prosecutor v. Milutinovic et al*, IT-99-37- AR72, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise, Appeals Chamber, 21 May 2003.

Of course, the difference between the ICTY and the Hariri Tribunal is in that JCE was found in the Statute only implicitly by the Appeals Chamber in *Tadic*, while JCE has been expressly provided for by the Council in the Hariri Tribunal Statute. That would seem to exacerbate the situation when it comes to the Tribunal's (inherent?) powers of review of a Council decision, yet the basic principle is still the same: at the time of the commission of the crimes in question, the only law which was binding upon individuals which will be charged for these crimes before the Hariri Tribunal was Lebanese law. Therefore, the only way in which the Tribunal could accept an indictment based on JCE would be for it to conduct a parallel review of Lebanese law to see whether the application of these rules would produce the same result as a common purpose theory.[383] That would certainly be one way of putting the reference in Article 2 of the Statute to rules regarding 'criminal participation' in the Lebanese Criminal Code to some good use. Short of an outright dismissal, the only other alternative would be to allow a miscarriage of justice to occur.

C *Civil law features of the Tribunal*

Another distinctive characteristic of the Hariri Tribunal is that it incorporates elements of the civil law systems more than the other international *ad hoc* courts. As is well known, international criminal tribunals have generally been based more on the adversarial, common law model of trial, though not all features of these systems were adopted [384]– for instance, there is no trial by jury in international courts, and the rules of evidence are consequently much more relaxed. Into this mix of common law and civil law, the Hariri Tribunal adds four specific characteristics of civil law systems, to date either rare or unprecedented in international practice.

Firstly, the Tribunal will have a dedicated pre-trial judge, who will not participate in either the trial or the appeals chamber. It should be noted that this judge is, unlike in the ECCC, not a true investigative judge, but has the customary role of confirming the indictment, issuing arrest warrants, and so on.[385]

Secondly, the trial judges are set out to have a much more active role during the trial, as in inquisitorial systems, and as opposed to the passive, arbitral role that they have an adversarial systems. For example, Article 20(2) of the Statute provides that '[u]nless otherwise decided by the Trial Chamber in the interests of justice, examination of witnesses shall commence with questions posed by the presiding judge, followed by questions posed by other members of the Trial Chamber, the Prosecutor and the Defence,' while the Trial Chamber is also authorized to summon witnesses and order the production of additional evidence *proprio motu*. Furthermore, Article 28 of the Statute mandates that in drafting the future Rules of Procedure and Evidence of the Tribunal, the judges shall be guided, *inter alia*, by the Lebanese Code of Criminal Procedure.[386]

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[383] Lebanese criminal law may substantially differ from international forms of JCE, particularly JCE3, not simply in the way in that is theoretically formulated, but also when it comes to the elements of responsibility, for example the required extent of a defendant's contribution to the JCE, the standard of foreseeability when it comes to JCE3, and so on. This is of course notwithstanding the obvious fact that some of these elements are far from crystal-clear in international jurisprudence.

[384] See, e.g., A. Cassese, *International Criminal Law*, Oxford University Press, Oxford, 2003, at 365-387.

[385] See UNLC Report, *supra* note XX, paras. 28 & 29.

[386] Ibid., paras. 9 & 32.

Thirdly, the Hariri Tribunal Statute, much like the Rome Statute of the ICC, allows victims to participate in all stages of the proceedings.[387] It does not, however, give them the status of *parties civiles*, as is usual in civil law countries, where, for example, they have the right to continue or initiate criminal proceedings against the wishes of the prosecutor, the direct right to reparation, or the right to lodge an appeal against the judgment.[388]

Finally, the Hariri Tribunal is the first international court which expressly allows for trials *in absentia*.[389] It is well known that trials *in absentia* have had a troubled history during the drafting of the statutes and the rules of procedure and evidence of the first *ad hoc* tribunals, most of all because of a divergence between the common law tradition, which generally shuns trials without the presence of the accused, and the civil law tradition, which allows them.[390] Moreover, international human rights instruments at least on their face appear to disfavour trials *in absentia*, though the jurisprudence of international bodies does allow for them under specific conditions.[391] The last serious attempt to push trials *in absentia* into the mainstream of international criminal law was during the negotiations of the Rome Statute, but ultimately proved to be unsuccessful.

Now, however, according to Article 22 of its Statute, the Hariri Tribunal will be able to hold trials without the presence of the accused, if (a) the accused has expressly and in writing waived his right to be present; or (b) the state in which he is located refuses to hand him over to the Tribunal; or (c) if he has absconded or otherwise cannot be found, despite all reasonable attempts to secure his presence. Furthermore, the accused being tried *in absentia* must be represented by counsel, either one of his own choosing or one appointed by the Tribunal. Last, but far from least, Article 22(3) stipulates that '[i]n case of conviction in absentia, the accused, if he or she had not designated a defence counsel of his or her choosing, shall have the right to be retried in his or her presence before the Special Tribunal, unless he or she accepts the judgement.'

