The Politics and Practice of Individual Criminal Responsibility at the International Criminal Court

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Abstract

This interdisciplinary study examines the International Criminal Court (ICC) as a legal institution functioning within international politics by analysing the influence of the international legal norms concerning individual criminal responsibility on the outcomes of ICC prosecutions. Much of the international relations literature focuses on the opening of investigations and the selection of suspects at the ICC. Specifically, the ICC's poor record of successful prosecutions – consisting of only five convictions for core international crimes as of 2021 – is often explained by pointing out that international criminal justice proceedings generally follow the political interests of states and elites, thus, reproducing global structural inequalities by prosecuting actors without powerful political backing. However, the outcomes of ICC trials and the process of assessing the criminal responsibility of those individuals standing trials have remained significantly underexamined in the international relations literature. To address this gap, this thesis examines the outcomes of ICC trials with respect to what I call the 'politics' *of the legal field*, namely, the promotion and contestations of different understandings of the law by various actors. Based on an analysis of over 200 legal documents, 330 academic publications, NGO articles and state statements, this thesis argues that the idea that international trials should apply the laws on criminal responsibility in a narrow and predictable fashion, regardless of the trial outcome, gained significant support among ICC judges and many legal experts outside the Court. From the perspective of ICC judges, the restrained approach to criminal responsibility serves the purpose to institute a stable international legal order. Thus, by combining insights from international relations and legal studies, this thesis contributes to the literature on international criminal justice, by elucidating and examining in detail an important contributing factor to trial outcomes at the Court, namely, the ideological battles taking place within the field of international criminal law.

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1. INTRODUCTION

In 1998, the year in which the Rome Statute (RS) of the permanent International Criminal Court (ICC) was adopted, the former prosecutor at Nuremberg Benjamin Ferencz expressed his belief that the 'force of law' can 'replace the law of force'.[1] From this perspective, international criminal law (ICL) provided an alternative to the 'traditional channels' of responding to atrocities, that is, through political action by states, and instead put to trial those 'individuals who, normally hiding behind the shield of state sovereignty, grossly breach human rights'.[2] Therefore, the introduction of the legal norm of individual criminal responsibility in international law was aspired by many human rights advocates to put an end to the rule of power politics that had historically dominated the international arena. Yet, when the Court began operation, those lofty expectations were toned down.[3] As of February 2021 only five persons have been convicted for mass atrocities at the ICC, all of whom nationals of African countries, states continue to co-operate only with those investigations which seemingly do not infringe upon their political interests, and the prosecutor continues to face significant pressure from global powers with respect to the opening of investigations. One non-governmental organization (NGO) described the situation as a 'crisis point in international justice'.[4] The clash between expectations and reality has prompted academic debate on the question whether ICL can function successfully as a legal regime or whether it reintroduces the traditional modes of state power politics under the guise of legal reasoning.[5]

This research aims to contribute to the interdisciplinary scholarship that examines the ICC as a legal institution functioning within the realm of international politics[6] by providing a comprehensive analysis of the influence of a specific set of legal norms concerning individual criminal responsibility on the outcomes of ICC prosecutions, which have generally remained neglected in the literature. The latter generally focuses on the process of opening investigations and of selecting individual suspects at the ICC. Specifically, critics insist that international legal norms are ultimately indeterminate and that international criminal justice proceedings generally follow the political interests of states, thus, reproducing global structural

[1] Ferencz 1998:225.
[2] Cassese 2011:272.
[3] Roth-Arriaza 2013:542.
[4] O'Donohue 2018.
[5] Sander 2015:752-755.
[6] Bosco 2014. Branch 2011. P. Clark 2018. Nouwen 2013. Schabas 2012.

inequalities.[7] From this perspective, ICL can only be enforced against developing nations and vanquished countries after a war,[8] or when the ICC aligns with the governments of nations by prosecuting members of insurgent organizations while tacitly offering de facto immunity to supporters of the regime.[9] Consequently, on this account power politics directly affects the outcomes of international prosecutions and ICL is rendered a tool for the most powerful actor in a given situation, whether that actor constitutes Western states, the United Nations (UN) Security Council, or the ruling elite in a particular country. While the critical literature convincingly explains the limited selection of situations for investigation and individual cases at the ICC, it neglects the important question of what happens with those persons with 'no powerful friends left',[10] such as rebel leaders or deposed state officials, when they end up at trial. Some of those persons, including leaders of rebel organizations in the Democratic Republic of the Congo (DRC) and Mali, were convicted at the ICC, but others, such as the former Ivoirian president Laurent Gbagbo and the Congolese politician Jean-Pierre Bemba Gombo, were acquitted. In fact, as of February 2021, the ICC's acquittal rate stands at 55 percent,[11] an unprecedentedly high percentage compared to the UN international criminal tribunals for the Former Yugoslavia (ICTY) and for Rwanda (ICTR), which has led many legal experts and human rights advocates to doubt the ICC's ability to fulfil its mandate and punish the perpetrators of mass atrocities.[12] Consequently, the attribution of criminal responsibility at the Court is a question of crucial importance for understanding the way in which the ICC functions as a legal institution in the international political realm that requires further examination.

The supporters of international trials provide some insights into this question. Many scholars acknowledge the ICC's embeddedness within the realm of power politics and the ensuing implications for the prosecutorial strategy of initiating investigations, but they nevertheless insist that the determination of the guilt or innocence of the accused depends on legal norms, not power politics.[13] Yet, the liberal legalist literature generally does not engage

[7] Krever 2014. Mamdani 2009.
[8] Zolo 2009.
[9] Branch 2017:35.
[10] McManus 2017:318, emphasis omitted.
[11] Excluding trials for offences against the administration of justice under Article 70 RS, four persons have been convicted at the Court for mass atrocities and four others have been acquitted. ICC 'Defendants', https://www.icc-cpi.int/defendants.
[12] Ellis 2019. Moffett 2019. Robinson 2013a.
[13] Bass 2000. Cassese 2011. Luban 2013:508.

with the question how politics and law *interact* within the ICL field, resulting from its narrow focus on state power-politics. The politically sensitive aspects of international law are treated as distinct from those aspects that are presumed to strictly follow legal norms, including matters of criminal responsibility. Thus, the legal norms are treated as static and objective rules, without further enquiry into their mode of operation in the international criminal justice field. This research provides new insight into this debate by examining the precise manner in which legal norms matter within complex political contexts. It does so through an interdisciplinary study of the history and theory of individual criminal responsibility as a legal norm, examining the variety of understandings about what constitutes sound legal reasoning around criminal responsibility in ICL, with a focus on recent ICC cases.

The thesis argues that the legal norms that regulate the assessment of individual criminal responsibility can be reduced neither to the subjective interests of states and judges, nor to some objective legal standard, whether that standard is to be found in the statutory text or in natural law. Rather, the meaning of the individual criminal responsibility laws is revealed in the 'continuing practice' of reasoning with legal norms. Every interpretation of a legal norm is contested and justified against the background of pre-existing sets of shared understandings about what constitutes sound legal reasoning with respect to that particular norm. Those shared understandings are enforced by the 'community' of international criminal law practice, that includes judges, prosecutors, lawyers, legal scholars, NGOs, and state officials. While the epistemic community of international criminal law is bound by the core shared legalist agreement that the perpetrators of mass atrocities should be punished on the basis of a fair trial, important disagreements emerge within legalism around the meaning of criminal law principles. The challenge of reaching consensus on the precise requirements of individual criminal responsibility laws is compounded by the different professional background of the members of the ICL epistemic community, ranging from human rights advocacy to criminal law practice in civil or common law countries.

Consequently, the legal norms that guide the attribution of individual criminal responsibility at the ICC are *simultaneously* political and legal. The term 'political' here is used to differentiate the way in which legal norms are analysed in this thesis from the static portrayal of legal norms as objective rules, which is often found in the liberal-legalist literature. Hence, individual criminal responsibility norms are here considered 'political' in the sense that they represent intersubjective beliefs about the meaning and purpose of the law in the international

society, that are promoted and contested by different actors within the ICL field. But those norms are also legal: not because they represent objective rules, but because their interpretation and application is guided by the specific rules of practice that are enforced by the ICL epistemic community.

The thesis employs qualitative methods to analyse the variety of shared understandings that are held by members of the ICL community of practice with respect to individual criminal responsibility laws. The primary method used for collecting data is discourse analysis of over 200 legal documents, over 330 academic publications, numerous NGO articles and state statements, that concern the ICC's establishment and the court's operation. Although the concept of criminal responsibility refers to a range of legal norms, this thesis specifically focuses on the legal theories, or doctrines, commonly known as 'modes of liability'. Those theories define the forms of participation in an international crime that trigger criminal responsibility by view of the defendant's acts and mental state with respect to the crimes.[14] The discourse analysis focuses on the drafting, interpretation, and application of the RS provisions that define the key elements of the modes of liability, namely Article 25(3)(a) to (d) that lists the forms of participation in the commission of a crime, Article 28 on the command responsibility principle, and Article 30 that defines the mental element requirements of liability. The discourse analysis is supplemented with interviews of legal experts, NGO officials, diplomats, and one sitting ICC judge. Furthermore, in order to provide context to the analysis of the assessment of criminal responsibility at the ICC, this thesis makes a comparison with the relevant practices of the International Military Tribunal (IMT) at Nuremberg and the International Military Tribunal for the Far East (IMTFE) at Tokyo, that were established immediately after the Second World War, and the ICTY and ICTR that began operation in the 1990s.

The results of the analysis point to three observations. Firstly, while the ICL community of practice enforces specific norms that define what constitutes sound legal reasoning, those norms vary across time and place, even on short time scales – in this case, between the ICTY and ICTR, which started operating in the early 1990s, and the ICC which was established in the late 1990s and began operating in the 2000s. In the context of the former tribunals, convictions based on a tenuous relationship between the defendant and the crime have been

[14] Scheffer 2010:76. Jackson 2015:87-88.

justified on the grounds of the perceived necessity to put in motion the wheels of international criminal justice. However, the establishment of the permanent ICC and the drafting of the RS marked a shift in the expectations of many members within the ICL community of practice, with an increasing number of legal experts in the mid-1990s calling for codification of the principles of criminal law in the RS and strict compliance with those principles at the new court, even if the result were more acquittals.[15] Consequently, the detailed text of the criminal responsibility provisions that ended up in the RS needs to also be understood by view of the principled beliefs about the meaning of the law that were presented by various members of the ICL community of practice during the RS negotiations and not simply as the result of states' attempts to shield their nationals from convictions by narrowing the scope of the criminal responsibility laws in the Statute.

Furthermore, many ICC judges chose to *interpret* the RS provisions regulating the attribution of criminal responsibility in a manner that significantly restricted the scope of situations in which the defendant could be found guilty, even perhaps going further than what was intended by some of the RS drafters. The *Lubanga* Pre-Trial Chamber (PTC) strongly disassociated the new court from the 'joint criminal enterprise' mode of liability, that was often used at the ICTY but triggered criticism from many legal experts for infringing upon the criminal law principles of personal culpability and fair labelling. Instead, the ICC judges adopted what they perceived to be a more 'objective' theory of liability called 'control over the crime' and borrowed heavily from the continental legal tradition. Furthermore, unlike the UN tribunals, the ICC judges at the *Bemba* PTC concluded that the command responsibility principle required proof of a causal connection between the accused and the crimes, thus, significantly narrowing the scope of the provision. Finally, the ICC judges imposed a very strict mental element standard of liability, that many chambers, including the *Bemba* PTC, *Lubanga* Appeals Chamber (AC) and *Ntaganda* Trial Chamber (TC), defined as 'virtual certainty' that one's conduct would result in a crime. In short, while the international trials during the immediate post-Cold War period tended to be result-oriented, aiming at delivering convictions, at the ICC the focus shifted on the technical application of legal rules, regardless of the trial outcome.[16]

[15] Eser 1993. Ambos 1996.
[16] Amann 2003:180-181.

Secondly, the empirical analysis reveals a stable line of legal reasoning behind the application of the RS criminal responsibility provisions in individual cases. The detailed comparison between the cases that have ended up in acquittals, such as *Gbagbo and Blé Goudé*, and those where the accused was convicted, such as *Ntaganda*, revealed that the ICC judges applied the modes of liability in an equally restrained manner in both types of cases. With the possible exception of the first ICC trial, *Lubanga*, where the trial judges appeared willing to infer the accused's control over the crimes from his position of authority over the direct perpetrators of those crimes, other ICC chambers have applied the modes of liability listed in the RS in a significantly narrow fashion. Consequently, the final verdict in ICC cases appeared to be foremost influenced by the ability of the prosecutor's evidence to meet the high criminal responsibility requirements that were followed in ICC jurisprudence. Furthermore, the empirical analysis does not offer support for the proposition that the judges have lowered those requirements for the purpose of convicting certain persons and tightened the requirements by view of acquitting others. More specifically, the analysis reveals that the strict criminal responsibility requirements enforced by the ICC judges generally allowed for the confirmation of charges and convictions in those cases, such as *Ntaganda*, *Banda and Jerbo* and *Al-Hassan*, where there was evidence of the defendant's personal engagement in the criminal conduct. Conversely, the cases against individuals that have been removed from the scene of the crimes, such as former political figures like Bemba and Gbagbo, have experienced difficulties meeting the ICC judges' requirements and have often resulted in acquittals. Overall, the analysis of the understandings about the meaning of the law, that are shared by the majority of ICC judges, sheds light onto an important factor that influences the outcomes of ICC trials. From the perspective of ICC judges, the technical and narrow application of the criminal responsibility laws serves the purpose to protect the integrity of the judicial process and to uphold the liberal values that underpin international criminal justice. Without claiming that legal norms are the only factor determining trial outcomes, the findings of this thesis nevertheless provide new interesting insights into the question why in several cases the ICC prosecutor has failed to convince the judges that the defendant should bear criminal responsibility.

Finally, the empirical analysis suggests that the difference between the assessment of criminal responsibility at the post-Second World War trials and the UN tribunals, on the one hand, and the ICC on the other hand, should not be interpreted as a sign that the practice of ICL has become more 'legal' as the discipline 'matures'. The concept of 'legal norms' is revealed as a socially-bounded intersubjective phenomenon, not as an objective standard

against which the ICC scores *better* compared to previous tribunals. It cannot be said that earlier tribunals have not followed the law, while the ICC has. Rather, those tribunals have followed different visions of the 'laws' on criminal responsibility. The IMT, IMTFE, and the UN tribunals often perceived morality as the animating force behind legality. From that perspective, if the law did not follow the dictates of moral consciousness, namely, to prevent the perpetrators of mass atrocities to escape punishment by staying away from the scene of the crimes, it was considered merely a technical rule and not a principle of 'justice'. By contrast, the majority of ICC judges, including at the *Bemba* AC and the *Gbagbo and Blé Goudé* TC, along with some criminal law scholars have considered that the law should be applied in dispassionate manner despite the horrendous nature of international crimes. From that perspective, the narrow and predictable interpretation of the law, regardless of the trial outcome, carries its own normative significance, namely, to ensure a legitimate system of international governance.

These three observations point to the conclusion that the politics *of the legal field*, i.e. the promotion and contestations of different understandings of the law by various actors have rendered the restrained approach to criminal responsibility influential at the ICC. The critical scholarship and the liberal-legalist theories have provided insightful but limited accounts of the dynamics taking place within the ICL field, resulting from their focus on the interests of states and politically powerful classes. This study presents a new dimension of the dynamics of the ICL field, which enables a more comprehensive analysis of the outcomes of ICC proceedings.

This is not to imply that the politics of the international criminal law field, i.e. the continuous battle of ideas about the purpose and scope of the law, is the only factor that influences trial outcomes at the ICC. Other factors, such as the limited opportunities for collecting evidence of mass atrocities, especially when those have taken place years before the investigation, could significantly hinder the prosecutor's ability to link the accused to the crimes. Scholars have pointed out the pervading problems with the early ICC investigations, such as the use of intermediaries to collect evidence, the lack of local knowledge of the situation, and the short field trips of the prosecutor to the sites of investigation.[17] As chapter 7 observes, different factors such as the problems of collecting evidence, the interests of governments, and the politics of the legal field can influence trial outcomes in conjunction with

[17] De Vos:2013.

one another. For example, the availability of government cooperation is important for the prosecutor's ability to collect evidence. Furthermore, depending on the understandings shared among the judges about the requirements of the law, they may be willing to tolerate to a different extent the prosecutor's investigation hurdles.

The main contribution of this thesis is, thus, to examine an important factor influencing trial outcomes at the ICC, that has remained overlooked in the international relations literature on the Court, without negating the importance of the other factors. This thesis also examines a particular stage of ICC proceedings, namely the confirmation of charges proceedings and the trials, that has triggered little interest in the literature compared to the process of opening investigations. In other words, this thesis examines what happens when the suspects enter the courtroom.

On this note, it should be mentioned that the focus of this thesis is on *judicial* reasoning with respect to the assessment of criminal responsibility, and not on the selection of suspects by the ICC prosecutor. This is important because, although the Office of the Prosecutor (OTP) is part of the ICC, the politics of the legal field may play out differently in the practice of selecting sites for investigations and individual suspects, with the possibility for more direct and consistent state involvement with respect to such practices because those questions are of utmost concern of governments. The interaction between law and politics in the prosecutor's strategy falls outside of the scope of this thesis but, as chapter 2 observes, it has been often examined in ICL scholarship.

Finally, while this thesis comprises an interdisciplinary research that examines legal documents and legal scholarly analysis, I aim to present the findings foremost for the international relations academic audience. The proposition that the battles over the interpretation of legal norms are important for understanding the outcomes of international trials may indeed seem self-evident from a legal perspective. But it has largely been neglected as a topic of analysis in the international relations literature. While interdisciplinary studies that borrow insights from both legal studies and political science have been conducted on other aspects of ICL, such as the ICC's 'complementarity' mechanism,[18] no similar study has been conducted on the laws of criminal responsibility. A contributing factor to this is the fact that

[18] See Nouwen 2013. De Vos 2020.

the legal scholarship on criminal responsibility issues is written in highly technical manner and aimed at legal scholars and lawyers. By presenting a detailed analysis of the main debates within legal scholarship and legal practice at international criminal tribunals on the question of criminal responsibility, this thesis aims to present to the international relations audience an important aspect of international criminal justice in a comprehensive manner.