What was the purpose of introducing this type of trial for the Tribunal, when they were rejected for all other UN courts? The UN Legal Counsel explained that the reason for doing so was to take more fully into account the (civilist) legal culture of Lebanon.[392] While that is a plausible explanation, it is certainly not a complete one. It is politically far more likely that a possibility was foreseen of Syria's lack of cooperation with the Tribunal, manifested in its likely refusal to hand over any accused who are its own nationals. As already explained, Syria is at least for the time being under no legal obligation to cooperate with the Tribunal, since Resolution 1757 did not ask it to do so. For now, it has adequately cooperated with the IIIC,[393] but it is impossible to know at this time whether it will prove as accommodating when it

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[387] See Art. 68 of the Rome Statute, Art. 17 of the Hariri Tribunal Statute. See also G. Greco, 'Victims' Rights Overview under the ICC Legal Framework: A Jurisprudential Analysis', 7 International *Criminal Law Review* (2007) 531.
[388] See UNLC Report, *supra* note XX, paras. 31 & 32.
[389] Ibid., paras. 9 & 33.
[390] See more P. Tavernier, 'L'expérience des Tribunaux pénaux internationaux pour l'ex-Yougoslavie et pour le Rwanda', 79 (828) *International Review of the Red Cross* (1997) 647-663; Schabas, *supra* note XX, at 419-422.
[391] See Schabas, *supra* note XX, at 419.
[392] See the transcript of the press conference of the UN Legal Counsel, 2 May 2007, available at http://www.un.org/News/briefings/docs/2007/070502_Michel.doc.htm. See also UNLC Report, *supra* note XX, para. 32.
[393] Eighth report

comes to the Tribunal itself. That will probably depend on how high up the Syrian chain of command will the prosecutor set his eyes to.

It is also quite unlikely that trials *in absentia* can by themselves adequately address a potential lack of cooperation by Syria, absent further pressure from the Council. Furthermore, just from the purely practical standpoint of trial management, the fact that the Statute gives defendants convicted *in absentia* the right to a re-trial dramatically reduces the utility of such trials as a time-saving measure. It seems inconceivable that any defendant who refuses to surrender to the Tribunal would actually appoint counsel and thereby forfeit his right to have a retrial, and it is even more unlikely that he would otherwise accept a conviction. Trials *in absentia* would therefore make sense only if a case involves a plurality of defendants, only one or two them are unavailable, and, as a matter of evidence, these defendants comprise an indispensable part of the whole criminal group, which would make their prosecution *in absentia* cost-effective by actually strengthening the case against the other co-defendants.

4 Conclusion

So far, the IIIC investigation into Hariri's death has been progressing relatively smoothly.[394] The Tribunal itself is likely to start operating in late 2008, with the IIIC serving as an embryonic office of the prosecutor.[395] As of August 2007, it has been decided that the seat of the new Tribunal will be in The Hague,[396] where it will certainly be keeping some good company. The Tribunal's funding is yet to be secured and many practical arrangements still need to be made, though it is likely that there will not be any major problems in that regard.

As explained in this article, the oddities of the Tribunal are many. The peculiar circumstances of its establishment, as well as the legal mishmash that it is supposed to be applying, are almost without precedent in international practice. There is no escaping the conclusion that before us is not a hybrid court, but a hermaphrodite court.

That does not mean, however, that the Tribunal is doomed to failure, and that the problems presented are unsolvable. The practical difficulties posed by the disparate interests of the major players within Lebanon's Byzantine political system, to which the initial design of the Tribunal as a mixed court fell prey to, should not be underestimated. The feelings of normalcy that the Tribunal location in The Hague will inspire must not obscure the fact that its achievements, if any, will depend entirely on its ability to navigate the political currents of Lebanon, as well as on the international community's willingness to exert enough pressure to secure Syria's cooperation.

When it comes to the legal difficulties discussed above, they can all be resolved if those concerned show a little wisdom. If that indeed comes to pass, the Tribunal will still be odd, but it might yet prove to be a success.

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[394] See, e.g., 'U.N. probe has identified people who may have been involved in Hariri assassination', *International Herald Tribune*, 12 July 2007.

[395] See Michel

[396] See 'Lebanon: Ban Ki-moon welcomes Dutch agreement to host Hariri tribunal', *UN News Centre*, 17 August 2008, available at http://www.un.org/apps/news/story.asp?NewsID=23535&Cr=leban&Cr1= .

The Extraordinary Chambers in the Courts of Cambodia (Khmer Rouge Tribunal): Finally Getting Started

> *"Death was so close that we grew used to its fetid breath and its hideous countenance. It was so familiar to us that no-one in the camp could sustain the same degree of revulsion at its ubiquitous presence. Like my fellow prisoners, like Duch, like man on earth, I had secretly tamed terror."*[397]

Cedric Ryngaert*

Abstract
The Extraordinary Chambers in the Courts of Cambodia, the tribunal that will bring to justice surviving Khmer Rouge members who are responsible for atrocities in the Democratic Kampuchea between 1975 and 1979, is finally getting started. This article identifies a number of practical challenges that the tribunal faces, particularly possible interference by the Cambodian Government, the selection of Khmer Rouge targets, the role that victims will be allowed to play in the tribunal's process, and the tribunal's precarious budgetary situation. It is argued that only if the tribunal's proceedings are perceived as independent, fair and inclusive will the outcome of the trials be palatable to the Cambodian people, and will political reconciliation be facilitated.

ARTICLE

The tribunal that will bring to justice surviving Khmer Rouge (KR) members who are responsible for atrocities in the Democratic Kampuchea (DK) between 1975 and 1979, is finally starting its work. The Extraordinary Chambers in the Courts of Cambodia (ECCC), as the tribunal is officially known, were established after tortuous negotiations between the United Nations and the Cambodian Government.[398] They have their legal basis in a 2001 Cambodian Law (later amended, hereinafter the "Law") and a 2003 Agreement between the UN and the Cambodian Government

[397] F. Bizot, *The Gate*, London, The Harvill Press, 2003, 284. *See on* Duch, part 2 of this article.

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[398] *See* for an overview: C. Etcheson, "The Politics of Genocide Justice in Cambodia", in C.P.R. Romano, A. Nollkaemper & J.K. Kleffner (eds.), *Internationalized Criminal Courts and Tribunals : Sierra Leone, East Timor, Kosovo, and Cambodia*, 2004, Oxford, Oxford University Press, 2004, 181-205.