This thesis proceeds as follows: chapter 2 reviews the debate between advocates of international criminal justice and critical scholars on the way in which ICL norms operate within the realm of international politics, and presents the theoretical framework and methodology for examining the dynamics of the ICL field that are informed by the intersubjective nature of the legal norms on criminal responsibility. Chapter 3 discusses the main debates that take place within the ICL epistemic community on matters related to criminal responsibility, giving rise to different, sometimes conflicting sets of shared understandings about the nature of the relevant laws. Chapter 4 examines the assessment of criminal responsibility at the Nuremberg and Tokyo tribunals and the UN tribunals, with reference to the specific sets of shared understandings that dominated the ICL discourse at the relevant times. Chapter 5 turns to the drafting of the criminal responsibility provisions in the RS. Chapter 6 proceeds with an analysis of the interpretation of the relevant provisions by the ICC judges after the Court started operation. Chapter 7 examines the factual findings of the ICC judges on the criminal responsibility of the defendants in all ICC cases in which the confirmation of charges hearing was completed. Chapter 8 analyses in detail two case studies – the *Gbagbo and Blé Goudé* trial where the TC acquitted the accused and the *Ntaganda* trial where the accused was convicted. Chapter 9 concludes by discussing questions for future research on ICL practice.

2. LITERATURE DEBATES, THEORY AND METHODOLOGY

This chapter begins with a discussion of two strands of literature that examine the interplay between law and politics in international trials: the liberal legalist scholarship that perceives law and politics as distinct social phenomena, with law providing an objective constraint on power politics, and the critical scholarship that views ICL as a reflection of the structural power inequalities in the international arena. The critical approach appears better at explaining *which cases enter the ICC*, but not the judicial reasoning behind the assessment of the defendant's guilt or innocence. The liberal legalist approach provides insights into this question, by suggesting that certain aspects of the ICC's operation, such as the assessment of the accused's guilt or innocence, are determined by legal norms. But the liberal-legalist scholarship neglects the question *how* specifically those legal norms influence judicial reasoning. To address this gap, namely, the lack of detailed analysis of the manner in which legal norms matter with respect to the assessment of individual criminal responsibility at the ICC and the politics of the legal field, this chapter proposes building an 'intersubjective' framework of analysis – one that recognizes the law's inherent normativity not as an objective fact but as a form of social practice.

2.1 Defining the concepts

The scope and subject matter of international criminal justice have historically been subject to disputes.[19] Nevertheless, for the purpose of this thesis international criminal justice can be understood broadly to unite the legal norms that formulate ICL, the jurisprudence of international criminal courts and tribunals and their policies.[20] ICL covers crimes that are said to be of concern to *humanity* as such.[21] While it is still debatable precisely which conducts fit into this definition, the Rome Statute of the ICC lists four specific types of international crimes: genocide, crimes against humanity, war crimes and the crime of aggression.[22] International crimes are often referred to as 'atrocity' crimes'.[23] This definition of international criminal

[19] For a historical overview of the debates see Mégret 2019.
[20] Stahn 2012:252.
[21] Van Sliedregt 2014:1140.
[22] Rome Statute: Article 5.
[23] Sheffer 2002:400.

justice, while open to dispute, is chosen here because it reflects what is generally understood by this term within the ICL field.[24]

Unlike other branches of international law, ICL imposes *individual* responsibility rather than state responsibility for international crimes.[25] Another distinguishable characteristic of ICL is that it provides for *criminal* responsibility, rather than civil responsibility. Given the nature of mass atrocities, the individuals prosecuted through ICL would often be high-ranking state or military officials, especially with respect to the crime of aggression.[26] Nevertheless, under ICL the accused are being prosecuted in their capacity as rational individuals bearing criminal responsibility for their personal conducts, and not as state representatives.[27]

Although the notion of individual criminal responsibility for mass atrocities constitutes the 'underlying logic' of ICL,[28] it presents a relatively recent phenomenon in international law. International treaties from the early 20th century, such as the Hague Conventions on the Laws and Customs of War concerned *states*' obligations to punish the perpetrators of war crimes.[29] In 1945 the IMT in Nuremberg, established to prosecute the defeated Nazi major generals, instituted the norm of individual criminal responsibility in international law by proclaiming that international crimes were committed by 'men, not abstract entities'.[30] The individual criminal responsibility norm was then applied at the IMTFE in Tokyo that prosecuted former Japanese officials in the aftermath of the Second World War.[31] But even after the Nuremberg and Tokyo judgments, discussions about the establishment of a permanent international criminal court continued to contemplate the possibility of imposing state responsibility for international crimes.[32] The norm of individual criminal responsibility finally re-emerged in international law in the 1990s with the establishment by the UN Security Council of the ICTY

[24] For further analysis see section 3.2.
[25] Drumbl 2007:5-6. Van Sliedregt 2012a:61-65.
[26] Bellelli 2016:33.
[27] Cryer et al. 2014:7.
[28] Baaz 2015:674.
[29] Bantekas 2006:122.
[30] *IMT Nuremberg Judgment*:466.
[31] For an overview of the similarities and differences between the IMT and IMTFE see Kaufman 2010.
[32] Mégret 2019:83. See e.g. Pella 1950:51-52.

and ICTR,[33] and became institutionalized into the statute of a permanent judicial institution with the adoption of the RS in 1998 and the beginning of the ICC's operation in 2002.[34]

In addition to international courts and tribunals, nation states play an important role in the enforcement of individual criminal responsibility for mass atrocities.[35] The relationship between national and international courts varies. The UN tribunals enjoyed 'primacy' over national courts, which allowed the tribunals to request the deferral of cases by national courts to the competence of the international tribunals. By contrast, the ICC operates under a 'complementarity' regime, that renders the ICC a court of last resort.[36] The RS gives priority to national proceedings and a case would be inadmissible at the Court unless the state that has jurisdiction is 'unwilling or unable genuinely to carry out the investigation or prosecution'.[37] The ICC's case law has further established that the Court can also take on a case in the situations where the state with jurisdiction over it has remained 'inactive', i.e. had not initiated investigation or proceedings.[38] Furthermore, the early 2000s have seen the rise of 'hybrid' courts, including the Special Court for Sierra Leone (2002), the Special Panels for the serious crimes committed in East Timor (2000), the Extraordinary Chambers in the Courts of Cambodia (2006) and the Special Tribunal for Lebanon, in an attempt to 'blend international supervision with local ownership'.[39]

While domestic proceedings and hybrid courts demonstrate the spread of international criminal justice globally, the scope of this research is limited to an analysis of *international* courts by view of examining the particular challenges that the realm of international power politics poses to the assessment of individual criminal responsibility. Consequently, the main focus of analysis will be the permanent ICC, and other international tribunals – the IMT, IMTFE, and the UN tribunals – will be examined for the purpose of providing contextual understanding of the historical development of individual criminal responsibility norms in ICL. Because they were set up by the victorious Allies, the IMT and IMTFE have sometimes been

[33] Gaeta 2016:169.
[34] Schabas 2007:21.
[35] Lutz and Sikkink 2001.
[36] For a discussion of the two types of jurisdiction see Lattanzi 2016:186 et seq.
[37] Rome Statute: Article 17(1)(a).
[38] *DRC, First Arrest Warrants Decision*: ¶29.
[39] Bellelli 2016:14-15

described as 'multinational' rather than truly 'international',[40] but they are included in the analysis due to their significant role in ICL scholarship and practice.

2.2. Theories of international criminal justice

This chapter analyses the interdisciplinary scholarship that has examined the promotion and institutionalization of ICL and the idea of individual criminal responsibility as means to address mass atrocities, within the realm of international politics. For the purpose of clarity, the literature was grouped into two branches: liberal-legalist scholarship and critical scholarship. These generic notions do not suggest that there are no differences between the works discussed in each section. Rather, the aim is to examine the main arguments made by, on the one hand, those scholars who have been generally sympathetic to the promotion of international criminal justice, and on the other hand, those scholars who have been more critical thereof. Liberal scholars often criticise various aspects of ICL, but their arguments usually constitute an 'internal' critique aimed at *improving* the performance of international courts rather than contesting the existence of ICL.[41] Similarly, not every critical scholar has rejected the idea of international criminal justice but those authors have sought to problematize 'underlying assumptions' on which that system is premised by view of the systemic inequality in international politics.[42]

2.2.1. Liberal-legalist scholarship – an internal view of the ICL field

From a liberal perspective the rule of law constitutes a mechanism for ordering social relations that constrains the arbitrary use of power.[43] The legal realm is associated with 'harmony' and the provision of *objective* means to resolve disputes, and is distinguished from the political realm, associated with 'competition, conflict and supremacy'.[44] This section discusses, firstly, the liberal-legalist arguments in favour of the use of ICL and its underlying concept of individual criminal responsibility as means to address mass atrocities and, secondly, the liberal-legalist account of the operation of ICL norms in the international political realm.

[40] Bellelli 2016:11-12. Nevertheless, most commentators describe the IMT as an international tribunal. See Heller 2011:110-111.
[41] Mégret 2014:18.
[42] Sander 2015:753.
[43] Gallant 2008:21.
[44] Shaw 2003:12.

2.2.1.1. Constraining private vengeance and political power

The liberal scholarship perceives the legal approach to addressing mass atrocities as more balanced and objective compared to the alternative of political action. International trials are considered to end the cycle of 'private uncontrolled vengeance' in the aftermath of mass atrocities by substituting it with a 'measured process of fixing guilt' to individual perpetrators.[45] Furthermore, scholars have increasingly argued that international trials have an important socio-pedagogical effect.[46] More specifically, by stigmatizing atrocious acts as socially unacceptable, international trials are said to promote the internalisation of norms of lawful behaviour within the international community, and thus prevent future atrocities.[47]

The liberal understanding of ICL is grounded in a vision of the world as composed of equal rational individuals, responsible for their personal conducts.[48] Contrary to the 'simplistic myths of primordial hatred', mass atrocities are often considered to be deliberately incited by power-thirsty rational elites.[49] Consequently, the notion of individual criminal responsibility is considered particularly appropriate for addressing mass atrocities, compared to the 'primitive and archaic' forms of collective accountability, such as state responsibility, that harbour the danger of rekindling inter-group violence.[50] Unlike forms of collective accountability, the liberal individualized notion of criminal responsibility is said to ensure that 'the guilt of the few would not be shifted to the innocent'.[51]

ICL scholars and practitioners have recognized that the use of individual criminal responsibility also poses challenges. The term 'system criminality' has often been used to denote the scale and the peculiar normative context of mass atrocities.[52] International crimes generally involve mass participation[53] and appear to be facilitated by a social climate of fear and hatred that 'authorize[s]' conducts that would be considered delinquent behavior under

[45] Shklar 1964:158. See also Bass 2000:7. Minow 1998:26.
[46] For a commentary on that branch of ICL scholarship see Sander 2019.
[47] Akhavan 2001:12-13. Damaška 2008:345.
[48] G. Fletcher 2002:1507-1508.
[49] Akhavan 2001:7. See also Akhavan 2009:629-630. Bensouda 2012:6.
[50] *Annual Report on the ICTY*: ¶16.
[51] *Momir Nikolić Judgment*: ¶60. See also Sassòli and Olson 2000:756.
[52] Nollkaemper 2009:16. Van Sliedregt 2012a:20-21.
[53] Nersessian 2006:81.

normal circumstances.[54] Such considerations have raised suspicion whether individual criminal responsibility, a legal tool used in Western countries to address 'ordinary' domestic criminality, can provide an adequate accountability mechanism for the 'extraordinary evil' of atrocity crimes.[55]

Nevertheless, such observations generally constitute an 'internal' critique because they do not completely reject the use of individual criminal responsibility as a response to mass atrocities. Rather, those scholars suggest that ICL presents only part of the solution to the problem of mass atrocities and needs to be *complemented* by mechanisms, such as truth and reconciliation commissions, that address the systemic dimensions of international crimes.[56] Even one of the most ardent critics of the direct replication of individual criminal responsibility from domestic to international law, Mark Drumbl, proposed that a reformed model of international criminal trials could be useful in addressing mass atrocities.[57] Consequently, despite the conceptual differences between domestic crimes and atrocity crimes, the punishment of *individual persons* through criminal trials has become an integral part of the transitional justice toolbox.[58]

2.2.1.2. The liberal historical account of ICL: a struggle between law and state power-politics

The liberal-legalist scholarship has perceived the development of ICL as a continuous struggle between on the one hand, human rights advocates promoting legal norms and, on the other hand, self-interested states seeking to protect their sovereignty and the immunity of government officials from international prosecution.[59] Hence, the promotion of ICL has been rooted in the liberal idea that the sovereignty claims of a state that jeopardizes the physical security of its citizens should lose ground to the ability of international tribunals to prosecute the responsible individuals.[60] The liberal-legalist account recognizes the role of some 'good-will' states in the promotion of international criminal justice but mostly in terms of 'canalizing

[54] Kelman 2009:36, emphasis ommitted.
[55] Drumbl 2007:6. Aukerman 2002:41.
[56] Nollkaemper 2009:4. L. Fletcher and Weinstein 2002:625. May and Fyfe 2017:95.
[57] Drumbl 2007:207-208. See also L. Fletcher 2005:1018.
[58] Teitel 2014:xviii.
[59] See Sikkink 2011:17. Lutz and Sikkink 2001. Cassese 2011:272. Safferling 2004:1472.
[60] May 2004:32.

the inputs' of global civil society, with the latter acting as the main drivers of the ICL movement.[61]

The promotion of ICL over traditional power politics has generally been presented as a 'journey' marked by several steppingstones.[62] The Nuremberg trial of the Nazi major generals has largely been considered as the foundation on which the system of individual criminal responsibility for mass atrocities was built.[63] Many liberal-legalist scholars do not negate that political considerations played a crucial role at Nuremberg, most notably in relation to the discriminatory selection of the accused[64] and the retroactive nature of some of the laws applied by the tribunal.[65] But the advocates of international criminal justice have generally perceived the Nuremberg trial as a success of the legalist movement against state power politics, even if a limited one.[66] According to Gary Bass, the fact that the Allies rejected the alternative of summary executions without a trial and created the Nuremberg tribunal instead, demonstrated that those countries were 'constrained' by the strong influence of liberal legalism.[67] Even more importantly, the limited victory of law over politics at Nuremberg has been considered significant because it 'launched a remarkable international movement for human rights founded in the rule of law'.[68] Hence, while the liberal scholarship has recognized that the complete success of law over politics was not accomplished at Nuremberg, the tribunal was seen as the first step towards a *better* system of legal accountability for mass atrocities.

The proponents of international criminal justice then often point to the political stalemate during the Cold War that reportedly prevented the institutionalization of the Nuremberg legal principles into a permanent international criminal court.[69] The establishment of the UN tribunals in the 1990s , hence, was viewed as an important accomplishment for the rule of law.[70] However, the ICTY and ICTR remained 'no more than ad hoc tribunals' that were created by a political institution – the Security Council.[71] For ICL advocates, the next step in

[61] Tallgren 2015:147.
[62] Sander 2015:751.
[63] See Bass 2000:204-205. Eser 2001:4-5. Ferencz 1998. Robertson 2006:1.
[64] Tomuschat 2006:834.
[65] Minow 1998:32-33.
[66] See Cassese 2002:8. Tomuschat 2006:837.
[67] Bass 2000:149.
[68] Minow 1998:47. See also Sikkink 2011:5.
[69] Ferencz 1998:218-219. Nanda 1998:414.
[70] Lutz and Sikkink 2001:17.
[71] Eser 2001:6.

the promotion of international criminal justice was the development of a permanent and independent international criminal court.[72]

The establishment of the ICC was perceived as a testament of the efforts of human rights advocates and 'like-minded' states to defeat the 'power-preserving politics-dominated frame' of international negotiations and to build an institution that would be guided by 'the fundamental principles of law'.[73] Nevertheless, scholars and practitioners sympathetic to the court's establishment recognized that ICL continued to face significant political challenges even after the permanent court began operation.[74] Notably, those hurdles were attributed to the fact that great powers were 'not yet ready' to surrender some of their sovereign rights to the ICC.[75] Nevertheless, in the liberal-legalist literature this has not been perceived as an evidence of the failure of international criminal justice as a tool for addressing mass atrocities. Rather, it is commonly considered that the 'progressive internalization' of ICL norms in the world of power politics[76] would take a 'fairly long period of time'.[77] In the meantime, the sympathetic scholarship has called for managing expectations with respect to the ICC's capacity to conduct successful prosecutions and for seeking an incremental rather than immediate change of state attitudes towards ICL.[78] Hence, while the liberal scholarship acknowledges that the *complete* triumph of law over politics may never take place in the state-dominated international realm, ICL is said to have come a long way since its early days.[79] Hence, the proponents of international criminal justice appear to aim at gradually achieving an *ever greater* role of the rule of law in addressing mass atrocities.

Overall, the liberal-legalist account recognizes that power politics and legal norms have often interacted during the development and enforcement of international criminal justice. But the liberal literature treats law and politics as *distinct* phenomena: the 'political' is associated with the efforts of states to protect their sovereignty from the reach of international criminal justice and the 'legal' is perceived as a set of objective norms constraining the arbitrary use of power. While the legalistic position recognizes that the manner in which the rule of law is

[72] Ferencz 1998:225.
[73] Deitelhoff 2009:60. See also Welch and Watkins 2011:960.
[74] Cassese 2011:273. Ignatieff 2015.
[75] Interview with Benjamin Ferencz in Khomami 2017.
[76] Akhavan 2001:30.
[77] Cassese 2008a:499. See also Van Sliedregt 2014:1146. Stephen 2012:84.
[78] Kersten 2019. Harrington 2010.
[79] Luban 2013.

institutionalized and enforced has historically been compromised, and may never be completely separated from political interests, the very existence of objective legal norms that are distinct from state interests is not questioned.

2.2.2. Critical scholarship – the external view of the ICL field

By contrast, drawing on insights from critical legal studies (CLS) and Marxist studies, a growing body of scholarship has provided an 'external', or a 'meta-critique' of ICL that questions the fundamental liberal logic of the field and the objectivity and distinctiveness of international law from power politics.[80] This section firstly examines critical accounts of ICL and individual criminal responsibility and then proceeds with critical analyses of the institutionalization and enforcement of international criminal justice.

2.2.2.1. Problematising the perceived neutrality of ICL

CLS perceive international legal norms as ultimately *indeterminate* due to the ambiguity of the legal language which, on that account, can be invoked to 'justify *any* behaviour' and, therefore, can be instrumentalized by politically powerful actors.[81] Marxist studies problematize this account of international law further by observing that historically the indeterminacy of international legal norms has been employed in a very *specific* manner, namely, by interpreting international law in favour of the materially powerful classes and nations.[82] By creating the perception of sovereign equality between nations, it is suggested, international law has in reality '*facilitated*' the material inequality between states.[83] Hence, international law is considered not as normatively superior to power politics, but on the contrary – as a tool of global imperialism.[84] Therefore, from a critical perspective the purported separation of law from politics is problematic because it masks social reality by concealing the driving role of power politics and global capitalism in international relations.[85]

[80] Baaz 2015:676.
[81] Koskenniemi 2006:67, emphasis added. See also Sinclair 2010:79-80.
[82] Chimni 2017:356. Miéville 2006:54-60.
[83] Knox 2016:323, emphasis in the original.
[84] Chimni 2017:264. Miéville 2006:225-226.
[85] Knox 2016:319-320.

Building upon the insights of CLS and Marxist studies on international law, some ICL scholars have problematized the liberal-legalist narrative and argued that the legal norm of individual criminal responsibility has in practice served to decontextualize and depoliticize international crimes.[86] In particular, critical scholars have suggested that the notion of individual criminal responsibility obfuscates the role of *structural* factors such as colonialism, neo-liberal economic policies, and global capitalism in enabling the social climate that is conductive to the commission of mass atrocities.[87] Consequently, the fight against impunity for *mass atrocities* through the rule of law is argued to have historically legitimized other forms of physical and economic violence that were 'routinized' by the neo-liberal international order, such as land grabs, humanitarian intervention and the imposition of structural adjustment programs on developing countries.[88]

Furthermore, the enforcement of ICL is said to produce a particular image of the perpetrator of mass atrocities as non-white, male, strong, gruesome and particularly barbaric.[89] From a critical perspective, the nationals of the Global South have become the 'scapegoats' for the international community that has itself been involved in producing the socio-economic conditions enabling mass atrocities.[90] In other worlds, rather than challenging political power, ICL and the individual criminal responsibility norm are said to reaffirm the existing power inequalities, or the 'double standards', between the Global North and the Global South.[91]

2.2.2.2. Power politics and the institutionalization of ICL

The critical scholarship approaches the historical development of ICL from a significantly different perspective compared to the liberal-legalist scholarship, by problematizing the role of key actors and events. Human rights activists and NGOs have been presented in less benign terms in critical scholarship, namely, as actors that have become complicit in the process of maintaining the dominance of Western ideas in international criminal justice.[92] Contrary to the liberal narrative, Danilo Zolo has described the creation of

[86] Koskenniemi 2002:13-14. Engle 2016:45. Ainley 2011. Clarke 2015.
[87] Clarke 2011. Schwöbel-Patel 2016:268-269. Krever 2013:703-704. Marks 2011:71. Tallgren 2002:594-595.
[88] Nesiah 2016:112-113.
[89] Schwöbel-Patel 2016:256-257. Mutua 2001a:202.
[90] Bikundo 2012:27. Clarke 2011:11-12.
[91] Schabas 2012:85. Tosa 2018:57.
[92] Zolo 2009:xii. Lohne 2017:465-468. Mutua 2001b. Mégret 2012:14.

ad hoc international tribunals not as steps of the gradual journey of promoting law within the realm of power politics, but as manifestations of 'victors' justice' against the 'vanquished, weak and oppressed peoples'.[93]

The permanent ICC has not escaped criticism of perpetuating the double standards among states either.[94] The selection of defendants at the Court – as of September 2020, all African nationals – has led some scholars to describe the ICC as: 'a Western court to try African crimes against humanity'.[95] Notably, scholars have observed that ICL can be instrumentalized to serve the interests not only of great powers, but also of the governments of less powerful states when enforced against rebels or opposition members by undermining international support for such groups and legitimizing oppressive governmental policies.[96]

Therefore, it is said that the practice of international criminal justice cannot be insulated from political interests.[97] Nouwen and Werner propose that with each investigation the ICC inevitably becomes implicated in the realm of the political by implicitly stigmatizing the suspects as 'enemies of mankind' and praising the cooperating parties as 'friends of humanity'.[98] Scholars have argued that the difficulties of enforcing ICL further subdue the Court to power politics because sovereign states would cooperate with international courts only to the extent that the latter prosecute their opposition, but not if government officials are subject to proceedings.[99] Acting heads of states were charged at the ICC only when the situation was referred by the UN Security Council, which some interpreted as a confirmation of the politicization of international criminal justice.[100] Overall, it has been suggested, only those individuals with 'no powerful friends left' become subjects to international trials.[101] Consequently, critical scholars remain unconvinced by the suggested objectivity of the legal approach to addressing mass atrocities because the selective application of ICL has enabled

[93] Zolo 2009:xii.
[94] Bikundo 2012:28.
[95] Mamdani 2009:627.
[96] P. Clark 2008:43. Schabas 2008a:16. Branch 2011:186.
[97] P. Clark 2018:80.
[98] Nouwen and Werner 2011.
[99] Schabas 2008a:19. Peskin 2017:405. Krever 2014.
[100] Kersten 2016:163. Kiyani 2017:96-97.
[101] McManus 2017:318, emphasis omitted.

'*any* politicization of justice, *any* instrumentalization of legal institutions to political interests'.[102]

Crucially, the critical scholarship problematizes the very attempt by liberal legalists to present the law as separate from and superior to politics.[103] Phil Clark's analysis of ICC interventions demonstrated that the failure to acknowledge that the practice of ICL cannot be 'distan[ced]' from local politics has affected adversely both the Court and the afflicted communities.[104] Scholars have also expressed concerns that the emphasis on necessarily employing ICL for 'ending impunity' for mass atrocities has obscured the need to justify such practices and precluded constructive criticism thereof.[105] From this 'external' to the ICL field perspective, to question the fundamental premises of international criminal justice is not equivalent to justifying impunity for mass atrocities. As Moyn observes, the alternative to liberal legalism 'is not doing nothing; it is doing something else'.[106] By subsuming 'all issues of liability within a criminal and individual frame', ICL is said to divert attention away from other forms of accountability, which may be particularly relevant in the context of mass violence, such as civil or corporate liability.[107] By 'monopolizing' the discourse of global justice, ICL has left 'fundamental issues outside the scope of what can be defined as unjust'.[108]

2.3. The internal v. the external views on ICL: strengths and weaknesses

By focusing on the ICC's embeddedness within domestic and international politics, the critical scholarship provides key insights into matters of determining the Court's jurisdiction, including the question of *which cases enter the ICC and which proceedings have the potential to be completed*. The liberal-legalist scholarship has justified the prosecutor's geographical focus on developing countries on legal or pragmatic grounds,[109] but more critical analyses have revealed the influence of the Court's institutional interests, namely, to achieve effectiveness of

[102] Branch 2010:34, emphasis in the original
[103] Nouwen and Werner 2011:961-964.
[104] P. Clark 2018:17.
[105] Moyn 2016:68-69. See also Krever 2013:710.
[106] Moyn 2016:69. See also Clarke 2009:237.
[107] Anderson 2009:347.
[108] Branch 2010:34.
[109] Ambos 2012a:510-514. Bassiouni and Hansen 2016:316-317. DeGuzman 2016a:333-334.

prosecutions, and the interests of the political actors upon which the Court depends for obtaining cooperation, with respect to the selections of investigations and suspects.[110]

For instance, scholars have suggested that political considerations influenced the OTP's decision to refrain from prosecuting acting government officials from cooperating states.[111] The practice of 'self-referrals', where a state voluntarily refers a conflict situation taking place on its territory to the ICC for investigation, has been perceived as another illustration of the way in which ICL favours rather than challenges political power.[112] Self-referrals were made by several states, including Uganda, the DRC, the Central African Republic (CAR), and Mali.[113] While the investigation in Côte d'Ivoire was initiated *proprio motu* by the ICC prosecutor, pursuant to their power under Article 15(1) RS, because the ICC was previously invited to intervene by the Ivoirian government, that investigation also resembled the self-referral dynamics.[114] It has been suggested that self-referrals 'signa[l]' to the OTP which actors to co-operate with and which actors to target as suspects.[115] In all of the self-referred investigations, the ICC has charged only members of rebel movements or the political opposition, essentially enabling governments to dispose from dangerous rebels.[116] Liberal scholars have generally stressed that states are not able to simply use the law as a tool because the RS requires the referral of 'situations' rather than specific cases to the ICC, which leaves the government officials just as vulnerable to potential prosecution as the rebel leaders.[117] However, more critical analyses have suggested that while in principle the ICC's law should operate in that manner, *in practice* the governments making referrals have often been able to exert enough political pressure on the court to secure their officials from prosecution.[118] Consequently, in international criminal justice power politics often plays out with respect to the decisions where *not* to open investigations and who *not* to prosecute.[119]

[110] Kersten 2016:17.
[111] Branch 2007:188. Rodman and Booth 2013:286. Kersten 2016:162.
[112] Nouwen 2013:116-120. P. Clark 2018:55. Schabas 2008b:751-753.
[113] ICC, Situations under Investigations, https://www.icc-cpi.int/pages/situation.aspx.
[114] P. Clark 2018:288.
[115] Kerstern 2016:163.
[116] Jessberger and Geneuss 2012:1089. Schabas 2008:757. See also Cassese 2006:436.
[117] Simmons and Danner 2010:230-231.
[118] See Rodman and Booth 2013. Vinjamuri 2018:337. Chapman and Chaudoin 2013:404-405.
[119] Mutua 2016:103. Mégret 2015:81-82.

More recently, some ICC decisions regarding the opening of investigations challenged the view of the inevitable politicization of ICL. Since 2016 the OTP has started to open investigations outside Africa.[120] Furthermore, despite the announcement by the United States (US) that visas would be denied to any ICC staff members involved in the investigations of American forces operating in Afghanistan,[121] the OTP requested the judges to open a *proprio motu* investigation in Afghanistan. The PTC judges considered that without state cooperation the Afghanistan investigation would be 'doomed to failure' and declined the prosecutor's request.[122] However, the AC judges unanimously decided to authorise the OTP's investigation, thus, demonstrating that the court would not so easily give up on politically challenging cases.[123] Such developments suggest that the influence of power politics in international criminal justice cannot completely explain the selection of sites for investigation and specific cases.

However, the critical scholarship has, nevertheless, provided important insights into the overall picture of the cases that *enter* the ICC courtroom. Bosco's detailed analysis of the ICC's investigations record proposes that in practice the ICC has 'accommodated' to the state-dominated international reality, rather than challenged that reality.[124] As of September 2020, the only suspects that have stood (pre-)trial proceedings at the ICC have been either members of insurgent organizations or deposed state officials,[125] or persons who appeared voluntarily after being summoned by the Court, as was the case with the six Kenyan suspects and the members of insurgent organizations in Darfur.[126] Those cases in which states have refused to comply with their obligations and arrest the accused, such as the case against the former Sudanese president Al-Bashir, have not yet reached the courtroom.[127] In other cases, this time against Kenyan nationals, the suspects appeared voluntarily at the court but the proceedings were terminated due to the prosecutor's inability to collect evidence as a result of the Kenyan

[120] The first investigation outside Africa was opened in Georgia in 2016, https://www.icc-cpi.int/georgia. The OTP subsequently opened investigations in Afghanistan and Bangladesh/Myanmar, https://www.icc-cpi.int/pages/situation.aspx.
[121] *The Guardian* 2019.
[122] *Decision on the Authorisation of an Investigation in Afghanistan*: ¶90, ¶¶94-5.
[123] Trahan 2020.
[124] Bosco 2014:20. On that point see also Vinjamuri 2018:340.
[125] The defendants in the cases originating from the investigations in the DRC, the CAR, Côte d'Ivoire, Mali, and Uganda. ICC Defendants database at https://www.icc-cpi.int/defendants.
[126] Women's Initiatives for Gender Justice 2011:120.
[127] For a discussion of the reaction of African states to the Al-Bashir case see Mills 2012. Cole 2013:685-689.

government's efforts to obstruct ICC proceedings.[128] Hence, in those ICC cases that have failed to obtain the cooperation of at least some states, the court has not had the opportunity to enter judgments on the accused's alleged criminal responsibility.

That being said, critical scholarship often stops short of examining what happens in those ICC cases in which the court has obtained sufficient government cooperation to have the accused apprehended and to conduct investigations. Yet, the trial record of the ICC is a key aspect of the Court's operation for understanding the way in which ICL functions in the international realm. The outcomes of international trials are not preordained to end up in conviction and the ICC is a stark example of this. As of February 2021, the court has served only five convictions, in the *Lubanga*, *Katanga*, *Al-Mahdi*, *Ntaganda*, and *Ongwen* cases, and four acquittals, in the *Ngudjolo*, *Bemba* and *Gbagbo and Blé Goudé* cases. Moreover, the ICC has dismissed some or all charges in several cases, such as *Mbarushimana* and *Abu Garda*.

The Court's trial record is not without consequences for its institutional standing. Even though in principle liberal legalists are interested in holding international trials rather than obtaining a certain number of convictions, in practice commentators have suggested that a significant rate of acquittals risks dismissing the project of international criminal justice as 'an enormous waste of time and money'.[129] The performance of international criminal tribunals has increasingly been assessed in terms of the costs spent on investigations and proceedings.[130] Consequently, a high rate of acquittals could 'impair the reputation' of the Court by dissuading the global public in its ability to fight impunity.[131] The ICC has already been criticised for turning into a 'very expensive 'acquittal machine''.[132] This has also triggered criticism from some state parties. At the 2018 ASP the United Kingdom expressed serious concern about the fact that: 'After 20 years, and 1.5 billion Euros spent we have only three core crime convictions'.[133] Therefore, it is of crucial importance to analyse the ICC's trial outcomes, given their implications for the image that the Court projects in front of actors on which it depends

[128] For an insightful analysis of the attempts of the Kenyan government to challenge the ICC investigation see Peskin 2017:413-422.
[129] Osiel 2009:22. See also Combs 2010:228-233.
[130] Stahn 2012:256.
[131] Combs 2010:358.
[132] Robinson 2013a:700.
[133] Foreign & Commonwealth Office 2018.

for material and moral support, including the ICC's Assembly of State Parties (ASP), which determine the Court's budget,[134] and human rights advocates.

From a liberal-legalist perspective, the failure of critical studies to explain the outcomes of ICC trials can be attributed to the lack of appreciation of the normative distinctiveness of legal reasoning. For liberal scholars, international criminal justice institutions constitute '*more* than just vehicles for the crude application of power'.[135] The ICC is differentiated from political organizations precisely for its obligation to make determinations on the basis of the law.[136] Hence, an overall consensus that 'law matters' unites the liberal-legalist view of ICL.

There is some variation of opinion among liberal legalists with respect to the *extent* to which law matters in international criminal justice. ICC officials have generally maintained that all aspects of the interpretation and enforcement of ICL should remain separated from political considerations.[137] The ICC's prosecutor Fatou Bensouda argued that politics had '*no* place' in the execution of her mandate.[138] Sympathetic scholarship, however, has generally warned against such manifestations of 'judicial romantic[ism]' that may lead to misguided expectations about the possibility of *completely* separating international criminal justice from political considerations.[139] Many supporters of international criminal justice acknowledge that due to the ICC's incapacity to prosecute all persons responsible for international crimes, a certain degree of selectivity with respect to the choice of suspects is inevitable.[140] Hence, on that account the prosecutor may, for example, 'sequence' investigations by starting with those actors who lack state support before moving on to more significant political figures in order to increase the ICC's chances of apprehending the suspect.[141] But it is still deemed unacceptable if the prosecutor targets individuals without sufficient evidence, or if the judges assess the defendant's guilt or innocence without following the criminal responsibility laws.[142]

[134] Woolaver and Palmer 2017:656-659.
[135] Bass 2000:12, emphasis added.
[136] Cassese 2006:441. Sikkink 2011:13.
[137] As observed by Sander 2015:784. See, e.g. *Gbagbo and Blé Goudé Reasons of Judge Henderson*: ¶10.
[138] Bensouda 2013: ¶14, emphasis in the original.
[139] Akhavan 2009:629. See also Goldston 2010:386-387.
[140] Akhavan 2001:30. Luban 2013:508-509.
[141] Rosenberg 2017. Weiner 2013:556-560. Akhavan 2009:631-632. Goldston 2010:393-402.
[142] Luban 2013:508. Weiner 2013:548-549. Danner 2003:536-537.

Yet, the liberal-legalist approach also falls short of examining how the laws of individual criminal responsibility operate and influence trial outcomes. It is simply remarked that *some* acquittals constitute the inevitable price of relying on a criminal justice system that respects the rule of law.[143] The most obvious explanation for the ratio of acquittals and dismissals of charges at the ICC on this account appears to be inability of the ICC prosecutor to collect sufficient evidence for obtaining a conviction,[144] often attributed to the refusal of individual states to cooperate with the collection of evidence[145] or the ASP's reluctance to grant the OTP additional funding.[146] Because international judges are presumed to refrain from entering a conviction unless the defendant's guilt has been clearly established, despite the potential political benefits of such decisions, the liberal-legalist perspective locates the reason behind the failure of ICC prosecutions in the desire of states to protect their sovereignty and financial interests and the resulting inability of the OTP to collect sufficient incriminatory evidence.

While all of the above affect trial outcomes, this thesis argues that the liberal-legalist perspective still presents an incomplete picture of the assessment of criminal responsibility because it falls short of enquiring into the manner in which legal norms are enacted in practice. The problem with the liberal-legalist literature is that by spending much effort on explaining the distinctiveness of law from state power-politics, it renders legal norms as objective standards and fails to examine the various dynamics taking place within the legal field that influence the ways in which those legal norms would play in practice. Because liberal-legalist approaches perceive legal norms as objective and, thus, having a universally uniform influence on judicial reasoning with respect to the assessment of criminal responsibility across all institutional settings, regardless of the socio-political context, that approach fails to convincingly explain why the ICC judges and those at the UN tribunals have treated differently the prosecutors' arguments and evidence.

However, important differences have been observed between the ICC and the UN tribunals in terms of the judges' response to the prosecutors' investigatory hurdles, which indicates that the availability of evidence, while an important factor, is not the only one that influences trial outcomes. Empirical studies have observed the UN tribunals' general

[143] Women's Initiatives for Gender Justice 2018:57. Jackson 2018a.
[144] See De Vos 2013. Guilfoyle 2019a.
[145] Amnesty International 2016.
[146] Evenson and O'Donohue 2016.

willingness to admit evidence that would otherwise not meet the standards of domestic criminal proceedings, essentially lowering the burden of proof on the prosecutor,[147] especially in cases concerning leadership figures.[148] In effect, commentators have noted that rather than the prosecutor seeking to prove the defendants' guilt, the latter have had to prove their innocence at the UN tribunals.[149] By contrast, the ICC has shown 'unparalleled willingness to reject the prosecution's evidentiary offerings'.[150] In decisions like the *Bemba* appeal judgment or the *Gbagbo and Blé Goudé* trial decision, the ICC judges have demonstrated 'zeal for impeccable standards' and a 'hypersceptical' attitude towards incriminating evidence, which has resulted in the prosecutor's failure to prove the defendant's guilt.[151] Even though the small number of verdicts at the ICC – nine, as of February 2021 – precludes a conclusive comparison, the record of acquittals at the Court is telling of the implications of the restrained evidentiary assessment. The acquittal rate at the ICTY was about 17%[152] and about 18% at the ICTR,[153] compared to 55% at the ICC. The permanent court has served only five convictions and four acquittals for international crimes as defined under Article 5 RS.[154] Unlike the UN tribunals, which displayed a 'proconviction bias'[155], the ICC has looked at the prosecutor's incriminating evidence with a 'jaundiced eye'.[156] As this thesis will show, by looking into the normative dynamics of the ICL field, namely the ideas about the scope and purpose of ICL norms that have been promoted and contested within that field, one gets a deeper understanding of the different practices of the ICC and its predecessors.