(hereinafter the "Agreement"). Now that the Court's Internal Rules have been adopted on 12 June 2007 and its investigators were sworn in on 13 June 2007, justice is eventually in sight. The Office of the Co-Prosecutors (OCP) will probably submit its first (confidential) introductory submission in mid-2007, which will allow the Office of the Co-Investigating Judges (OCIJ) to embark on its investigations.

At the outset, it should be noted that, of all international or internationalized (hybrid/mixed) criminal tribunals, the ECCC will probably the most difficult to manage. For one, unlike the other tribunals, the crimes within the Court's purview have been committed thirty years ago. As a result, prominent suspects have died ("Brother Nr. One" Pol Pot, to name just one), witnesses have aged, documents have decayed, and forensic evidence has been destroyed.[399] For another, the ECCC is the first mixed tribunal in which the domestic side is institutionally preponderant.[400] This invites the questions of how UN and Cambodian staff will work together, and of how Cambodian standards could be aligned with international standards.

This article does not aim to discuss the black-letter law of the Law and the Agreement, or the Internal Rules for that matter[401]. Others have previously done that, as far as the Law and the Agreement are concerned at least.[402] Instead, this article will focus on a number of practical challenges that the Court, and especially its OCP and OCIJ, are facing, or are bound to face in the very near future. These challenges include possible interference by the Cambodian Government (part 1), the selection of KR targets (part 2), the role that victims will be allowed to play in the Court's process (part 3), and the Court's precarious budgetary situation (part 4).

1. Political interference

Beneath the veneer of international criminal justice, political forces are always at work. Almost inevitably, justice for ideology-based mass crimes is caught up in a political process. The new powers-that-be may seek to influence the criminal system justice system so that it serves their needs in terms of power consolidation and enhanced national or international legitimacy. Mixed tribunals are singularly prone to politicization, in particular when the national element is as preponderant as it is in the ECCC. The ECCC, after all, form part of the existing court structure of Cambodia and has a majority of Cambodian judges. The ECCC may not be immune from the widespread corruption and political interference that plagues the Cambodian justice system.

For one, Cambodian judges and prosecutors are almost all member of the governing Cambodian People's Party (CPP).[403] Cambodian ECCC judges and the Co-

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[399] *See also* the statements of Cambodian Co-Prosecutor Chea Leang, KR Trial Info, 5 June 2007.

[400] The ECCC Trial Chamber is composed of three Cambodian judges and only two international judges. The ECCC Supreme Court Chamber is composed of four Cambodia judges and only three international judges. Article 3.2 of the Agreement; Article 9 of the Law.

[401] The Internal Rules, adopted on 12 June 2007, could be retrieved from http://www.eccc.gov.kh/english/cabinet/files/irs/ECCC_IRs_English_2007_06_12.pdf

[402] *See, e.g.*, E.E. Meijer, "The Extraordinary Chambers in the Courts of Cambodia for Prosecuting Crimes Committed by the Khmer Rouge: Jurisdiction, Organization, and Procedure of an Internationalized National Tribunal", in C.P.R. Romano, A. Nollkaemper & J.K. Kleffner (eds.), *Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo, and Cambodia*, 2004, Oxford, Oxford University Press, 2004, 207-232

[403] *See, e.g.*, remarks of Sam Rainsy Party lawmaker Son Chhay about the Cambodian criminal justice system (*Phnom Penh Post*, June 15-28, 2007, at 4): "We are also still concerned about the political influence in the court system. Almost all the judges and prosecutors are member of the CPP."

Prosecutor have similarly been carefully selected by the Government. This raises the specter of judges and the Cambodian Co-Prosecutor being cautious not to embarrass the Government. Given the Government's repeated emphasis of peace and reconciliation over justice, this is reason for concern. Apart from concerns over government instructions to Cambodian ECCC staff, concerns have also been raised about corruption. Allegations of corruption have actually been swirling around the Cambodian side of the ECCC since early 2007. Cambodian staff would allegedly have paid kickbacks as a percentage of UN salaries to the Cambodian Government who selected them. This led to a public outcry from the Open Society Justice Initiative (OSJI), a U.S. NGO that has supported the establishment of the ECCC.[404] The Cambodian Government thereupon threatened to expel OSJI staff.[405] UNDP, which oversees 6 million USD of donor funds earmarked for the Cambodian side of the Court, duly ordered an internal ECCC audit, which was completed by 30 March 2007. Yet, citing standard confidentiality practice, UNDP refused to release the results of the audit. This has obviously increased suspicion that the allegations of corruption were actually true, and may further undermine confidence in the ECCC.[406]

In spite of the apparent politicization of the ECCC, Cambodian and international staff seem to work together rather well, though. Cooperation between Cambodian and UN staff of the Office of the Co-Prosecutors was smooth in the first year of preliminary investigations (July 2006-July 2007), with the frankest discussions focusing rather on aligning the civil and common law method of thinking, and the tightly integrated staff doing their utmost to finalize a wide-ranging first (and possibly last) initial submission on crimes committed by the Khmer Rouge.[407] By the same token, although the UN had earlier threatened to withdraw from the ECCC if the Internal Rules would fail to live up to international standards, the Rules were duly adopted after a last-ditch ten-day long conference on 12 June 2007, after the most contentious issue – over the legal fees levied by the Cambodian Bar Association on foreign lawyers – was solved in late April 2007.[408]

2. Targeting whom?

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[404] Open Society Justice Initiative, press statement 14 February 2007; James Goldston, Executive Director, Open Society Justice Initiative, Letter to the Editor on Corruption Charges at Khmer Rouge Court, *Cambodia Daily*, 7 March 2007.

[405] Similarly fury was provoked after the London-based environmental NGO Global Witness published a damning report on illegal logging in Cambodia, implicating high-ranking government officials, on 31 May 2007, on the eve of an important international donor conference for Cambodia. Newspaper publishing of the report was banned by the Government. Global Witness staff was already expelled from Cambodia in 2005. *See* for the report named 'Cambodia's family trees': http://www.globalwitness.org/media_library_detail.php/546/en/cambodias_family_trees. *See* on the Government's reaction: *International Herald Tribune*, "Cambodian Government Orders Ban, Confiscation of Illegal Logging Report", 3 June 2007.
Criticism of Cambodia's human rights record by Yash Ghai, the UN Special Representative for Human Rights in Cambodia, in March 2006, was similarly met by a harsh rebuke from Cambodian Prime Minister Hun Sen, who called Ghai "deranged" and UN human rights staff in Cambodia "long-term tourists". *See BBCNews*, 29 March 2006.

[406] *See Phnom Penh Post*, June 1-14, 2007, at 1 and 4.

[407] Interview with OCP analist, Phnom Penh, 20 June 2007.

[408] The Cambodian Bar Association initially demanded a whopping 4900 USD fee for foreign lawyers, which could have made it prohibitively expensive for foreign counsel to represent Khmer Rouge defendants. After pressure from the international ECCC judges and the Japan, the main ECCC donor, the registration fees were reduced to 500 USD.

As for now (July 2007), the OCP has not yet released its strategy or policy. I was nonetheless assured that it has one.[409] The OCP policy will for the time being remain shrouded in mystery, as the OCP's introductory submission will not be made public. Any information will have to be gathered on the basis of leaks, (possibly terse) public statements of the OCP,[410] and challenges filed with the Pre-Trial Chamber (PTC). As for the OCP, it has indicated that it *will* make public statements; a first statement is due when the OCP sends its introductory submission to the OCIJ.[411] As for the PTC, it may be noted that, in a departure from ordinary Cambodian practice, PTC decisions will be made public.[412] PTC challenges may include disagreements between the two Co-Investigating Prosecutors *casu quo* Co-Investigating Judges and challenges by the parties against decisions by the Co-Investigating Judges, once the latter start their investigations after having received the OCP's introductory submission.

Will the public be allowed to glean elements of the prosecutors' or investigating judges' strategy through the PTC mechanism dealing with disagreements within the OCP or the OCIJ? Arguably, it is highly unlikely that internal disagreements will be allowed to play out in the open. The Agreement, the Law and the Internal Rules admittedly provide for an elaborate 'supermajority' mechanism to deal with such disagreements,[413] yet faith in the ECCC risks crumbling if the mechanism is resorted to. Open conflicts between the international and the Cambodian Co-Prosecutors *c.q.* Investigating Judges may have disastrous consequences in that they shake the cooperative spirit which is supposed to guide the work of the Court. Because the ECCC function within the existing court structure of Cambodia and the Cambodian side dominates the Court, albeit slightly, the danger is real that the international Co-Prosecutor will bow to the demands of the Cambodian Co-Prosecutor, rather than the other way round. Quite likely, international staff will internalize the domestic political limits in which the Court operates, limits which Cambodian staff are all too familiar with. For fear of scuttling the whole process, the international Co-Prosecutor will be reluctant to push his demands too far, and may go along with the Cambodian Co-Prosecutor. This is not to say that the international Co-Prosecutor will have no influence over his Cambodian counterpart. Doubtless, he will. However, at the end of the day, when the international Co-Prosecutor's ideas elicit concerns over domestic political stability, caving in is a likely outcome.

What are now these domestic political limits that restrain prosecutorial strategy? In fact, these limits are part and parcel of the very first article of the Law and the Agreement. This article provides that the ECCC only have jurisdiction to "bring to trial senior leaders of DK and those who were most responsible".[414] It is no secret that the category "senior leaders of the DK" refers to the surviving members of

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[409] Interview with OCP analist, Phnom Penh, 20 June 2007.

[410] Pursuant to Rule 54 of the Internal Rules, OCP submission shall be confidential. However, "mindful of the need to ensure that the public is duly informed of ongoing ECCC proceedings, the Co-Prosecutors may provide the public with an objective summary of the information contained in such submissions, taking into account the rights of the defence and the interests of Victims, witnesses and any other persons mentioned therein, and the requirements of the investigation." It is unclear whether the Co-Prosecutors have to give such a summary *jointly*, or whether any one of them could take the initiative without involving or having the consent of the other. Rule 54 *in fine* may be cited in support of the second interpretation, as, unlike the first part of the rule, it provides specifically for *joint* action to "correct any false or misleading information" when the case is still under preliminary investigation.

[411] Press conference ECCC, Phnom Penh, 13 June 2007.

[412] Rule 78 of the Internal Rules. This Rule was *not* included in the draft rules of 3 November 2006, and was only adopted during the conference on the adoption of the Internal Rules in early June 2007.

[413] Article 7 of the Agreement; Articles 23 and 26 of the Law; Internal Rules 71 and 72.

[414] Article 1 of the Agreement; Article 1 of the Law.

the DK Central Committee. The case against seven of these persons has been carefully built by Stephen Heder and Brian Tittemore in their 2001 report "Seven Candidates for Prosecution."[415] In this report, the authors argued that the "evidence strongly suggests the individual criminal responsibility of these [seven] individuals for DK-era crimes, based upon their own conduct and, in most cases, for the conduct of their subordinates."[416] Upon its publication, UN Assistant Secretary General for Legal Affairs Ralph Zacklin told *The New York Times* that it "will be a template for any prosecutor, a starting point for any investigation."[417] Given that the report's principal author, Stephen Heder, is now working for the OCIJ, this holds all the more true today.