Some legal scholars have attributed the difference of approaches between the ICC and the UN tribunals to ICL's 'matur[ation]' into a more sophisticated legal system over time that has allegedly led the permanent court to exhibit greater respect for legal norms than its predecessors.[157] The notion of the 'progress' is rooted in the Enlightenment tradition and serves

[147] Combs 2010.
[148] Zahar 2014:242-244.
[149] Bertodano 2002:410. Robinson 2008:934.
[150] Combs 2017:124.
[151] Robinson 2019.
[152] Based on data from 'Key Figures of the Cases', at https://www.icty.org/en/cases/key-figures-cases.
[153] Based on data from 'The ICTR in Brief', at https://unictr.irmct.org/en/tribunal.
[154] Excluding the cases for offences against the administration of justice. See ICC's 'Defendants' database at https://www.icc-cpi.int/defendants.
[155] Combs 2010:222.
[156] O'Sullivan 2015:156.
[157] Combs 2017:124. See also Spiga 2011:11-12. Robinson 2017:635. Van Schaack 2009:103.

as a powerful rhetorical tool in international law.[158] The optimistic discourse of progress and renewal implies that international law can *improve* and that the historical pitfalls of its creation and enforcement need not be repeated. This discourse perceives the existence of a single telos of perfect legal order, legalism, that can be reached. But from a critical perspective, the liberal narrative of progress is deemed 'dangerous' because it obfuscates the repetition and continuity of the power inequalities that have historically underpinned the development of international law.[159] On this account, every step towards the integration of the 'international legal community' has been supplemented by 'a gesture of exclusion' of certain peoples and classes.[160]

The issue with the 'maturation' thesis is that it depicts ICL's development as a natural progression towards an idealized objective system of criminal law 'that cannot be located anywhere'.[161] Much of the criticism that Marxist and critical legal studies have raised in relation to ICL is not specific to the international context but problematizes the idea of 'criminal law' as such. Just as convicting individuals for mass atrocities obfuscates the complicity of the 'unjust international society' in the commission thereof, so the overt emphasis on individual agency in national penal systems is said to 'divert attention from how domestic crime is also the product of an unjust domestic society'.[162] Even liberal-legalist scholars have warned that domestic penal systems are not immune to 'illiberal' excess in criminalization.[163] By presenting criminal law in idealized and abstract terms, the 'maturation' thesis, thus, obfuscates the role of the social context in shaping legal rules and places the latter outside the realm of critical analysis and contestation. The 'maturation' thesis ultimately fails to recognize that there are different interpretations of what legalism means in practice instead of a single, necessary telos of the development of international law. The rest of this thesis aims to provide a more pluralist, instead of progressivist, understanding of the changes within international law.

[158] For an analysis of the 'progress' discourse in international law see Altwicker and Diggelmann 2014.
[159] Mégret 2012:12.
[160] Berman 1999:1523.
[161] Tallgren 2002:567.
[162] Sander 2015:812.
[163] Ambos 2015a:317. Dubber 2011:925-926. See also Stewart 2012.

2.4. Between the two approaches – an intersubjective perspective on ICL

This thesis seeks to address two gaps in the literature on international criminal justice – one theoretical and one empirical. In relation to theory, both the external critique of ICL and the liberal-legalists accounts have made important insights into the field of international criminal justice. The liberal scholarship suggests that despite the influence of state politics, ICL exhibits a distinctive form of objective legal reasoning. The external critique of the field, however, has problematized the notion of legal norms, by pointing out that law and politics do not simply interact as distinctive logics of reasoning – rather, power relations *permeate* the process of developing and enforcing the law. However, by focusing on the subjectivity of the law and its potential use by the global elite as a tool to manipulate the masses, the critical scholarship risks simplifying the complex modes of operation of legal norms.[164] Both approaches have a very specific and limited idea of what 'politics' entails – the self-interest of states, or classes in the Marxist critique. The difference is that the liberal-legalist accounts see law and politics, understood as powerful interests, as able to be divorced in practice, in progressive future development; while critical scholarship perceives law and politics as impossible to separate.

By contrast, this thesis develops an integrated 'intersubjective' approach that is sensitive to both the distinctiveness of legal reasoning and the role of power in shaping the law. The works of scholars such as Judith Shklar and Otto Kirchheimer, written following the aftermath of the Nuremberg and Tokyo trials, provide important insights in that regard. Those scholars have suggested that the use of legal norms to address social issues does not constitute an antithesis to politics, but rather: 'one form of political action among others'.[165] Trials on mass atrocities are considered political trials, not because they lack legal foundation, but because they demarcate the fields of politically and legally acceptable decisions.[166] Yet, that form of political action is considered distinct because it is guided by the norms that are *specific to* the legal field.[167] Consequently, there is a difference between a legalist political trial guided by the liberal-legalist norm of following the rule of law, and one that is not. The practice of legal rule-following is said to introduce within the political trial 'an element of irreducible risk for those

[164] Rock 1974:144. Bourdieu 1987:815.
[165] Shklar 1964:143. See also Kirchheimer 2015[1961]:6.
[166] Simpson 2007:11.
[167] Abbott and Snidal 2013:35.

involved', because of the judges' relative independence to apply legal norms.[168] The uncertain outcome of legalist trials, as opposed to purely political show trials, and the ability of the defendant to present a persuasive counternarrative to the prosecutor's case is said to bestow on such proceedings normative legitimacy.[169] Hence, it is argued, the legalistic political trial could be persuasively distinguished from 'an action which for propaganda purposes is called a trial but partakes more of the nature of a spectacle with prearranged results'.[170] Those political trials that have been 'unconstrained' by legal norms, such as the Moscow show trials following the Second World War, essentially lose their second word and become a matter of 'just politics'.[171] Hence, from this perspective, law matters in international criminal justice, *because* it demarcates the boundaries of legally permissible decisions and differentiates legalized politics under the form of trials guided by the concept of individual criminal responsibility from other types of political responses to mass atrocities.

More specifically, this thesis aims to analyse the assessment of individual criminal responsibility at the ICC from the perspective of what I would call 'intersubjective legalism'. Intersubjective legalism differs from the 'internal' liberal-legalist view because the former recognizes that legalism is not a purely objective system of rules but merely one among competing 'ideologies'.[172] As such legalism cannot be understood separately from the social context that (re)produces it. Indeed, to take the superiority of an idealized version of the law for granted, as the 'maturation' thesis does, is problematic from an intersubjective perspective because creates the flawed perception that all international problems can be resolved through an international court and that no other action is needed.[173] That being said, the intersubjective perspective also differs from critical studies because it recognizes law's normativity, even if that normativity is understood as legalism being one among competing ideologies, rather than *the most* morally worthy ideology. Critical scholars, such as Martti Koskenniemi, consider the practice of rule-following a professional habit of lawyers, deprived of any normative value.[174] But an intersubjective perspective recognizes the inherent normativity of that practice. Although she objects to the attempts to distinguish law as a distinct entity from politics, Shklar,

[168] Kirchheimer 2015[1961]:339. See also Bass 2000:7.
[169] Osiel 1999:249.
[170] Kirchheimer 2015[1961]:339. See also Bass 2000:16.
[171] Simpson 2007:12.
[172] Shklar 1964:2.
[173] Shklar 1964:134.
[174] Koskenniemi 2006:67-68.

nevertheless, perceives the legal formalism, exemplified in the constant search for rules, as a value-oriented order.[175] Within the legal field, the ability to follow rules impartially is considered a 'virtue' and not empty formalism.[176] The normativity of the law is, hence, not objective but intersubjective – based on social recognition and practice.

Consequently, intersubjective legalism provides a perspective on the ICC that is both internal and external – internal, because it aims to understand the perceptions of the actors within the ICL field regarding the meaning of the law and the constraints it imposes upon judicial reasoning; external, because it recognizes the subjectivity of those understandings and the extent to which they reflect and reproduce the dominance of Western-influenced ideas of law and legal process. The next section of this chapter builds the intersubjective theoretical framework of this research by, firstly, examining rationalist international relations approaches and normative legal approaches to the study of judicial independence and the interpretation of international law within the realm of power politics. The chapter proceeds with building an intersubjective legalist framework that borrows insights from the 'practice' approach to studying international relations and 'field' studies and with presenting the methods for interdisciplinary analysis that will be used to examine ICL practice. Chapter 3 then applies the intersubjective framework specifically to the ICL field, by discussing the main set of norms, or 'shared understandings' that bind the ICL field together, and the *internal* debates about the meaning of the laws regulating individual criminal responsibility within the field.

Secondly, this thesis seeks to address an empirical gap in the interdisciplinarity literature on international criminal justice. Most interdisciplinary ICL studies have focused on the selection of situations for investigation and individual suspects[177] or the judicial decisions that concern the jurisdictional reach of the court, especially with respect to the RS's complementarity provisions.[178] Yet, the analysis of the ICC's judicial pronouncements in relation to individual criminal responsibility laws has been largely confined to internal discussions among legal scholars and practitioners. To address this gap, chapters 4 to 8 examine the practice of assessing the guilt or innocence of the accused at international courts and tribunals with reference to the influence of *both* the politics of state interests that surrounded

[175] Shklar 1964:15-16.
[176] Shklar 1964:113.
[177] Vasiliev 2017:68.
[178] Nouwen 2013. Schabas 2008a.

their establishment and operation and the internal debates about the meaning of the law that were taking place within the ICL legal field at the time. Chapter 4 provides a historical perspective by looking to the IMTs at Nuremberg and Tokyo and the UN tribunals and the arguments that have been forwarded for the purpose of contesting and justifying the legal reasoning of the judges at those tribunals. Chapter 5 examines the process of drafting the RS, focusing on the provisions that codify the modes of attribution of criminal responsibility, and chapter 6 analyses the interpretation of those provisions by the ICC judges. Chapter 7 examines the judicial reasoning behind the application of the relevant provisions in relation to the assessment of the criminal responsibility of the accused in specific cases, by providing an overview of ICC jurisprudence, and chapter 8 presents a detailed analysis of the acquittals of Gbagbo and Blé Goudé and the conviction of Ntaganda. The analysis takes into consideration the legal reasoning of the judges, the political context surrounding the proceedings and the reactions to the judgments by legal scholars, practitioners, and NGOs.

2.5. Theoretical framework – Towards an Analysis of ICL 'Practice'

This section overviews two branches of interdisciplinary studies on international law and proceeds to formulate a new framework for analysing the operation of international law within the realm of international politics. Firstly, this section discusses the 'rationalist' studies of international law. The special volume of *International Organization* on 'Legalization and World Politics' famously defined the legalisation of international affairs in relation to three procedural dimensions, namely, the degrees of 'obligation' and 'precision' of international legal regimes and the level of 'delegated' authority by states to international courts.[179] While some rationalist approaches focus exclusively on state interests,[180] others recognize that international relations are structured by both material power and ideas.[181] What unites the different rationalist studies is their instrumentalist perspective on international law – international adjudication is considered to gain relative delegated autonomy from the realm of politics because it enables states to gain information about the rules of international engagement and to build a reputation of trustworthy actors.[182]

[179] Abbott et al. 2000:401-402.
[180] Posner and Yoo 2004. Goldsmith and Posner 2006.
[181] Helfer and Slaughter 2005. Abbott and Snidal 2000:425.
[182] Guzman 2008. Voigt 2017. Alter 2008.

This 'instrumentalist' perspective has been challenged by 'normative' international legal studies, which place emphasis on the internal logic of legal rules.[183] From a rationalist perspective, the 'precision' of international legal rules, or the law's ability to set clearly and unambiguously what is expected from states, is considered important because it enables international law to function as a 'coordinating device' for states seeking to maximise their payoffs.[184] By contrast, normative legal studies observe that the clarity and coherence of the law serve a more fundamental purpose, namely, to create the special 'compliance pull' of international law.[185] The instrumentalist view recognizes that the 'obligation' to comply with international law is distinct from political coercion because the law invokes a peculiar type of technical procedures, such as principles of the interpretation of legal rules, applicable defences, and accepted remedies for breaches of legal commitments, and relies on a specific legal rhetoric, including terms like 'signature, ratification, and entry into force' of international treaties.[186] But the distinctiveness of legal obligation, as defined by the rationalist literature, does not carry any normative significance. It is simply perceived to enable rational actors to identify the appropriate rules of interaction within the legal context in order to reap the benefits of international cooperation. Conversely, normative legal studies consider the nature of legal obligation to be intrinsically distinct from other types of international commitments because states are said to comply with their 'legal' obligations out of principled belief in the rightness of the legal norms, and not out of fear for being punished.[187]

However, the tendency of normative studies to use examples of states' compliance with international laws in the absence of coercive mechanisms as a testament to the recognition of legal norms as legitimately binding, has led some critical scholars to describe international law as merely an 'apology' for politics.[188] Because like rationalist studies, the normative scholarship generally focuses on the question *why states comply* with international law, those studies have failed to provide a detailed explanation of the internal logic that distinguishes law from other types of norms generating state compliance, such as cultural, professional, or religious norms.

[183] Keohane 1997.
[184] Abbott et al. 2000:412-413.
[185] Franck 1990.
[186] Abbott et al. 2000:409-410.
[187] Franck 1990. Chayes and Chayes 1995.
[188] Koskenniemi 2006.

To address this conundrum, this section borrows insights from studies examining the 'practice' of international law as a specific form of principled reasoning. From that perspective, the meaning of the law resides neither in the legal text, nor in the subjective interpretation of the judge, but within the 'community of practice' of international law that enforces a set of shared understandings about what constitutes sound *legal* reasoning.[189] The proposed theoretical framework further integrates insights from CLS in order to elucidate the power inequalities that shape the interactions within the community of legal practice, manifested in the competition over who gets the authority to interpret the law.[190] The centrality of expert knowledge as a source of power within the juridical field suggests a reordering of the traditional perception of international politics – within the community of international legal practice states lose their central position and actors such as judges, legal scholars and NGOs gain leverage. Furthermore, this framework enables the investigation of the 'politics' peculiar to the legal field – in the form of competition over the authority to determine the meaning of the law, which can involve many different kinds of actors and different forms of action.

2.5.1. Rationalist scholarship – the 'constrained independence' of international law

The seminal pieces that have marked the 'rebirth' of interdisciplinary scholarship on international law have all adopted a rationalist perspective.[191] These include the works of Kenneth Abbott,[192] Anne-Marie Slaughter Burley,[193] and the special *International Organization* volume on 'Legalization and World Politics'. Rationalist studies have recognized the distinctiveness of the logic of the law from the logic of politics and have even suggested that legal rules can influence international relations.[194] But international adjudication has, nevertheless, been perceived as deeply embedded into state politics.[195] The relationship between law and state politics is presented as reciprocal, mediated by international *institutions*.[196] By shaping a court's mandate and choosing whether or not to comply with

[189] Brunnée and Toope 2011. Kratochwil 1989. Johnstone 2011.
[190] Bourdieu 1987.
[191] Dunoff and Pollack 2013:8-9.
[192] Abbott 1989.
[193] Slaughter Burley 1993.
[194] Slaughter Burley 1993:221.
[195] Goldstein et al. 2000:387. Abbott et al. 2000:404.
[196] Keohane 1997:499-501.

judicial decisions, states are said to exert influence on international law.[197] But in turn, judicial institutions can induce states into compliance with international law by providing certain benefits such as information and good reputation to compliant states.[198] As discussed below, while rationalist accounts differ in opinion regarding which force is stronger – the ability of states to pressure international courts or the latter's ability to secure their autonomy from political interests – most rationalist studies support some version of the argument that international courts operate under a mode of 'constrained independence'.[199]

A sub-set of rationalist scholars, pertaining to the realist tradition of international relations, have dismissed the existence of international law independently from the realm of power politics. International law is seen as epiphenomenal, a reflection of the interests of great powers without any independent force on its own.[200] Building upon the realist premise of the dominance of state power within international relations, the 'economic' approaches to international law argue that international legal norms could, nevertheless, serve a limited function, to the extent that they help states to obtain the benefits of international cooperation.[201] According to Posner and Yoo, international courts can provide relatively neutral information about the facts and the law when disputes between otherwise cooperating states arise.[202] Notably, on this account, nothing prevents states to ignore the rulings of international courts, if states do not believe that submitting the matter to those courts would be in their interest.[203] Consequently, only those international courts that are completely dependent on state control are considered able to survive in the international arena. If international judges interpret the law in a manner that does not conform with states' interests and forward decisions based on 'moral' ideals, those rulings would likely be ignored.[204]

By contrast, those rationalist approaches that have been animated by liberal institutionalism consider that international law serves a more fundamental role in international relations. From this perspective, international courts not only provide information to the

[197] Helfer and Slaughter 2005:949-953.
[198] Keohane 1997:500. Guzman 2008.
[199] Pollack 2013:373. The term 'constrained independence' was coined by Helfer and Slaughter 2005.
[200] Mearsheimer 1994. Morgenthau 1948.
[201] Posner and Sykes 2013. Posner and Yoo 2004.
[202] Posner and Yoo 2004:12.
[203] Ibid.:10.
[204] Ibid.:5.

disputing parties, but also serve as trustees that secure states' credible commitments.[205] According to Guzman, if a state wants to reap the gains of future co-operation with other states, then compliance with international law is in their interests because it enables that state to build a good reputation of a reliable partner.[206] Notably, preserving the law's autonomy from state interests is deemed necessary if international courts are to fulfil their function as trustees.[207] Judicial independence is said to contribute to the image of international courts as trustworthy institutions that oversee states' compliance with international law.[208]

However, even if international judges are able to obtain some independence from state interference in their decision-making, this factor in itself appears insufficient to protect the integrity of legal decisions. As Voeten puts it: an independent judge is 'not by a definition a good judge'.[209] Judicial *independence* should be distinguished from judicial *impartiality*. The former concerns the set of institutional and other factors ensuring that judges make decisions free from external influence. The latter constitutes: 'the lack of interest or bias' in relation to the parties of the case.[210] Consequently, more than judicial independence is required to distinguish international law from politics, understood as powerful interests – the practice of legal reasoning needs to be autonomous not only from state power, but also from the idiosyncratic personal ideologies of individual judges.