Although Heder has previously, in his academic capacity, warned of the danger of political interference in the Court's work and of political predetermination of the suspects, he has also argued that there is no evidence whatsoever that implicates Cambodian Prime Minister Hun Sen – who was a KR cadre before he defected to Vietnam in 1977 – nor any one in a position of significant power in the government, in KR atrocities.[418] In so doing, he may have curried favor with the Cambodian Government (although, quite likely, this was not his intention). As a result, the Government may agree on Heder's seven candidates for prosecution, five of whom are still alive.[419] Given the amount of evidence linking especially the three highest-ranking DK figures, Nuon Chea ("Brother Nr. 2", the party ideologue), Khieu Samphan (the Chairman of the DK State Presidium) and Ieng Sary (the Minister of Foreign Affairs), to crimes against humanity,[420] the Cambodian Government will probably be hard-pressed to prevent these ringleaders from being indicted.[421] It is in that respect not unlikely that the ECCC will overturn the government pardon granted to Ieng Sary in 1996. Together with Pol Pot, Ieng Sary was convicted *in absentia* to

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[415] S. Heder & B.D. Tittemore, "Seven Candidates for Prosecution. Accountability for the Crimes of the Khmer Rouge", War Crimes Research Office, Washington College of Law, American University and Coalition for International Justice, republished in cooperation with the Documentation Center for Cambodia, Phnom Penh, 2004, 153 pp.

[416] *Id.*, at 133.

[417] E. Becker, "New Links in Khmer Rouge Chain of Death", *The New York Times*, 16 July 2001.

[418] *See, e.g.*, Heder's intervention in a public discussion held in Phnom Penh on 17 November 2004, "The Khmer Rouge Tribunal: Is It Worth It and for Whom?", transcript of taped discussion in DC-CAM, *Searching for the Truth*, 4th quarter 2004, 32.

[419] Ta Mok, (Chhit Choeun), "the Butcher" died in custody on 21 July 2006. Another candidate, Kae Pok died of high blood pressure in 2000.

[420] While "Khmer Rouge" and "genocide" are often mooted in the same sentence, it is doubtful whether the DK atrocities amounted to "genocide" in the strict legal sense. Under Article II of the Genocide Convention, only "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group" could qualify as genocide. As the DK atrocities were probably not specifically perpetrated against a group as defined in this provision, but rather against all segments of the Cambodian population ("auto-genocide"), the DK regime may not have committed genocide. *Contra* characterization as "genocide": W. Schabas, "Cambodia: Was It Really Genocide?", 23 *Human Rights Quarterly*, 470-477 (2001). *See however* (implicitly) *pro* characterization as genocide in the legal sense: L. Duong, "Racial Discrimination in the Cambodian Genocide", Genocide Studies Program, MacMillan Center for International and Area Studies, Yale University, GSP Working Paper No. 34, 2006 (arguing that the Khmer Rouge particularly targeted ethnic Vietnamese, Cham Muslims and Chinese, with almost Vietnamese being expelled and exterminated by early 1979). Although the DK atrocities may arguably not amount to genocide, there is, however, ample evidence that they were part of a widespread or systematic attack on the civilian population, and, thus, that they may qualify as crimes against humanity.

[421] While conviction of these persons may seem likely, obviously, their innocence ought to be presumed at the outset so as to prevent animosity from prevailing over procedural rigor. *See also* Article 35 of the Law.

death on the basis of Decree Law nr. 1 of the new Cambodian Government brought to power by the Vietnamese in 1979, in what was internationally perceived as a "show trial". To encourage him to lay down arms and defect to the Government, the Government pardoned him on 14 September 1996. The Agreement and the Law leave it up to the ECCC to decide on the scope of the pardon.[422]

Because the Cambodian Government has, since 1997, when it requested UN assistance in setting up a Khmer Rouge tribunal, been ambiguous, to say the least, on the need to dispense justice, it is, however, not even a given that it will welcome an indictment of Nuon, Khieu and Ieng. It was Prime Minister Hun Sen himself who famously urged Cambodia to "dig a hole and bury the past". Sok An, the Cambodian Deputy Prime Minister who negotiated the ECCC Agreement with the UN, has similarly, in a string of statements, let it be known that peace and reconciliation, whatever that means, ought to prevail over the need for justice.[423] The risk of renewed violence, of the Khmer Rouge again taking up arms, thereby endangering the hard-fought relative stability of the country, is typically raised. Nonetheless, there is no indication that the former KR leaders command any popular or military support, or that KR members who defected to the Government in the 1990s will have second thoughts if the KR atrocities were to be exposed.[424] After all, the ECCC only has temporal jurisdiction over crimes committed in the DK period, and not over crimes committed between 1979 and 1998 (when the KR was disbanded and KR cadre entered civilian life).

If only the three cited members of the DK Central Committee were to be indicted, the ECCC could be named a success. Being the most senior leaders, they may bear the greatest responsibility for the 1975-1979 atrocities. It may be noted here, in passing, that, in fact, less the Co-Prosecutors or Co-Investigating judges themselves but rather Khmer Rouge specialists recruited as analists with the Court may determine which DK leaders will be prosecuted by the Court. These specialists, for the most part foreigners such as Heder, who have often worked for decades on DK crimes, have intimate knowledge of the DK command structure. The most senior officials of the OCP or OCIJ entirely lack this knowledge.[425]

Aside from "senior leaders of DK", "those who were most responsible" may also be brought to justice. Unlike "senior leaders", it is, on its face, entirely unclear what the wording "most responsible" means. However, on closer look, it is highly likely that the category of "those most responsible" was tailor-made for Duch, the

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[422] Article 11 of the Agreement and Article 40 of the Law.

[423] *Phnom Penh Post*, June 15-28, 2007, at 4 ("In striving to achieve this long-awaited justice we must not jeopardize our country's newly-won national peace, unity, and stability."); Sok An, "The Rule of Law and the Legacy of Conflict", DC-CAM, *Searching for the Truth*, April 2003, 52 ("we keep in our minds that [the ECCC] must not damage the process of reconciliation", citing the "unprecedented atmosphere of optimism and relative absence of violence"); DC-CAM, *Searching for the Truth*, April 2003, 53 ("Our society has achieved peace and stability and the trials are not an integral part of the ending of the internal fighting", adding "that this [*i.e.*, setting up the ECCC] is time and energy that has been diverted from the many pressing tasks of our national reconstruction."

[424] *See,* however, N. Ray, *Lonely Planet Cambodia*, 5th ed, 2005, 274 ("However, if and when a trial for surviving Khmer Rouge leaders moves forward … just because the former rebels now wear Britney Spears T-shirts instead of Mao caps, doesn't mean they have forgotten to fight.").

[425] International Co-Prosecutor Robert Petit (Canada), for instance, has served on the ICTR and the Special Court for Sierra Leone. He has also worked as a UN legal adviser in Kosovo and a serious crimes prosecutor during the UN mission in East Timor. International Co-Investigating Judge Marcel Lemonde (France), for his part, was presiding judge of a section of the Paris court of appeal.

warden of the Tuol Sleng/S-21 prison in Phnom Penh.[426] In this prison, now turned into a museum, thousands of prisoners were tortured before being sent to their certain deaths in the killing field of Choeung Ek outside Phnom Penh. Duch was not a member of the Central Committee and could thus not qualify as a "senior leader". Yet, undoubtedly, it was unthinkable to let Duch, the warden of this infamous symbol of the DK era, off the hook, and the category of "most responsible persons" was thus created. Duch, who could, unlike some senior leaders, not exercise meaningful political leverage, was arrested in 1999, and has since remained in custody. Fallen from grace with the Cambodian Government, and given the evidence implicating him (*inter alia* contained in the Tuol Sleng Archives), Duch will probably not escape indictment and conviction.[427]

Because of its general wording, the category of "most responsible persons" may obviously encompass more DK cadre than just Duch. However, except for those of us who master the art of reading tea leaves, we have no indication of who may fall within this category. It has been argued that it does not cover the actual killers, but only those who had decision-making responsibility (estimated at about 50 by Steve Heder).[428] Nonetheless, it may not appear justified to exclude from the personal jurisdiction of the Court those who have killed hundreds of victims with their own, sometimes bare, hands. Time, budgetary and evidentiary constraints will probably decide on whether, and if so, to what extent, the OCP and the OCIJ will also target particularly brutal mid- or lower-level perpetrators. Quite possibly, given the elapse of time and an incomplete paper trial, it will be harder to prove guilt of those who were most responsible for the DK atrocities than to prove guilt of the most senior leaders.

3. Victim participation and reparations

What sets the ECCC apart from the other *ad hoc* tribunals is probably less the political realities it has to factor in (it is no secret that the ICTR has not been immune from influence by the Rwandan Government), but rather the procedural role that the victims are allowed to play. Victim participation in the ECCC process is not the result of a one-off decision by the UN and the Cambodian Government. Instead, it is part and parcel of the Cambodian system of criminal procedure. This system, like the French system on which it is based, provides, unlike common law systems, for extensive procedural rights for victims.

Victim participation was also included in the ICC Statute.[429] This is testimony to the fact that victim participation in the ECCC process also rides on the waves of an increased awareness that an international (or internationalized) criminal tribunal's success depends on the role it allots to victims. Victim participation allows victims to have their voice heard and to be taken seriously. This may make the outcome of the

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[426] *See, e.g.*, H. Uñac & S. Liang, "Delivering Justice for the Crimes of Democratic Kampuchea", in J.D. Ciorciari (ed.), *The Khmer Rouge Tribunal*, Phnom Penh, Documentation Center of Cambodia, 2006, 133, at 143. See for a gripping literary account of Duch's personality when Duch was responsible for a jungle prison camp where French national Francois Bizot was held in the early 1970s: F. Bizot, *The Gate*, London, The Harvill Press, 2003, 285 pp.

[427] *See* on the relatively easy case against Duch, *inter alia*, J. Fromholz, "Proving Khmer Rouge Abuses: Uses and Limitations of the Available Evidence", in J.D. Ciorciari (ed.), "The Khmer Rouge Tribunal", Phnom Penh, Documentation Center of Cambodia, 2006, 107, at 118-121.

[428] Steve Heder's intervention in the public discussion held in Phnom Penh on 17 November 2004, "The Khmer Rouge Tribunal: Is It Worth It and for Whom?", transcript of taped discussion in DC-CAM, *Searching for the Truth*, 4th quarter 2004, 38.

[429] Articles 68 and 75 of the ICC Statute.

trials more palatable, heal old wounds, and contribute to reconciliation of victims and perpetrators. Through victim participation, criminal retributive justice may also become restorative justice.[430]

How victim participation will play out in practice in the ECCC, is unclear. During its preliminary investigations, the OCP received only a handful of complaints, most of them without merit. Now that the Internal Rules, which clarify the role of the victims, have been adopted, and the OCIJ will be seized, however, victims may come forward in greater numbers. It should not be excluded that the OCIJ will be flooded by victims' complaints and civil party petitions. Much will depend on how the collective complaint mechanism is used and managed by victims, their lawyers, their associations, and the Court's Victims Unit[431].