By view of such considerations, the international relations scholarship has increasingly moved away from the two extreme views of international courts – either as completely dependent on political interests or as fully independent trustees. Instead, recognition have gained the theories of 'constrained independence', according to which the integrity of international law requires balancing of the competing claims made by a variety of international actors over the correct interpretation of the law.[211] The work of Karen Alter and other scholars has suggested that an important role in safeguarding the legality of judicial decisions from political and idiosyncratic decisions play the 'substate and societal interlocutors' of

[205] Alter 2008. Majone 2001:105-107. See also Helfer and Slaughter 2005:904.
[206] Guzman 2008:33. See also Helfer and Slaughter 2005:904. Voigt 2017:512.
[207] Grant and Keohane 2008:32.
[208] Voigt 2017:512.
[209] Voeten 2013a:424.
[210] Pérez 2017:467.
[211] Helfer and Slaughter 2005. Steinberg 2004:249. Ginsburg 2013. Mahoney 2008:320. Pérez 2017:471-472.

international courts, such as domestic judiciaries, advocacy networks and the general public.[212] Those 'interlocutors' can empower international courts to render legally independent decisions by creating social pressure on states to comply with the decisions of international courts.[213] Consequently, international courts are considered to lose their power not when their judgments oppose existing governmental policies, but when they fail to obtain the support of legal experts and civil society – the actors that can pressure governments into compliance.[214] In addition to shielding judicial decisions from state interests, non-state actors, and in particular the epistemic community of international lawyers, are also considered to uphold the integrity of international adjudication from the personal biases of individual judges.[215] The 'peer pressure and professional norms emanating from an increasingly global community' of legal institutions is said to induce international courts to follow the rule of law in their decisions.[216] In other words, non-state actors are said to protect the integrity of the law from the political preferences of both states and individual judges.

Nevertheless, the 'constrained independence' literature recognizes that states retain a key role in international law. States can constrain courts, not only by renegotiating the court's mandate or withdrawing from its jurisdiction, but also by questioning the court's reasoning, delegitimising its authority, and even 'starving' the court by reducing its diet of cases.[217] Hence, from this perspective, two types of 'constraints' simultaneously influence the interpretation and application of international law – those imposed by self-interested states and those imposed by non-state actors that support the rule of law. As Helfer and Slaughter suggest, the 'strategic space' within which international courts operate ensures that international judges produce decisions that are both 'politically tolerable' *and* 'legally plausible'.[218]

The rationalist scholarship provides important insights into the interaction between politics and law in international relations, but there are important limitations to it. By focusing on the instrumental significance of international law, those studies fail to account for the

[212] Alter and Helfer 2010:565.
[213] Alter 2014:20.
[214] Ibid.:24.
[215] Helfer and Slaughter 2005:953.
[216] Helfer and Slaughter 2005:905. See also Voeten 2013a:427. Pérez 2017:469.
[217] Helfer and Slaughter 2005:949-952. See also Steinberg 2004:263-267.
[218] Helfer and Slaughter 2005:942-943.

internal logic of international law and what distinguishes legal norms from other international norms. Goldsmith and Posner hold that state's occasional compliance with international law stems not from any 'sense of legal obligation' but merely 'results from states pursuing their interests'.[219] Similarly, Guzman notes that states do not inherently seek to obtain reputation as law abiding, but do so only when the perceived future gains from international co-operation outweigh the costs of complying with international law.[220] This economic approach precludes further inquiries into the qualities of international legal norms because the latter are perceived merely as coordination devices enabling states to fulfil their interests in a world of imperfect information.[221] But even those institutionalist studies that, inspired by liberal international relations theories, challenge the state-centric analyses of international law, perceive the latter in instrumentalist terms. The crucial difference is that, on this account, international law '*empowers*' a broader set of actors by giving them 'symbolic, legal, and political resources' to voice their claims.[222]

Helfer and Slaughter's account provides some insights as to how the legal integrity of international adjudication could be preserved, but the authors do not examine in detail the process through which the 'peer pressure' of the epistemic community of international lawyers ensures such outcomes. Indeed, the authors acknowledge that '[m]any' of the possible interpretations of the law would be legally convincing, and consequently, acceptable to the epistemic community of international lawyers.[223] It is suggested that '[l]aw matters' but also that '*within the constraints of law*, flexibility exists' with regard to the remedies that the court orders.[224] Consequently, the observation that the expectations of the epistemic community of international law would ensure that judgments are rendered in a legally convincing manner and wound not just be reduced to state politics, provides little insights into the nature of the legal arguments that would be produced. The flexibility of the law suggest that international judges could render decisions as varied as deferring to state sovereignty or, conversely, entering novel interpretations of the law that impose stricter restrictions on states, and both types of remedies can be considered legally convincing.[225] But if law is so flexible, it becomes susceptible to the

[219] Goldsmith and Posner 2006:39.
[220] Guzman 2008:35.
[221] Keohane 1997:488-489.
[222] Alter 2014:19, emphasis added.
[223] Helfer and Slaughter 2005:942.
[224] Alter 2014:60, emphasis added.
[225] Wessel 2006:420-421. Stainberg 2004:258.

critique that there is in fact nothing to distinguish international law from international politics apart from the professionalisation of the juridical field – the fact that only lawyers have the authority to determine whether a solution is congruent with the law.[226] Hence, without an examination of the process of legal reasoning, the rationalist literature risks rendering law nothing more than politics forwarded through seemingly apolitical mechanisms.

The failure of rationalist studies to examine the internal logic of international law has been attributed to the unequal 'terms of trade' between the international relations and international law disciplines. Generally, international relations theory has provided much of the theoretical and methodological content of the studies on international courts, while the role of international law studies has been limited to providing deep knowledge about legal doctrine, process and institutional design.[227] Rationalist studies perceive law as 'a set of rules used to alter behaviour by modifying the costs and benefits associated with different actions'.[228] By reducing international law to a sanctioning mechanism, the rationalist studies have failed to differentiate international legal norms from other forms of political and social control, thus, denying law's normative distinctiveness. If international law is to be differentiated from politics, one has to approach legal reasoning as a process of 'rule-guided' decisions and not as 'merely instrumentally rational actions'.[229] Therefore, the following section turns to the normative legal scholarship on international law.

2.5.2. Normative legal scholarship: the 'compliance pull' of international law

Unlike the rationalist perspective, normative studies suggest that there is more to law than its coercive power or the ability to appeal to the self-interest of international actors.[230] Those studies observe that in international law, sanctioning authority is 'rarely granted by treaty, rarely used when granted, and likely to be ineffective when used'.[231] Nevertheless, international law is not considered epiphenomenal because it is said to possess specific qualities that generate 'perceived obligation' to comply with international rules, despite the

[226] Koskenniemi 2006:56.
[227] Dunoff and Pollack 2013:4.
[228] Ibid.:18.
[229] Kratochwil 1989:18.
[230] Franck 1990:20-21.
[231] Chayes and Chayes 1995:32-33.

lack of traditional enforcement mechanisms.[232] In other words, the distinctiveness of international law is considered to hide in its ability to generate a perceived duty to comply that goes 'beyond the fear of penalties' for violations.[233] Because legal norms are perceived as 'prescriptions' for appropriate conduct, rather than as an enforcement mechanism with causal power, examples of states' non-compliance with a legal rule are not considered to invalidate the existence of that legal norm.[234] Rather the factors that (in)validate a legal norm are perceived to be rooted in the internal characteristics of that norm.

Lon Fuller's influential theory of the 'internal morality' of law identifies eight criteria of legality: legal norms should be general and accessible to the public, clear, non-contradictory, non-retroactive, realistic and relatively constant.[235] When these criteria are met law is said to attract its own adherence – the 'fidelity' to law – by making law legitimate in the eyes of the people. Consequently, on Fuller's account, legal norms, or the norms that meet his eight criteria, constitute an internal commitment instead of externally imposed duties threatening sanctions for non-compliance.[236] That peculiar form of internal commitment could only be generated by legal norms, which distinguishes the law from other forms of political and social control.[237]

Similarly, with respect to international law, Thomas Franck has identified four distinctive traits that legitimise international legal norms. The first one is 'determinacy' of the content of the norm in terms of either its textual clarity ('substantive determinacy') or a 'legitimate clarifying process' (procedural determinacy).[238] Next, an international legal rule is said to enact symbolic validation – the communication of law's authority through 'cues', such as specific rituals, or with reference to the rule's pedigree.[239] International legal rules are also considered coherent or generally applicable, as opposed to '[i]diosyncratic' and 'aberrational'.[240] Finally, Franck has argued that international legal rules require 'adherence', understood as the vertical nexus between a 'primary rule of obligation' and a hierarchy of secondary rules that regulate

[232] Franck 1990:40-41.
[233] Chayes and Chayes 1995:116.
[234] Ibid.:113-114.
[235] Fuller 2004[1963]:39. Murphy 2005:240-241.
[236] Brunnée and Toope 2010:26-27.
[237] Ibid:34.
[238] Franck 1990:66-67, emphasis omitted.
[239] Ibid.:92.
[240] Ibid.:152.

the application of the primary rule.[241] These internal qualities are considered to generate international law's 'compliance pull' upon states without resorting to sanctioning mechanisms of self-interested gratification.[242] For Franck though, the determinacy, symbolic validation, coherence and adherence of international law cannot be determined in the abstract. Rather, the international 'community', understood generally as a 'community of nations',[243] is said to validate these qualities of the law and, consequently, the overall legitimacy of international legal norms.[244]

Franck significantly contributes to the discussion of the distinctive qualities of international legal norms, but his account nevertheless maintains a 'positivists' focus on state recognition as requisite to maintaining the legitimacy of international law.[245] In effect, Franck's argument resembles circular reasoning. On the one hand, the *legitimacy* of legal rules, rather than any sanctioning mechanism, is said to trigger state compliance. But on the other hand, state recognition is requisite for establishing that legitimacy.[246] This dilemma of identifying the inherent normativity of international law has been famously problematized by Koskenniemi. On his account, if international law is justified merely as a reflection of state practice, the law risks being transformed into a mere 'apology' for politics. Yet, if international law is understood as a set of abstract normative standards, akin to natural law, that command states what to do, it turns into a speculative 'utopia'.[247] Therefore, Koskenniemi concludes that nothing can simultaneously distinguish international law from politics and from idiosyncratic visions of morality.[248] It appears that there is nothing inherently distinctive about the characteristics that, according to Frack, generate compliance with international law – the qualities of determinacy, symbolic validation, coherence, and adherence could also be observed in relation to other social norms in international relations.[249] Yet, this does not automatically lead to Koskenniemi's conclusion. As the next section discusses, international law could be distinguished from other social control mechanism by examining it not as a combination of

[241] Ibid.:184, emphasis omitted.
[242] Ibid.:26, 193.
[243] Ibid.:181.
[244] Ibid.:51-52. See also Franck 1998:10.
[245] Brunnée and Toope 2013:131.
[246] Keohane 1997:493.
[247] Koskenniemi 2006:17-18.
[248] Ibid.:23.
[249] Finnemore 2000:703.

static characteristics, but as an intersubjective 'practice' – a specific mode of reasoning assessed by an epistemic community.

2.5.3. The 'practice' of international law: integrating normative and critical legal studies

The goal of this section is to combine insights from normative legal studies that seek to highlight the distinctiveness of legal reasoning from international politics, and critical legal studies that elucidate the role of power relations in that process. Consequently, this section integrates propositions by the studies of international law as a specific form of 'practice' in international relations,[250] and field studies, borrowing on Bourdieu's work on the 'juridical field'.[251] While the former approach enables an 'internal' perspective on the field of legal practice, the latter – an 'external' view on the power relations that shape that field.

A group of interdisciplinary studies have examined law as a dynamic phenomenon that is generated and maintained 'through continuing struggles of social practice'.[252] Practices comprise 'socially meaningful patterns of action'[253] that are (re)produced by epistemic communities, or communities of practice, centred around a specific knowledge domain that 'endows practitioners with a sense of joint enterprise'.[254] Kratochwil argues that the practice of law constitutes the application of legal rules to a given controversy and the process of appraising the reasons given for that decision before a particular community. Consequently, law is understood as a form of *principled reasoning*, distinct from politics or morality.[255] The distinctiveness of legal reasoning, premised on its principled nature, is safeguarded by the communities of practice, which are said to ensure 'competent performances' of the practice of law and to protect the latter from idiosyncratic interpretations of the legal text.[256] The competent practice of law is assessed against the background of 'shared understandings' held by the participants of the community of legal practice regarding the meaning and application

[250] Adler and Pouliot 2011.
[251] Bourdieu 1987.
[252] Brunnée and Toope 2010:22. See also Brunnée and Toope 2013:135-136. Kratochwil 1989. Johnstone 2011.
[253] Adler and Pouliot 2011:6.
[254] Ibid.:17.
[255] Kratochwil 1989:18. See also Higgins 1995:2-3. Von Bogdandy and Habermas 2013.
[256] Brunnée and Toope 2011:108. Kratochwil 2001:51-52. Habermas 1996:224.

of the law.[257] Whenever an individual member of that community breaches a norm that triggers criticism by the rest of the members.[258]

In effect, legal norms are understood neither as objective rules codified in a legal text, nor as the subjective reflection of state interests or judicial biases. Instead, from a practice perspective, legal norms constitute *intersubjective* standards, the meaning of which resides within the argumentative process taking place in the community of practice.[259] The practice perspective, hence, provides a bridge between the role of agency and structure in the study of international law.

To argue that legal practice is intersubjective is not to suggest that the subjectivity of judicial interpretations is constrained by the objectivity of shared understandings about the meaning of the law. Rather, the very notion of shared understandings is intersubjective because those understandings constitute 'standards of competence that are socially recognized'.[260] This bears important implications for the study of law because it reveals the dynamic nature of shared understandings as vehicles for both continuity and change. The content of the shared understandings is constantly being 'renegotiated' by the members of the epistemic community.[261] While the results of their efforts remain bound by the broader normative environment of pre-existing shared understandings, individuals or groups with common vision could work to promote specific interpretations of the law.[262] Consequently, the structural constraints on international legal reasoning are simultaneously objective, in the sense that they shape legal reasoning in a particular point in space in time, and subjective, since they are themselves the product of the dominant social consensus at that place and time. The 'duality' of structure, i.e. its quality to constantly (re)produce itself through everyday practices, simultaneously constraining and enabling agents' actions, has for long been examined in the humanities and social sciences.[263] Stanley Fish's analysis of literary interpretation is particularly elucidating here: while the shared understandings of what constitutes sound reasoning within an epistemic community might change over time, at no point does that

[257] Brunnée and Toope 2010:24.
[258] Lechner and Frost 2018:14.
[259] Johnstone 2011:35.
[260] See Adler and Pouliot 2011:15.
[261] Adler and Pouliot 2011:17.
[262] Brunnée and Toope 2011:111. Bourdieu 1987:839.
[263] See e.g. Anthony Gidden's 'structuration theory'. Giddens 1984:25-27.

community remain without *any* canons of acceptability. Furthermore, any changes in social perceptions are not random, but 'orderly and, to some extent, predictable', because those changes constitute revisions of the pre-existing shared understandings, rather than completely novel phenomena.[264]

The philosophical underpinnings of the 'practice'-oriented legal scholarship are reminiscent of Habermas's theory of law as an '*argumentative process*'.[265] According to Habermas, the individual validity claims in relation to the meaning of the law are subjected to an 'ongoing critique' by the participants in the legal discourse. Hence, 'the cooperative search for truth' is considered to render legally convincing decisions.[266] Consequently, the 'law as practice' model becomes susceptible to the same criticism as Habermas's theory. The argumentative reasoning theory implies the existence of a consensual society of equally situated interlocutors, but in reality, some actors within the community of legal practice might possess stronger influence over the discourse than others.[267] Social practice can easily reproduce various forms of discrimination.[268] The existence of society-wide prejudices and inequalities suggests that social injustice is often rooted not in the poor quality of the law but within society itself.[269] For instance, feminist studies have deeply problematised the argumentative rationality model by pointing out the unequal 'dialogical capacities' of men and women in relation to the formation of 'public opinion'.[270] Similarly, some actors have been 'disproportionately influential' in shaping international legal regimes.[271] Therefore, to claim that certain understandings about the meaning of the law are socially shared, it not to suggest that those understandings are also 'just or fair'.[272]

But to admit that the argumentative rationality that defines the practice of law does not produce *completely* objective legal norms and does not immunize it from social injustices, is not to reject the idea of a distinctive legal reasoning in international law. If legal rules reflect the power inequalities between states or social classes, as argued by CLS and Marxist legal

[264] Fish 1980:349.
[265] Habermas 1996:227, emphasis in the original.
[266] Ibid.:226-227.
[267] Zehfuss 2002:148.
[268] Brunnée and Toope 2011:112.
[269] Sinclair 2010:174.
[270] Fraser 1985:116. See also Cohen 2013.
[271] Brunnée and Toope 2011:119.
[272] Sinclair 2010:32. See also Zehfuss 2002:150.

scholars such as Miéville,[273] one may well argue that those rules are 'unjust', but that does not make international law less 'legal'. This is because the form of politics that enters the international legal field is 'constrained and shaped' by the mode of reasoning governing that field.[274] As observed by Johnstone, because the evolution of shared understandings takes time, even the most powerful actors cannot directly replace the law with a new one in accordance with their preferences.[275] A different type of politics is at play in the international legal field – the 'competition for monopoly of the right to determine the law'.[276] Consequently, *expert* knowledge, or 'knowledge of the rules' of practice,[277] becomes a crucial source of power within the legal field because it vests with authority those members of the epistemic community that are able to claim it.[278] Even though the 'law as practice' model requires that all interpretations of the law demonstrate certain congruence with the pre-existing normative environment, the more authoritative is the opinion of an actor within the epistemic community, the more powerful influence that actor could project during the continuous process of renegotiating the rules and boundaries of what could be legitimately argued.

International courts, as the bureaucratic embodiment of legal expertise, are likely to be particularly influential members of the legal community of practice. Barnett and Finnemore's work reveals that the bureaucratic nature of international organizations bestows upon them the image of depoliticized, impartial and technocratic actors, that boosts their 'rational-legal' and 'expert' authority as providers of specialized knowledge.[279] In effect, international organisations derive the power to construct social reality, by 'naming' what constitutes a problem in global politics and establishing the boundaries of acceptable action in addressing those issues.[280] The expert authority of international courts is further enhanced by the increasing specialization of the legal field into separate regimes of knowledge, such as 'trade law', 'international criminal law', or 'human rights law'.[281]

[273] Chapter 2: section 2.2.2.1.
[274] Abbott and Snidal 2013:35.
[275] Johnstone 2011:52.
[276] Bourdieu 1987:817
[277] Fish 1980:343.
[278] Bourdieu 1987:816
[279] Barnett and Finnemore 2004:20-24.
[280] Ibid.:30-33.
[281] Koskenniemi 2009:9.