It is important to note that, while all DK victims are entitled to take civil action, *i.e.*, to participate in the criminal proceedings and to seek reparation, individual representation is strongly discouraged in order to prevent the Court from drowning in complaints. Common lawyers drawn from a list held by the Victims Unit are expected to represent groups of civil parties. By default, the Co-Investigating Judges or the Chambers may organize such common representation.[432] Also, a group of victims may choose to organize their civil party action by becoming members of a victims' association. They will be represented by the association's lawyers.[433] If the victims are grouped in or around a relatively small number of associations or lawyers, victim participation in the Court's process appears manageable.

One of the main rationales of a civil party action is, obviously, to obtain eventual reparation for the harm done. The ECCC Internal Rules, however, strictly circumscribe what reparations could be awarded to the civil parties. They could only be collective and moral, and they will be awarded against, and borne by the convicted persons.[434] Individual pecuniary damages will thus not be awarded. Nor is there an ICC-style Victims Trust Fund, to which donors contribute, for the benefit of the victims and their families.[435] ECCC reparations will be mainly symbolic, and, as the Internal Rules have it, take the form of an order to publish the judgment in any appropriate news or other media at the convicted person's expense, an order to fund any non-profit activity or service that is intended for the benefit of victims, or other appropriate and comparable forms of reparation.[436]

The indigence of the convict may clearly serve to erode any meaningful collective reparations. However, there is evidence that the Khmer Rouge have accumulated considerable wealth after they were driven from power in 1979. This wealth was generated by the investment of funds provided by their foreign backers and by the sale of gemstones from the Pailin area in western Cambodia which the Khmer Rouge controlled well into the 1990s. Possibly, Khmer Rouge funds could be located and confiscated, and used for the collective benefit of the victims, in essence, the entirety of Cambodia's people.

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[430] *See in extenso* Cambodian Human Rights and Development Association (ADHOC), "Comment on the right of the civil party in the proceedings of the Extraordinary Chambers in the Courts of Cambodia", available at http://www.adhoc-chra.org/?fn=full_text&id=181.
[431] The Victims United was established by Rule 12 of the Internal Rules.
[432] Internal Rule 23 (8).
[433] Internal Rule 23 (9).
[434] Internal Rule 23 (11).
[435] Article 79 of the ICC Statute.
[436] Internal Rule 23 (12).

Unfortunately, the reparations, will not address the entrenched economic injustices done to the Cambodian people after 1979, injustices which persist as of today. After the Khmer Rouge were deposed, private property confiscated by the DK regime was not necessarily returned to the legitimate owners. Much land ended up in the hands of officials of the new regime and their business allies. Above all else, land redistribution is probably what the Cambodian people most desperately need at this point in time. Ciorciari has pointed out that this economic suffering, a distant echo from the dark DK past, is "often much more central to the experience of afflicted communities" than the role of the DK Central Committee.[437] The nettlesome problem of land redistribution in Cambodia, one of the world's most unequal societies,[438] was again highlighted in a report of 12 June 2007 by the UN Secretary's Special Representative for Human Rights in Cambodia,[439] a report that led to a sharp rebuke from the Cambodian Government.[440] Doubtless, coming to grips with the economic injustices wrought by the DK period of collectivization and the subsequent concentration of land, a process that will require granting reparations in the form of large-scale economic reorganization at the initiative of the Government, may threaten the very existence of the ruling party. Emphasis on successful criminal retribution for DK crimes, resulting in prison sentences, may then serve to deflect attention, particularly of world public opinion and foreign donors, from underlying, and arguably more important persisting economic inequalities. As Ciorciari has argued, the trials may actually help solidify the ruling party's hold on power.[441] On an optimistic note, however, successful trials may ritualistically cleanse the country's soul and may be harbingers of long overdue rule of law reforms; the trials may embolden land-grabbing victims and the other downtrodden to seize the courts and confidently expect justice to be done to them.[442]

4. Budgetary constraints

Finally, some observations ought to be made on the ECCC budget, as without money no institution could be successful. It is understood that the ECCC should wrap up its work within a period of three years. The budget, at least, covers only three years of work. However, it is unclear when the three-year actually starts or has started. Is it the date on which the OCP started its preliminary investigation (July 2006)? Is it the date on which the OCP sends its initial submission to the OCIJ, and the OCIJ starts its investigations (probably July 2007)? Or is it the date when the first *trial* starts (probably early 2008)? It is, to be true, not unlikely that donors may be willing to contribute beyond a strict three-year period, when it is apparent that the ECCC

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[437] *See* J.D. Ciorciari, "Political Transition and Justice in Cambodia", DC-CAM, *Searching for the Truth*, 1st quarter 2004, 43.
[438] *See* on the income gap between rich and poor in Cambodia: *Phnom Penh Post*, June 1-14, 2007, pp. 1 and 8-9.
[439] OHCHR, "Economic Land Concessions in Cambodia: A Human Rights Perspective", June 2007, available at http://cambodia.ohchr.org/Documents/Reports/Thematic%20reports%20by%20SRSG/English/327.pdf
[440] "Cambodia Lashes Out at UN Envoy at Allegations of Systematic Human Rights Abuses", *International Herald Tribune*, 1 June 2007.
[441] *See* J.D. Ciorciari, "Political Transition and Justice in Cambodia", DC-CAM, *Searching for the Truth*, 1st quarter 2004, 48.
[442] *Compare* Y. Chhang, "The Tribunal Budget: We Must Look Forward While Looking Back", DC-CAM, *Searching for the Truth*, 4th quarter 2004, 2 (believing that "[o]nce people's faith in their government is restored, we can expect economic improvements").

function properly. However, donor fatigue should not be excluded. It should not be forgotten that it was not an easy undertaking to convince the international donors to fully subscribe to the pledged 56.3 million USD, which is, after, all a rather meager amount of money. The international community may have to be reminded that justice on the cheap may be justice denied.