Even though courts are generally considered to assist in the interpretation of the law, rather than create new law, scholarly analysis has challenged this view.[282] While judicial decisions are binding only to the parties to a given case, their reasoning is often later evoked in other cases. Judicial practice can lead to the adoption of 'soft law' norms – nonbinding rules that are habitually obeyed and that eventually 'harden' into formal law, in a process referred to as 'law-making through the back door'.[283] Another avenue for judges to develop the law is by enacting secondary legal norms that regulate the relationship between the primary legal norms when the latter rise together as competing approaches to a particular factual situation.[284] Moreover, because of the expert knowledge required for developing international law, states may implicitly encourage judicial activism. Data from the European Court of Human Rights revealed that governments may intentionally select more activist judges.[285] While lawmaking could not be explicitly delegated to international judges, in practice it may constitute a form of 'implied delegation' by states.[286]

Nevertheless, the interpretations of international judges need to resonate with the shared understandings about the meaning of the law held by the broader legal epistemic community. The community of legal practice extends beyond the 'narrow' circle of court bureaucrats and includes legal scholars and practitioners, international civil society, government officials and even members of the general public of international trials.[287] As a form of international organisation, international courts rely on their external environment not only for material resources – technologies, facilities, staff – but also for symbolic resources, namely, obtaining social legitimacy for their decisions.[288] The authority of an international court needs to be both 'asserted' by the court and 'recognized' by its various audiences.[289] Yet, not all of those audiences possess the same power to influence the development of shared understandings about the meaning of the law.

Because of the importance of expertise, legal practitioners and academics enjoy significant authority within the epistemic community, essentially instituting a 'professional

[282] See Boyle and Chinkin 2007: Chapter 6.
[283] Johnstone 2013:274-276.
[284] Lowe 2001.
[285] Voeten 2007:669-701.
[286] Johnstone 2013:268.
[287] Johnstone 2011:41-42.
[288] Barnett and Coleman 2005:597-598.
[289] See Alter, Helfer and Madsen 2018a:13.

monopoly' over the provision of juridical interpretations.[290] Law journals have been argued to 'structure and demarcate' the ICL field by offering venues for presenting and contesting new understandings of legal norms.[291] Schachter famously called this the 'invisible college' of international lawyers – a transnational community of legal experts who sustain cooperation through academic publishing and attending conferences.[292] The more technical the question under judicial review, the more authoritative legal experts are likely to be. The perceived professional nature of an enquiry could shield legal experts and practitioners from state interference in their deliberations on the law.[293]

The reputation of trustworthy information providers has similarly elevated the authority of NGOs within the international law field. While NGOs are not delegated any law-making power, they have often become involved the development of international law in an attenuated manner.[294] NGOs have participated during treaty negotiations and consulted state delegations.[295] Furthermore, NGO members have increasingly staffed international courts.[296] Nevertheless, as with legal experts, the power of NGOs to influence legal norms is not unlimited. Consistent with the 'law as practice' framework, those organizations can frame problems and norms in novel ways but not introduce ones that are utterly disconnected from the pre-existing normative environment.[297]

Precisely the emphasis on expert power, however, has rendered the actors on which international relations theory has traditionally focused – states – in a relatively disadvantaged position in the legal filed. The 'law as practice' model does not deny the ability of states to exert significant pressure on international courts by constraining their budges or attempting to influence judicial appointments, that has been largely examined by the rationalist literature. However, this particular type of state-centric power politics takes place *outside* the legal field. By contrast, the political battles taking place *within* the legal field,[298] require states to present arguments with reference to the pre-existing shared understandings accepted by the

[290] Bourdieu 1987:834-835. See also Kirchheimer 2015[1961]:13.
[291] Vasiliev 2015:703.
[292] Schachter 1977-1978:217.
[293] Alter, Helfer and Madsen 2018b:44.
[294] Johnstone 2013:269.
[295] Boyle and Chinkin 2007:64-65. Pearson 2006:273.
[296] Boyle and Chinkin 2007:92.
[297] Spiro 2013:233.
[298] Abbott and Snidal 2013:36.

international law community of practice. Consequently, when acting within the legal field, states could exert power by questioning the court's legal reasoning or by trying to delegitimise its expert authority.[299] For example, states can allege that a court exhibits an in-built bias against certain states that affects the judges' legal reasoning.[300] Furthermore, states could exert indirect power, for example, by co-opting NGOs or legal experts to advocate for particular understandings of the law,[301] or as will be discussed in the ICC context, by offering or refusing to cooperate with the prosecutor to collect evidence. But on this account, state interests do not directly influence legal outcomes because once states enter the legalized political arena, they could no longer claim to be the sole, or indeed, the most authoritative actors.[302]

The plurality of actors within the international legal field suggests a plurality of ideas in relation to the meaning of the law premised on different visions of justice. A community of practice need not hold 'deep' shared understandings of the right ordering of society. It could coalesce around 'thin' moral commitments, such as 'a basic acceptance of the need for law to shape certain social interactions'.[303] Hence, the minimum set of shared understandings that binds the community of practice by providing a background for assessing 'competent performances' does not necessarily create 'uniformity' of thought on more substantive questions.[304] An overall consensus exists within the legal communities of practice, regardless of their issue area, that some form of a 'general rule' is to be 'applied to an individual instance'. But while 'the duty of following rules' is not a source of disagreement, 'the *content* of the rules' is.[305] At the most general level, opinions could diverge whether to prioritize 'procedural' justice in the form of fair process or 'substantive' justice in the form of fair outcome.[306] In international law the differences of opinion are likely to be particularly exacerbated by the variety of domestic legal backgrounds of the participants in the community of practice. Consequently, the 'law as practice' approach provides a particularly useful tool for understanding the interplay between different visions of justice in international law.

[299] Helfer and Slaughter 2005:949-952. Alter 2006:315-316.
[300] Pauwelyn and Elsig 2013:467.
[301] Spiro 2013:229. Zolo 2009:xii.
[302] Alter 2006:337.
[303] Brunnée and Toope 2011:113. Brunnée and Toope 2010:32-33.
[304] Adler and Pouliot 2011:16.
[305] Shklar 1964:114, emphasis added.
[306] Franck 1998:7. See also Kirchheimer 2015[1961]:11.

The divergence in the sets of shared understandings on substantial issues among subgroups of the legal epistemic community bears implications for the authority that international courts could claim in determining the law. On the one hand, international courts could hardly ever accomplish legitimacy in relation to all actors of their environment.[307] If an international court's legal determinations resonate particularly strongly with the understandings of one subgroup, they will probably be contested by other subgroups. On the other hand, the existence of multiple audiences with different expectations makes it hard to determine certain behaviour exhibited by international organisations as 'bad' because it will likely concur with at least *some* ideas.[308] Consequently, the divergent understandings within the community of legal practice provide international courts with 'multiple pathways' to gain authority.[309] This is not to suggest that any interpretation of the law would go. The court's decisions still have to correspond with the overall set of minimal shared understandings around which the community of practice has coalesced. Rather, the interpretations forwarded by international courts would be subject to constant contestation and justification within the broader community of legal practice.

Similar 'battles' over the interpretation of the law, could also take place within international courts. International civil servants, such as judges, could internalize the norms of the respective organization in which they work.[310] In effect, a set of internal shared understandings, or a 'bureaucratic culture', can formulate within courts.[311] The existence of a strong internal culture of collegiality among judges could enhance the perception of the court's legal decisions as authoritative and sound.[312] But the establishment of internal consensus at a court is not preordained. When judges are selected at international courts, they already have a wealth of experience as practitioners, academics, or diplomats.[313] Previous research has found that judges consider their professional backgrounds almost more important than national backgrounds in their job.[314] The influence of the personal professional experience on the decisions of some international officials may prove stronger than the court's internal shared

[307] Black 2008:153.
[308] Barnett and Finnemore 2004:35-36.
[309] Alter, Helfer and Madsen 2018b:49.
[310] Trondal et al. 2010:12-13.
[311] Barnett and Finnemore 1999:718.
[312] Mistry 2017:706.
[313] Mackenzie and Sands 2003:280.
[314] Voeten 2013b:566.

understandings.[315] Internal court disagreements about the meaning of the law can be manifested by issuing 'dissenting' or 'separate' opinions to a particular judgment.[316] While the decision of an international court to form accountability relationships with a specific subgroup of the community of practice could influence that court's approach to the interpretation and application of the law, the within-court battles over the interpretation of the law would determine whether that court could formulate a uniform line of legal reasoning in the first place.

2.5.4. Concluding remarks on the theoretical framework

The 'practice' approach to international law revealed the intersubjective nature of international legal norms. On the one hand, those norms constrain and enable the behaviour of actors within the community of legal practice. On the other hand, legal norms are continuously (re)produced by the everyday practices of those same actors. However, beyond the set of minimal shared understandings that mark the outer boundaries of the community of legal practice, namely the importance of rule-guided decision-making, significant divergence exists within that community with respect to more substantial issues of legal practice. Hence, the international legal field is constantly witnessing battles of contestation over the interpretation and application of the law.

The theoretical framework presented in this section sought to combine the 'internal' understanding of the background rules shaping the field of international law with the 'external' sensitivity to the power forces that influence those understandings. Even though the background understandings that bind the community of legal practice are shared, this does not imply that the law presents a better solution to problems in international relations compared to policy approaches, nor that the practice of law is impermeable to politics. It simply suggests that there is *more* to the judicial interpretations of the law than the influence of state interests and the personal ideologies of the judges. More specifically, the practice of international law is guided by a distinct ideology shared by legal practitioners – the continuous search for rules to follow.[317] Consequently, the politics of the legal field, premised on the competition for claiming expert authority, are inherently different from the politics of international relations. Notably, in this respect the model presented here departs from those of Kratochwil and Brunnée

[315] Trondal et al. 2010:14.
[316] Mistry 2017:712.
[317] Shklar 1964:15.

and Toope. Both of their models search for particular characteristics of legal reasoning which not merely differentiate law from politics but also render normatively legitimate outcomes. By contrast, this thesis recognizes that competent legal reasoning can deliver decisions that are considered 'good' *within* the community of practice, but that can be viewed as deeply problematic *outside* the legal field.

This chapter examined the practice of international law in general. But as observed, the world of international law practice is 'sliced up in institutional projects that cater for special audiences' with 'special ethos'.[318] The rest of this thesis turns to the politics of the sub-field of ICL practice, and more specifically, to the competition over the determination of the meaning on the laws on individual criminal responsibility. Before that, this chapter concludes with the methods of analysis.

2.6. Methodology and key concepts

This thesis refers to the concepts of 'individual criminal responsibility' and 'the laws on individual criminal responsibility', which are related but distinct concepts. The former, namely the individual criminal responsibility norm, is understood in this thesis not as a legal norm per se, but as the expectation held by a variety of international actors that the perpetrators of mass atrocities need to be *personally* held accountable and that their conduct triggers *criminal* responsibility, as opposed to different forms of responsibility, such as civil liability. The norm of individual criminal responsibility is given effect in practice through specific legal norms, which are here referred to as the 'laws on individual criminal responsibility'. Those laws constitute a broad variety of legal norms, which relate to different aspects of criminal responsibility, e.g. whether heads of states enjoy immunity from prosecution, the minimum age of criminal responsibility, or the difference between justifications and excuses in ICL. This thesis specifically examines the laws developed in ICL for the purpose of attributing criminal responsibility to the accused, also known as 'modes of liability'.[319] Consequently, the analysis will focus on the ICC judges' findings in relation to the most relevant RS provisions in that regard, namely, Article 25(3)(a)-(d), which defines the modes of participation in the

[318] Koskenniemi 2009:9.
[319] Scheffer 2010:76. Jackson 2015:87-88.

commission of a crime, Article 28 on the command responsibility principle, and Article 30 that sets the mental element requirements of liability. Future research can focus on other intriguing aspects of criminal responsibility, such as the liability for inchoate crimes, including the attempt to commit a crime under Article 25(3)(f) and incitement to commit genocide under Article 25(3)(e),[320] and the grounds for excluding criminal responsibility under Article 31 RS.[321] Therefore, while the 'laws on individual criminal responsibility' comprise a broad variety, in this thesis the term will be used specifically in relation to the laws defining the modes of criminal responsibility.

2.6.1. Primary methods of analysis

Primary methods offer means to collect the evidence needed for the overall analysis.[322] Practices, including the practice of law, are often embedded in discourses that enable the signification of particular meanings.[323] Consequently, the primary method that this thesis employs is discourse analysis, or the study of the meanings that actors assign to concepts when they use language in specific contexts.[324] This thesis analyses a wide variety of forms of written discourse in order to examine the understandings of different actors about the meaning of the legal norms on criminal responsibility.

In relation to international judges, this thesis examines over 200 legal documents, including the decisions on issuing arrest warrants or summons to appear, decisions on the confirmation of charges against the accused, trial judgments, appeal judgments, dissenting opinions of judges, and other relevant decisions that were issued by the pre-trial, trial and appeals chambers with respect to every ICC case from July 2002 to July 2020. Even though judicial decisions are presumed to embody calm logic, in reality the judges often use expressive language that conveys their attitudes towards the question at hand.[325] The analysis focuses on two types of written legal discourse, namely, the judges' findings on the meaning of the law on criminal responsibility in all ICC cases, and the judges' factual findings on the alleged criminal responsibility of the defendant in every ICC case in which the confirmation of charges

[320] Heller 2010:609. Werle 2007:956.
[321] Eser 2002a.
[322] Lange 2013:42.
[323] Kratochwil 2011:56.
[324] Gee and Handford 2012:1.
[325] Finegan 2010:68.

proceedings was completed (Table 1). The analysis of the factual findings is limited to cases concerning core international crimes, as defined by Article 5 RS. Nevertheless, material from the cases for offences against the administration of justice under Article 70 is analysed with respect to the judges' findings on the general meaning of criminal responsibility norms.

Table 1: List of ICC cases involving international crimes according to Articles 5 RS with completed confirmation of charges proceedings

Situation under investigation	**Case**	**Defendant**	**Confirmation of charges decision**	**Current status**
Kenya	*Kenyatta,Mutaura&Ali*	Uhuru Muigai Kenyatta	Charges confirmed*	Charges withdrawn by the prosecutor
Kenya	*Kenyatta,Mutaura&Ali*	Francis Kirimi Muthaura	Charges confirmed*	Charges withdrawn by the prosecutor
Kenya	*Kenyatta,Mutaura&Ali*	Mohamed Hussein Ali	Charges dismissed	-
Kenya	*Ruto,Kosgey&Sang*	William Samoei Ruto	Charges confirmed	Charges vacated at trial
Kenya	*Ruto,Kosgey&Sang*	Henry Kiprono Kosgey	Charges dismissed	-
Kenya	*Ruto,Kosgey&Sang*	Joshua Apar Sang	Charges confirmed	Charges vacated at trial
Uganda	*Ongwen*	Dominic Ongwen	Charges confirmed	Convicted
Côte d'Ivoire	*Gbagbo&Blé Goudé*	Laurent Gbagbo	Charges confirmed	Acquitted, pending appeal decision
Côte d'Ivoire	*Gbagbo&Blé Goudé*	Charles Blé Goudé	Charges confirmed	Acquitted, pending appeal decision
DRC	*Katanga&Ngudjolo*	Germain Katanga	Charges confirmed*	Convicted*
DRC	*Katanga&Ngudjolo*	Mathieu Ngudjolo Chui	Charges confirmed*	Acquitted
DRC	*Mbarushimana*	Callixte Mbarushimana	Charges dismissed	-
DRC	*Lubanga*	Thomas Lubanga Dyilo	Charges confirmed	Convicted
DRC	*Ntaganda*	Bosco Ntaganda	Charges confirmed	Convicted, pending appeal decision

CAR I	*Bemba*	Jean-Pierre Bemba Gombo	Charges confirmed*	Acquitted
CAR II	*Yekatom&Ngaïssona*	Alfred Yekatom	Charges confirmed	Awaiting trial
CAR II	*Yekatom&Ngaïssona*	Partice-Edouard Ngaïssona	Charges confirmed*	Awaiting trial
Mali	*Al-Mahdi*	Ahmad Al Faqi Al Mahdi	Charges confirmed	Convicted
Mali	*Al-Hassan*	Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud	Charges confirmed	Trial commenced
Darfur, Sudan	*Banda&Jerbo*	*Abdallah Banda Abakaer Nourain*	Charges confirmed	Awaiting the suspect's appearance for trial
Darfur, Sudan	*Banda&Jerbo*	Saleh Mohammed Jerbo Jamus	Charges confirmed	Suspect declared deceased
Darfur, Sudan	*Abu Garda*	Bahar Idriss Abu Garda	Charges dismissed	-

* The judges declined to confirm some of the charges/the defendant was acquitted on some of the charges.

Data: ICC Defendants Database, available at: https://www.icc-cpi.int/Pages/defendants-wip.aspx, accessed on 22 February 2020.

To place in context the judges' factual findings on the defendant's guilt or innocence, this thesis further analyses submissions by the prosecutor, including applications for arrest warrant and documents containing the charges (DCC). The goal is not to determine whether the ICC judges have correctly assessed the defendant's criminal responsibility, but to examine what *general* types of facts and evidence the judges find convincing with respect to the assessment of criminal responsibility, and whether *a stable line of judicial reasoning* could be identified across different cases. Even though sensitive information, including names of persons and places, was redacted in some legal documents, overall there was sufficient publicly available information to gain insights into those questions.

Two main databases were used to access legal documents: the ICC's Court Records and Transcripts portal[326] and the Legal Tools Database, which provides a digitalized archive of the case law of the ICC, ICTY, ICTR, IMT, and the IMTFE.[327] Most of the documents were available in English, with few exceptions that were published only in French.

Next, in order to examine the understandings of legal academics with respect to criminal responsibility in ICL, the thesis employs discourse analysis of more than 330 publications that address the question. The analysis examines scientific discourse from a critical perspective that recognizes the embeddedness of scholarly publications into the social world[328] and the way they can reproduce, but also gradually reform the structure of the respective field of practice. The sources of data include books, chapters, and articles in leading international law and criminal law journals in English, including *Journal of International Criminal Justice*, *European Journal of International Law*, *Leiden Journal of International Law*, *International Criminal Law Review*, and *Criminal Law Forum*, to name a few. In addition, the analysis examines publications by legal academics in well-established online blogs, such as EJIL:*Talk!*, OpinioJuris, and International Justice Monitor. The discourse analysis of academic publications also provides insight into the understandings about the laws on criminal responsibility of several RS drafters, including Mahmoud Cherif Bassiouni, Roger Clark, Kai Ambos, and Per Saland, and former judges at the UN tribunals, including Antonio Cassese, Theodor Meron, David Hunt, and Mohamed Shahabuddeen, who have extensively published on matters of ICL.

With respect to NGOs' understandings on criminal responsibility matters, the analysis relies on articles, statements, reports, and *amicus curiae* submissions by human rights organizations, such as Coalition for the International Criminal Court (CICC), Human Rights Watch, Amnesty International, Women's Initiatives for Gender Justice (WIGJ), REDRESS, and the International Federation for Human Rights (FIDH). Those organizations generally support online archives dating back to the 1990s.[329]

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[326] Available at: https://www.icc-cpi.int/court-records.
[327] Available at: https://www.legal-tools.org.
[328] Van Dijk 2001:352.
[329] See Coalition for the ICC archive at: http://archive.iccnow.org/?mod=documents, WIGJ's database at: https://4genderjustice.org/#, Human Rights Watch: https://www.hrw.org/sitesearch?search=international+criminal+court, Amnesty International: https://www.amnesty.org/en/search/?q=international+criminal+law&sort=date.

Finally, in relation to the views expressed by states and government officials, the thesis looks to the official records of the Preparatory Commission for the establishment of the ICC and those of the Rome Conference, available through the Legal Tools Database and the official UN records.[330] The analysis also included records from the annual ICC ASP sessions[331] and news reports for the purpose of examining state reactions to ongoing trials and the overall functioning of the Court. In addition to discourse analysis, this thesis relies on secondary sources of data, including historical academic analysis, to provide insights into the political dynamics that surrounded the establishment of the IMT, IMTFE, and the UN tribunals.

2.6.1.1. Interviews and fieldwork

The textual discourse analysis was supplemented by interviews, which provided further insights into the variety of understandings about the law on criminal responsibility within the ICL field. The interviewees included one sitting ICC judge, legal academics who had written extensively on questions of criminal responsibility in ICL, former participants in the Rome Conference, NGO officials, and diplomats from state parties to the RS (Table 2). The interviewees were provided with a list of open-answer questions concerning their views on the appropriate interpretation of the RS provisions on criminal responsibility, the legal reasoning behind ICC judgments and the development of ICL.

Part of the interviews were conducted during a field trip to The Hague in May 2019 that included meetings with state diplomats and NGO officials and a visit to the ICC. The aim of the trip was to gain better understanding of the socio-political environment of the Court, namely, its relationship with state representatives and civil society. Other interviews were conducted in 2019 during a visit to the Ministry of Foreign Affairs in Bulgaria, a State Party to the RS since 2002. The discussions with Ministry officials who worked specifically on matters related to the ICC provided important insights into the relationship between a State Party and the Court and the domestic reactions to the ICC's interpretation of the law on criminal responsibility. The rest of the interviews were conducted via video online platforms in 2020.

[330] Available at: https://legal.un.org/icc/rome/proceedings/contents.htm.
[331] Available at: https://asp.icc-cpi.int/en_menus/asp/sessions/documentation/19th%20session/Pages/default.aspx.

Table 2: List of interviewed persons

Name	**Occupation**
Mr Georgi Minkov	Expert on international criminal law related questions, Human Rights Directorate, Ministry of Foreign Affairs, Bulgaria
H. E. Rumen Alexandrov	Ambassador of the Republic of Bulgaria to the Kingdom of the Netherlands since 2016
Ms Nadia Zhivkova-Vaneva	Legal Adviser, Embassy of the Republic of Bulgaria to the Kingdom of the Netherlands
Ms Melinda Reed	Executive Director, Women's Initiatives for Gender Justice
Professor Elies van Sliedregt	Chair in International and Comparative Criminal Justice at the University of Leeds
Professor Kai Ambos	Professor of International Criminal Law, Georg August Universität Göttingen, Germany Judge at the Kosovo Specialist Chambers Adviser to the German delegation at the Rome Conference
Sir Howard Morrison KCMG CBE QC	Judge at the ICC, term 11 March 2012 - 10 March 2021, president of the ICC Appeals Division Former ICTY judge
Professor Kevin Jon Heller	Professor of International Law at the University of Copenhagen and the Australian National University
Associate Professor Douglas Guilfoyle	Associate Professor of International and Security Law at the University of New South Wales Canberra
Professor Darryl Robinson	Professor in International Criminal Law, Queen's University, Ontario, Canada Adviser to the Canadian delegation at the Rome Conference

The purpose of the interviews with legal experts and practitioners was foremost to gather insights into the assessment of criminal responsibility at the ICC and the functioning of the Court in the international political arena more generally, from persons immersed in the everyday practices of the ICL field. As will be discussed in chapter 6, some of the works of the legal scholars who were interviewed have been referenced in ICC decisions with respect to interpretation of the RS's criminal responsibility provisions. Similarly, WIGJ is an NGO that specifically monitors the work of the ICC and that has often submitted *amicus curiae* observations at the Court, including in the *Lubanga* and the *Bemba* cases. As discussed in chapter 8, Judge Morrison was a member of the judicial team that delivered important decisions at the ICC, such as the *Bemba* Appeals Judgment.

In this thesis the interviews comprise a supplementary method for collecting data, the main method being discourse analysis. Consequently, references to interview statements will be used in the following chapters mainly to provide additional illustration of trends or ideas that have been observed in the legal literature, in judgments or in NGO commentaries.

2.6.2. Secondary method of analysis

Secondary methods are used to analyze the data collected through primary methods in order to produce a conclusion.[332] This study comprises an interpretative research that follows abductive reasoning – 'a continuous movement' between observations from the empirical world and theoretical insights.[333] Consequently, the processes of collecting data and analysing it were ongoing and interlinked throughout this study. The goal was to build an understanding of how the ICL field functions before making more specific observations on the influence of the politics of legal interpretation on the assessment of criminal responsibility.

In addition, this thesis conducts an 'internal comparison', i.e. a comparison of different spatial and temporal manifestations of the phenomenon under investigation, in order to illustrate any changes into the nature of that phenomenon.[334] Specifically, the assessment of criminal responsibility at the ICC is compared with the judicial reasoning at earlier international tribunals – the IMT, IMTFE, and the UN tribunals – for the purpose of identifying shifts in the dominant sets of shared understandings in the ICL community of practice. With respect to the UN tribunals, the analysis generally focuses on the ICTY, because many of the landmark decisions on modes of liability in ICL were delivered in ICTY cases, including *Tadić*, *Čelebići*, *Stakić* and *Brđanin*. Nevertheless, the analysis is supported with reference to the findings of relevant ICTR decisions. Furthermore, all questions on appeal at the ICTY and ICTR were addressed by the same set of judges.[335]

Before proceeding with the empirical chapters, the question of the explanatory goals of this study needs to be addressed. This study does not aim to present the politics of the legal

[332] Lange 2013:42.
[333] Dubois and Gadde 2002:554.
[334] Lange 2013:58.
[335] Drumbl and Gallant 2001:595.

field as the only explanation for the ICC's trial outcomes. On the contrary, it seeks to analyze one contributing factor therefor, that has so far remained uninvestigated in the literature on the Court, while recognizing that there may be alternative explanations, such as the ICC's complex relationship with states and the challenges of obtaining high-quality evidence of mass atrocities. In fact, those alternative explanation may work in conjunction with the politics of legal interpretation. As chapter 7 observes, for example, the prosecutor's problems of the unavailability of state support for investigations and the difficulties of collecting evidence could be exacerbated when she faces a bench that interprets the law in a narrow fashion and is particularly unwilling to tolerate the prosecutor's investigation hurdles.

Legal norms, understood as intersubjective beliefs shared by a group of members of the ICL field, cannot be considered the 'causes' of a specific line of judicial reasoning in the classic positivist sense. Norms often do not prescribe a particular behavior but 'serve only as determinants of a zone of permissibility'.[336] Furthermore, legal norms are not static but are constantly reproduced and reformed in the practice of law. Consequently, this thesis does not treat legal norms as either the direct or the only cause of the ICC approach to the assessment of criminal responsibility. Instead, it seeks to contribute to the interdisciplinary literature on the Court by tracing the simultaneously constraining and enabling influence of legal norms on judicial reasoning.

Another reason for refraining to make bolder claims regarding the role of legal norms is the limited set of cases available for observation. Even though the Court began operation in 2002, as of February 2021 it has completed confirmation of charges proceedings in relation to 22 suspects and only nine verdicts for core international crimes (Table 1).[337] Nevertheless, while this number of cases at the ICC may be relatively small compared to that at the ICTY and ICTR, it provides sufficient evidence to gain insights into the role of judicial reasoning in relation to the assessment of criminal responsibility, which could in the future be supplemented by further empirical research. Therefore, the goal is this thesis is not only to examine the operation of legal norms within the ICL field, but also to set a research agenda for future interdisciplinary research on international criminal justice.

[336] Kratochwil 2001:63.
[337] Excluding offences against the administration of justice under Article 70 RS.

With these caveats in mind, even if one cannot speak of causality in the positivist sense with respect to legal norms, the findings of this thesis can be used to make inferences about a broader range of case studies. For instance, the insights gained from this thesis in relation to the constraining and enabling impact of the legal norms on the assessment of criminal responsibility can be used in future research for examining other types of ICL norms, apart from criminal responsibility. Some scholars have already employed similar analytical approach to examine the construction of meanings of the legal norms of 'complementarity' in ICL.[338] This thesis contributes to the emerging scholarship on the intersubjective 'practice' of ICL and aims to provide insights that facilitate further research in that direction.

2.6.2.1. Map of the empirical section

The remainder of this thesis employs the primary and secondary methods discussed in this chapter in order to examine the 'practice' theory of international legal norms, with respect to the assessment of criminal responsibility. Firstly, chapter 3 presents a framework that outlines the main subjects of debate within the ICL community of practice. Chapter 3 incorporates data collected from discourse analysis and insights from criminal law and international law studies in order to identify the main lines along which arguments about criminal responsibility are contested and justified within the ICL epistemic community. Chapter 4 analyses the assessment of criminal responsibility at the IMT, IMTFE, and the UN tribunals. Chapters 5-8 turn to the ICC and examine in detail the drafting, interpretation, and application in practice of Article 25(3)(a)-(d), Article 28, and Article 30 RS.

[338] De Vos 2020.

3. WITHIN THE ICL FIELD: DEMARCATING THE DEBATES ON CRIMINAL RESPONSIBILITY

It has been observed that ICL developed 'mostly out of practice rather than theory', as a form of 'ad hoc creation and application' of legal norms in response to specific atrocities.[339] Several scholars have examined the 'struggle between law and political diplomacy' in relation to the institutionalization and operationalization of ICL as a field of legal practice.[340] Hagan and Levi's sociological analysis of the ICTY observed that specific practices, such as collecting onsite forensic evidence, issuing secret indictments, and inducing arrests, over time became socially validified elements of the ICL field, which enabled the tribunal to conduct such practices relatively autonomously from politically powerful actors.[341] The sociological scholarship provides important insights into the practices enabling the *administration of* international criminal justice in the context of state politics. However, it largely overlooks the practices of the interpretation and application of the legal norms regulating the core ICL function – the assessment of individual criminal responsibility. For example, while Hagan and Levi observe that ICTY judges on occasion developed '*new* law with *new* force', that practice is explained as the result of the judges' efforts to make sense of the available facts and evidence in a given case,[342] rather than with a systematic analysis of the understandings shared among members of the ICL field of practice, situated within and outside the tribunal, with respect to the meaning of criminal responsibility laws.

To address this gap, this chapter, firstly, discusses the types of actors participating in the ICL community of practice and their varying levels of authority. It is observed that the core shared understandings binding the ICL field constitute the agreement that the perpetrators of mass atrocities deserve to be punished on the basis of fair criminal process. Next, the chapter turns to the internal debates taking place within the ICL field in relation to questions of individual criminal responsibility. The analysis reveals a variety of competing views on the meaning of criminal responsibility laws, resulting not only from the different professional background of the persons engaging in ICL practice, but also from the lack of agreement on the function of criminal law in society.

[339] Nouwen 2016:751.
[340] Hagan 2003. Hagan and Levi 2005. Dixon and Tenove 2013.
[341] Hagan and Levi 2005:1527.
[342] Ibid.:1520, emphasis added.

3.1. Actors within the ICL community of practice

The evolving field of international criminal justice has brought together 'a diverse set of actors with diverse aims and forms of authority'.[343] State diplomats remain key players in the ICL field, especially with respect to the ICC where the ASP constitutes the 'management oversight and the legislative body' of the Court.[344] In the ICL field, of particular importance for the level of state involvement appears to be the nature of the legal norms under consideration. Whether states would seek to protect their nationals from international prosecution[345] or, reversely, to dispose of troublesome rebel leaders by transferring those persons to international tribunals,[346] the most important ICL norms for states would be those regulating the jurisdictional reach of the international court and the powers of the prosecutor. Danner's study of the ICTY revealed that when states seemed confident in the unlikeliness of having their own nationals prosecuted by the tribunal, they tolerated bold judicial interpretations of the criminal responsibility laws.[347] The laws concerning the assessment of guilt or innocence exhibit particular 'flexibility' in ICL, especially in comparison with domestic penal systems.[348] With states focusing generally on jurisdiction-related legal norms and given the malleable nature of individual criminal responsibility norms, the interpretative power of judges would arguably increase in relation to the latter.

Furthermore, because ICL is a 'relatively new body' of international law,[349] judges have become key actors in the development of legal norms.[350] Judicial decisions have often been treated in ICL 'as if they themselves are a source of law'.[351] Given the importance of expert knowledge in claiming authority over the interpretation of the law, judicial lawmaking in ICL has sometimes been perceived as a legal corrective to the 'flawed process' of politically-

[343] Dixon and Tenove 2013:411.
[344] ICC, 'Assembly of State Parties', at https://asp.icc-cpi.int/en_menus/asp/assembly/Pages/assembly.aspx.
[345] Charney 1999:460. Ratner 2003:452.
[346] Schabas 2008b:757.
[347] Danner 2006:19-29.
[348] Van Sliedregt 2014:1147.
[349] Cryer et al. 2014:3.
[350] Powderly 2010:18.
[351] Darcy 2010:334.

motivated state lawmaking.[352] As observed by one commentator, 'judicial lawmaking' with respect to ICL constituted the 'truth of international politics that cannot be named'.[353]

However, in accordance with the 'practice' framework of ICL, judicial determinations have to display congruence with at least some understandings about the law that are held within the broader community of practice outside the court. Of particular importance is international legal scholarship. Christensen's comprehensive empirical study reveals that academia has played a double role in the development of legal norms. On the one hand, scholarship has served as a 'testing ground' for innovative interpretations of ICL.[354] On the other hand, judges have often relied on academic research to validate their interpretations of the law, essentially rendering ICL scholarship a 'tool' for fighting legal battles in court.[355]

NGOs constitute another important set of actors within the ICL field, that were particularly influential during the ICC's establishment.[356] Ever since, NGOs have retained a complex relationship with the court, serving simultaneously as: 'its most vigorous champions and its most demanding taskmakers'.[357] The involvement of NGOs in the ICL field is often examined in relation to their efforts to improve the administration of international criminal justice by mobilizing states to provide financial and logistical support to international courts.[358] However, NGOs are also able to claim expert authority with respect to determining the scope and meaning of ICL norms, as demonstrated by their important contribution to the drafting of the Rome Statute.[359] Some NGOs dedicated to monitoring the work of the court have produced expert legal analyses of ICC's decisions, including on issues of individual criminal responsibility.[360]

Overall, within the ICL field of practice, the determinations of legal experts – judges, academics, practitioners and activists – appear to be particularly influential in relation to the

[352] Van Sliedregt 2014:1147.
[353] Danner 2006:47.
[354] Christensen 2017:246.
[355] Ibid.:248.
[356] Glasius 2006. Welch and Watkins 2011:987-989. Deitelhoff 2009.
[357] Schiff 2008:144.
[358] Lohne 2017:450. Schiff 2008:152.
[359] Pearson 2006:272
[360] See the expert papers published by the Women's Initiatives for Gender Justice at https://4genderjustice.org/home/publications/gender-report-cards/ and https://4genderjustice.org/home/publications/expert-papers-and-reports/.

interpretation of highly technical rules, such as the criminal responsibility laws.[361] States play a role in the drafting of the text of those laws, but they may also grant significant autonomy to judges and other experts to develop the law on individual criminal responsibility, especially when they do not expect state officials to end up at trial. As discussed in chapter 5, the preoccupation of states with matters of jurisdiction and the prosecutor's powers rendered legal experts highly influential with respect to the drafting of the RS's criminal responsibility provisions. Consequently, the assessment of criminal responsibility at the ICC is better understood with respect to the competition over the authority to determine the meaning of the relevant legal norms among various actors, rather than with reference to the direct influence of states' political interests. This chapter proceeds by examining the development of the core shared understandings binding the ICL community of practice and the debates taking place within that community, that bear implications for the continuous (re)production of the individual criminal responsibility legal norms.

3.2. The outer boundaries of the ICL field

The current constitution of the ICL field is the product of decades of contestation and justification of ideas about international criminal justice.[362] Eventually, the ideas that gained dominance included: narrowing the scope of ICL to violations of the 'physical integrity rights' of persons, rather than their political or socio-economic rights,[363] and relying on individual criminal responsibility, rather than state responsibility, as an enforcement mechanism.[364] The success of this particular vision of international criminal justice appears to be the combined outcome of ideology and interests – the institutionalization of ICL resonated with the evolving international human rights movement during the immediate post-Cold War period, but it was also argued to have coincided with the 'territorial, economic, and governance agendas' of the Global North during that period.[365]

Eventually a community of practice coalesced around two central shared understandings. Firstly, that the perpetrators of mass atrocities bear criminal responsibility and should be

[361] Christensen 2017:247. Steer 2014:40-41.
[362] Mégret 2019:77-84.
[363] Sikkink 2011:16, emphasis omitted.
[364] Mégret 2019:81-84.
[365] Nesiah 2016:98.

punished, also referred to as the 'anti-impunity' norm.[366] In the 21st century the human rights movement became 'almost synonymous' with the idea of attributing criminal responsibility for human rights violations, whilst the reliance on amnesties met increasing criticism.[367] Yet, not any form of punishment would be compatible with the promotion of human rights. Consequently, the second shared understanding binding the ICL field is that punishment should be determined through a fair trial, or the norm of liberal 'legalism'.[368] The rationale is that 'the accused are also bearers of rights' and deserve fair trial'.[369] As a core ICL norm, legalism refers to the 'essential modalities' of the criminal process: 'the possibility of acquittal, standards of evidence, proportionate punishment'.[370] Within the ICL community of practice, it is considered that despite the Western outlook of this trial model, it provides a minimal common denominator of fairness that unites criminal justice systems worldwide.[371] Together, the anti-impunity norm and the legalism norm constitute the outer boundaries of the field of international criminal justice and provide the background framework against which members of the ICL community of practice present, contest and justify different understandings of the law. However, the precise meaning and requirements of specific criminal responsibility norms remain subject to contestation within the ICL field.