In a measure of the budgetary crisis haunting the Court from its inception, UNDP allegedly recommended in 2007 that salaries of Cambodian staff be cut by 45 percent, although Cambodian staff earn only half of what UN staff earn.[443] In addition, some obvious budgetary categories were never taken into consideration by donors. For one, the approximately 35 people working in the OCP were not included in the regular budget.[444] For another, the outreach budget is puny, which has left the OCP and the Public Affairs Office to outsource outreach to local NGO's. Fortunately, these NGO's, some of which have substantial financial resources, have developed laudable programs to bring the Court's message to the Cambodian people;[445] court officials regularly participate in forums set up by these NGO's.[446] Lastly, no funds have yet been allocated to the Victims Unit, set up under the Court's Internal Rules adopted as late as June 2007. It is expected that 600,000 USD is needed for this unit.[447]

Hopefully, advocacy-oriented NGO's, such as the Open Society Justice Initiative, may succeed in convincing donors to keep on stepping up to the plate. The Internal Rules now being adopted, the United States may finally be willing to foot its share of the bill, as the Rules in their present form undercut the due process concerns previously raised by the U.S.[448] What inferences for the ECCC one ought to draw from Cambodia's donors' – unrelated – renewed pledges to the Cambodian Government worth 690 million USD, a 15 pct. increase on the previous year, in spite of limited rule of law progress in Cambodia,[449] is not entirely clear.

5. Concluding observations

The most daunting task facing the crusaders against impunity for DK atrocities has eventually been accomplished: a tribunal designed to bring DK leaders to justice has been established, and it is up and running since mid-2007. Yet difficult times lie

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[443] *Cambodia Daily*, 22 June 2007.
[444] Interview with OCP staff member, 20 June 2007.
[445] *See* in particular the outreach programs of the following NGO's: Documentation Center of Cambodia (www.dccam.org), Center for Social Development (www.csdcambodia.org), Khmer Institute for Democracy (www.bigpond.com.kh/users/kid), and Adhoc (www.adhoc-chra.org).
[446] Interview with Public Affairs Officer Peter Foster, 20 June 2007.
[447] ECCC press conference, 13 June 2007.
[448] It may be pointed out that the U.S. has a historical responsibility to support the Court. For one, the effects of the 'secret' U.S. bombings of Cambodia have contributed to the rise of the Khmer Rouge (see in particular the account of W. Shawcross, "Sideshow: Kissinger, Nixon and the Destruction of Cambodia", New York, Simon and Schuster, 1979). For another, the U.S. has continued to give (tacit) support to the Khmer Rouge between 1979 and 1989 as a counterweight to Vietnamese dominance of Indochina (see in particular K. Rowley, "Second Life, Second Death: The Khmer Rouge After 1978", in S.E. Cook (ed.), *Genocide in Cambodia and Rwanda: New Perspectives*, Yale Center for International and Area Studies, Genocide Studies Program Monograph Series no. 1, 2004, 201-225). To its credit, however, the U.S. has, after the adoption of the Cambodian Genocide Justice Act in 1994, generously funded Cambodian NGO's dealing with the DK period, *e.g.*, the Documentation Center of Cambodia (funded in large part by USAID). Interview with DC-CAM staff, 21 June 2007.
[449] *Reuters*, 20 June 2007. *See* for stinging criticism of Western donors' blind generosity: *The Economist*, 23 June 2007.

ahead. Will the ECCC be able to withstand political pressure? Will sufficient funds be allocated? Will victims be sufficiently involved? An affirmative answer to these questions will determine the Court's legacy, and its role as a facilitator of political reconciliation and rule of law enhancement in Cambodia.[450] For if the Court were to be seen as a political ploy serving the needs of the elite, confidence in the justice system may be fatally undermined and thirty-year old wounds will continue to fester.[451]

Undeniably, Cambodia has made impressive strides towards peace and reconciliation over the last decade. The Cambodian Government ought surely to be credited with this process. Yet fair trials of the surviving DK ringleaders may constitute, as one commentator has noted, the "last chapter of [a] difficult healing process".[452] Once justice is done, the DK book may be closed. Judicial truth, although inevitably partial, will be available. Coupled with successful outreach efforts by NGO's (bringing the truth to the Cambodian people) and a revised history curriculum,[453] this will enable Cambodians to move on. It may be hoped that prosecutors, investigating judges and trial judges will rise to the challenge.

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[450] *See, e.g.*, S. Linton, *Reconciliation in Cambodia*, Phnom Penh, Documentation Center of Cambodia, 2004, 30 (pointing out that "[t]rials at the ECCC will provide a space within with [a positive mindset towards reconciliation] can be further developed into genuine and lasting reconciliation.").

[451] *Id.* (stating that "[t]he process should engender a minimum basis of trust so that there can be a degree of cooperation that takes Cambodians beyond merely tolerating each other.").

[452] H. Uñac, "Concluding Remarks, in J.D. Ciorciari (ed.), *The Khmer Rouge Tribunal*, Phnom Penh, Documentation Center of Cambodia, 2006, 157, at 161.

[453] History of the DK period has so far hardly been taught in Cambodian schools. K. Dy, with the help of DC-CAM, has now (2007) published a balanced "History of Democratic Kampuchea", primarily for use in Cambodian high schools. *See* for full text in English: http://www.dccam.org/Publication/Monographs/Kh-1.pdf and http://www.dccam.org/Publication/Monographs/Kh-2.pdf. The text was submitted to the Cambodian Government Working Commission to Review the Draft of the History of Democratic Kampuchea. On January 3, 2007, the Commission decided that, "the text can be used as a supplementary discussion material (for teachers) and as base to write a history lesson for (high school) students".