3.3. Internal debates within the ICL field

The broad shared understandings that mark the outer boundaries of the ICL field has enabled a variety of actors with different professional backgrounds and views about the law to engage in ICL practice. This section traces three internal debates of importance for examining the competition over determining the meaning of criminal responsibility laws in ICL: the debates between practitioners from criminal law and public international law backgrounds, between representatives of the common and the civil law domestic legal traditions, and between those who prioritize legality and those who prioritize morality as a guiding principle in ICL. Even though the latter debate has triggered relatively less attention in ICL literature, it is of utmost importance for understanding the dynamics surrounding the assessment of individual criminal responsibility at international courts and tribunals.

[366] For a critical analysis of the 'anti-impunity' movement see Engle et al. 2016.
[367] Engle 2016:15. See also Roht-Arriaza 1996.
[368] The term is borrowed from Bass 2000.
[369] Sikkink 2011:13.
[370] Bass 2000:24.
[371] Robinson 2013b:142-143.

3.3.1. Criminal law vs. public international law

The variation of branches of law involved in ICL's development has been long been recognized as a source of controversy within the field.[372] ICL constitutes an 'uncomfortable combination' between two bodies of law based on inherently different foundational principles and enforcement mechanisms – domestic criminal law and public international law.[373] The understandings about what constitutes sound legal reasoning, that are held by representatives of both groups, have created tensions on various issues within the ICL community of practice, including the rationale behind legal proceedings, the sources of law, and the appropriate interpretative techniques. Darryl Robinson famously called this the 'identity crisis' of ICL.[374]

The practice of criminal law involves a set of related but distinctive terms, such as responsibility and liability. A person could be responsible for a conduct and yet avoid liability by offering a justification or an excuse, such as duress, for her actions.[375] Hence, the terms responsibility and liability bear different consequences for the individual. Responsibility calls for accounting, but not necessarily for punishment because the person could offer a convincing defence for her actions, whereas liability implies a punitive response.[376] In criminal law, the assessment of criminal responsibility and liability for punishment are regulated by principles, or norms, ensuring the fairness of the proceedings and the accused's rights, that are absent from other branches of law.

Of utmost importance is the principle of *legality*, generally understood as the Latin maxim *nullum crimen sine lege* ('no crime without law'), which requires that the law is sufficiently clear to provide 'faire notice' about the criminality of the conduct.[377] Important corollaries of that principle are the requirement that criminal statutes are drafted with precision, the prohibition of extending criminal law provisions by analogy, and the requirement to resolve ambiguities in favour of the defendant (the rule of lenity).[378] While the indeterminacy of the

[372] See Danner and Martinez 2005. Van Schaack 2008. Fletcher and Ohlin 2005.
[373] Van Sliedgregt 2012a:8. Osiel 2009.
[374] Robisnon 2008.
[375] Duff 2008:103.
[376] May and Fyfe 2017:55.
[377] Gallant 2008:13.
[378] Van Schaack 2008:121.

legal language precludes the achievement of absolute certainty about the meaning of legal prohibitions, the legality principle constrains judicial interpretation and protects the law from purely idiosyncratic determinations on the criminality of a given conduct.[379]

Another key criminal law principle is that of personal culpability or guilt, according to which a person could only be held liable for her own conducts.[380] Punishment based on mere association with the wrongdoer or imposed collectively on the family, ethnic or religious group of the wrongdoer is precluded by the principle of personal culpability.[381] Culpability in criminal law consists of more than the physical act, or the *actus reus*, of committing a prohibited conduct. The existence of guilty mind, also known as *mens rea* or the mental element of liability, 'is at the hearth of the culpability principle' because it denotes the blameworthiness of the individual.[382] Consequently, the culpability principle requires that a person can be held liable only if that person has contributed to the commission of the crime and that the contribution was made with the requisite guilty mind.[383] Specifically, domestic criminal law systems usually require that the conduct is committed with *intention*, meaning either that the person desired to commit the crime, or knew with certainty that her conduct would result in a crime.[384] Most domestic systems also accept that *mens rea* below intention can attract liability, including the concepts of recklessness in common law systems and *dolus eventualis*, found in some Continental systems, which both denote conscious risk-taking that one's conduct could result in a crime.[385] Liability could also be imposed for negligent behaviour[386] but in light of the culpability principle, the less guilty the mind of the accused is, the less justified the imposition of liability appears. Consequently, negligence liability has proven controversial in domestic debates[387] and has usually been imposed for a limited set of offences, such as manslaughter.[388]

[379] Gallant 2008:31-33.
[380] Danner and Martinez 2005:83-84.
[381] Gallant 2008:17.
[382] Weigend 2014:491.
[383] Van Sliedregt 2012a:40.
[384] Van Sliedregt 2012a:40-41.
[385] Werle and Jessberger 2005:51-52.
[386] Van Sliedregt 2012a:44.
[387] See Alexander, Ferzan and Morse 2009:79. Williams 1964:122-123. In support of negligence liability see Hart 2008[1968]:147-148. Huigens 1995:1474-1476. Montmarquet 1999:845.
[388] Van Sliedregt 2012a:44.

The culpability principle requires not only evidence of personal guilt, but also proportionality between the accused' guilt and the harshness of the punishment.[389] 'Proportionality' refers not only to the length of the sentence but also to 'fair labelling' – the idea that the label of the offence ought to fairly express the offender's wrongdoing.[390] 'Labels' include the name of the offence or the type of criminal liability that the accused bears, e.g. principal liability, aiding a crime, negligent commission. Those labels 'reveal the story of an offender's criminality'.[391] The restrictions imposed by the principles of legality, culpability and fair labelling, are justified on the grounds that criminal liability constitutes the 'ultimate infliction of moral blame'[392] and imposes 'the highest legal sanctions available to society', namely, deprivation of freedom, and in some countries, death.[393]

In addition to criminal law scholars and practitioners, the ICL field has also integrated experts from the related fields of human rights and international humanitarian law who have brought their specific background understandings about legal sources and procedure.[394] Many human rights and humanitarian law prohibitions concerning state responsibility have been recast as treaties penalizing individual conduct in ICL.[395] Important differences exist, however, between coercive penal norms and 'gentle' human rights norms, which do not have the authority to incarcerate individuals, but rely on mechanisms such as public shaming, forward-looking capacity building, and symbolic findings of state wrongdoing.[396] Because of the different forms of punishment, criminal law places the burden of proof on the prosecution and protects the defendant's rights, while human rights law focuses on the victims' suffering and allows broader interpretations of legal norms to ensure that harm is addressed.[397] International humanitarian law provides for penal sanctions, but it leaves their implementation to states. Unlike ICL, it lacks the authority to indict individuals at the international level.[398] Consequently, human rights and humanitarian law norms are not equivalent to penal norms and the existence of certain human rights prohibitions does not suffice for holding individuals

[389] Werle and Burghardt 2014:304.
[390] Williams 1983.
[391] Nersessian 2006:96.
[392] Safferling 2004:1473.
[393] Gallant 2008:17.
[394] Robinson 2008:928.
[395] Van Schaack 2008:149-150.
[396] Danner and Martinez 2005:86.
[397] Ibid.:86-89.
[398] Gaeta 2016:169.

criminally liable for such conducts.[399] The transformation of a human rights violation into an international *crime* requires the imposition of individual criminal responsibility directly at the international level.[400]

Due to their different rationales, the communities of practice of the defendant-oriented criminal law and the victim-oriented human rights and humanitarian law differ in their understandings in relation to the sources of law, the interpretative methodologies and the investigative techniques. In addition to the law codified in international treaties, public international law, including human rights and humanitarian law, can rely on customary international law and the general principles of law recognized by civilized nations.[401] However, customary international law threatens the principle of legality because customs rarely establish clear rules that provide notice about prohibited conducts and often exist along counter-customs.[402] The 'malleability' of the content of the general principles of law has raised similar concerns.[403]

The shared understandings within international law and within criminal law practice also diverge regarding the methods of interpreting the law. According to the Vienna Convention on the Law of Treaties, treaties could be interpreted according to the 'ordinary meaning' of the text, their 'context', and their 'object and purpose'.[404] Depending on whether judges decide to interpret the law in light of the treaty text, the drafters' intentions or the underlying goal of the treaty (the 'teleological' approach), the results could significantly diverge.[405] Because of the fair notice requirement, from a criminal law perspective the textual approach appears more appropriate than intent-based or teleological approaches.[406] By contrast, because human rights and humanitarian law aim at maximizing protection to the vulnerable, 'little legitimacy is gained by unquestioning reliance on text' in those fields.[407] For instance, according to the Martens Clause, *moral* considerations, such as 'the laws of humanity, and the dictates of the

[399] Gallant 2008:128.
[400] Roth 2010:278-279.
[401] *Statute of the International Court of Justice*, Article 38(1)(b)-(c).
[402] May 2008:161. Van Schaack 2008:138.
[403] Raimondo 2010:46.
[404] *Vienna Convention on the Law of Treaties*, Article 31.
[405] Pauwelyn and Elsig 2013:451.
[406] Grover 2010:557.
[407] Wessel 2006:440. See also Danner and Martinez 2005:89.

public conscious', can be evoked to determine humanitarian obligations.[408] Similarly, human rights institutions often rely on teleological reasoning and interpret their constitutive treaties as 'living instruments' that must be adapted to the needs of modern society.[409]

From a human rights and humanitarian perspective, ICL's ability to punish individuals has been perceived as an 'enforcement revolution'.[410] International prosecutions have been described as a 'sword' for protecting the victims of human rights abuses.[411] Speaking on behalf of the 800 member organizations of CICC, William Pace remarked that the ICC's creation 'would save millions of humans from suffering unspeakably horrible and inhumane death'.[412] Furthermore, some scholars have suggested that the punishment of the perpetrator could offer some remedy for the emotional and psychical injuries afflicted to the victims.[413]

By contrast, other members of the community of practice have perceived ICL as system of criminal rather than international law, and expressed concerns for the protection of the defendant's rights.[414] Because international crimes bear even stronger stigma than their national counterparts,[415] many legal scholars and practitioners called for bringing ICL closer to domestic criminal law by exhibiting stricter compliance with the principles of legality,[416] culpability,[417] and fair labelling.[418] From this perspective, since the accused are the ones whose liberty is at risk, *their* human rights must be shielded to preserve the integrity of liberal trials.[419] Consequently, while both sides of the debate have demonstrated commitment to the core shared understandings of ICL, human rights advocates have prioritised concerns for ending impunity, while legal scholars with background in criminal law have generally called for the rational-technical application of legal rules.

[408] *Fourth Hague Convention*:633.
[409] Van Schaack 2008:146-147.
[410] Ignatieff 2000:294. Heath 2012:321. Bassiouni 2006:264-265.
[411] Stahn 2012:255. Gallant 2008:90.
[412] *Rome Conference Official Records*:129.
[413] Sepinwall 2009:293.
[414] Sander 2010:127.
[415] Mégret 2015.
[416] See e.g. Ambos 2006. Sander 2010. Robinson 2008. May 2004. Fletcher and Ohlin 2005.
[417] Ambos 2007:173-173. Van Sliedregt 2012a:85.
[418] Robinson 2008. Nersessian 2006.
[419] Ambos 2013:87.

3.3.2. Common law vs. civil law

Notably, significant differences of opinion can also be observed within the criminal law community of practice, often mirroring variations between the common law and the civil law traditions. The text of many ICL provisions may appear neutral in terms of domestic pedigree, but the pre-existing professional experience of international judges, which often involves serving at domestic courts, could influence the interpretation of those provision in practice,[420] especially when international judges are confronted with lacunae in the still-evolving body of ICL.[421]

Both common and civil law penal codes in principle respect the foundational norms of criminal law but with some variations. The legality principle is well established in civil law, but does not have the same legal authority in all common law systems.[422] Furthermore, common law systems have been observed to apply less strictly the principle of personal culpability in relation to group criminality.[423] Examples of such practices include the US *Pinkerton* conspiracy doctrine,[424] the felony murder rule,[425] and the English common purpose doctrine.[426]

Further differences exist in relation to the process of determining and applying the law. Common law generally relies on pragmatism or 'common sense',[427] while civil law systems adopt a highly systematized and theoretically developed approach to criminal law.[428] This principled approach is known as *Dogmatik* in Germany.[429] Civil law countries often codify a set of fundamental legal norms valid for all crimes into the 'general part' of their penal statutes.[430] The codification of the general part is considered to provide better 'fair warning' about the applicable law, in accordance with the legality principle.[431] The difference between

[420] Van Sliedregt 2012a:8. Merope 2011:331.
[421] Steer 2014:41.
[422] Lamb 2002:740.
[423] Van der Vyver 2005:58.
[424] Noferi 2006:94.
[425] Kadish 1985:352. Roth and 1985:446.
[426] Krebs 2010:590. See also Kadish 1997:375-378.
[427] Bohlander 2011:400.
[428] Trechsel 2009:26-27. Ambos 2006:665. Van der Vyver 2005:58.
[429] G. Fletcher 2011:179.
[430] Mantovani 2003:26-27. Simester and Shute 2002:3.
[431] Simester and Shute 2002:4.

the pragmatic and the theoretical approaches to criminal is also reflected in the authority of legal academia in both systems. While the official sources of law in common law are often limited to statutes and juridical precedents, civil law systems have historically relied on scholarly teachings.[432] It has been observed that some German judges have changed long-standing jurisprudence on a certain topic, convinced by renowned academics that their previous views had been wrong.[433]

Nevertheless, the common-civil law debate should not be exaggerated.[434] Firstly, there are important divergences within those systems, including on questions of criminal responsibility.[435] Most countries, including Germany, Spain and England employ the 'differentiative' model of perpetration, that distinguishes between those actors who *commit* the crime, i.e. the 'principal' perpetrator/s, and those who merely *assist* its commission, i.e. the 'accessory/accessories' to the crime.[436] But the differences between differentiative models cut across the civil-common law division. Anglo-American common law and French civil law both follow the 'naturalistic' approach, which considers a principal only the physical perpetrator of the crime, while the co-perpetrators and indirect perpetrators (those who have used someone else to commit the crime) are considered mere accessories to that crime. From a naturalistic perspective the terms 'principal' and 'accessory' do not carry any normative significance – the accessory can be more blameworthy than the principal perpetrator. By contrast, Germany's 'normative' approach treats the co-perpetrators and indirect perpetrators as principals to the crime in order to emphasise the degree of their culpability.[437] As the following chapters discuss, the different approaches to perpetratorship are of utmost importance for understanding the development of theories, or modes, of liability in ICL.

Another reason why the common-civil law distinction should be treated with caution is the trend of convergence between the two traditions. Academic works have played an important role in bridging the two traditions.[438] Another important development was the creation of the US's Model Penal Code, which constituted the 'first systematic approach' to developing a

[432] G. Fletcher 1998:754.
[433] Bohlander 2011:401-402.
[434] Dubber 2011:925.
[435] R. Clark 2001:295.
[436] Van Sliedregt 2012a:66.
[437] Van Sliedregt 2012a:71-73. See generally Jain 2005.
[438] Ambos 2006. Trechsel 2009.

general part of criminal law in the Anglo-American world.[439] Nevertheless, the practice of codification has not enjoyed uniform popularity across common law countries. The urge to categorize the law has triggered criticism among some common law scholars[440] who associate that practice with 'the inflexibility of top-down … anti-democratic, civil dogmaticism'.[441]

This debate resurfaced in relation to the development of a general part of ICL. Some legal experts considered the search for uniformity in all aspects of ICL's doctrine and practice is 'misguided'.[442] But many legal scholars and practitioners actively called for the development of a general part in ICL for the purpose of ensuring a more coherent legal system.[443] It has been considered that the development of a general part would mark 'the formal coming of age' of ICL and 'emancipate' the discipline from the 'rudimentary' nature of public international law.[444] Some scholars suggest that ICL should adopt something akin to the German *Dogmatik*,[445] while others – that ICL should 'walk its own path' taking into account 'the peculiarities of *international* criminal liability'.[446] But, even if a consensus is achieved within the ICL community with respect to the systematization of the law, the uniformity of thought within that community would still be challenged on other grounds, rooted deep into the essence of criminal law: the question 'what is the rationale behind punishing individuals?'.

3.3.3. Morality vs. legality

As discussed, broad interpretations of the principles of legality and personal culpability in ICL have generally been explained with the influence of human rights and humanitarian law norms. This section argues that another set of competing understandings, this time originating from within the criminal law community, also bears implications for the assessment of criminal responsibility in ICL. This internal debate helps to understand why not only human rights activists, but also some criminal law scholars and judges adopt a more flexible approach to legality, that takes into consideration the outcome of proceedings instead of applying the

[439] Ambos 2006:661. See also Dubber 2011:928.
[440] See Gardner 1994:217. Simmons 1992:463-554.
[441] Dubber 2011:928.
[442] Greenwalt 2011:1067-1068.
[443] Van Sliedregt 2012b:852. See Eser 2001. Ambos 1996. Mantovani 2003:26.
[444] Militello 2007:943.
[445] G. Fletcher 2011:179. Jain 2005:97-98.
[446] Vanacore 2015:859, emphasis in the original.

criminal law principles in a strictly technical manner. It also elucidates why other members of the ICL community perceive this practice as a threat to the integrity of the discipline.

One of the shared understandings in criminal law is that a person is punished for her wrongful conduct. However, it has been debated whether such conduct represents a wrongful choice or a manifestation of an immoral character. In essence, this is a debate between those who consider that the *immorality* of certain conducts is sufficient to merit punishment and those who perceive immorality as a nebulous source of guidance for social behaviour and insist that only the violation of clearly established legal rules should trigger punishment. Two different values are prioritised – morality vs. legality, understood as legal formalism.

5.3.3.1. Choice vs. character

The Anglo-American legal literature has debated the appropriate basis of attributing criminal responsibility – a wrongful choice or an immoral character. According to the 'choice' model, criminal responsibility should be imposed only when a person has had 'the normal capacities, physical and mental' to act in accordance with the law and 'a fair opportunity' to exercise those capacities, but for whatever reason has failed to do so.[447] It is considered that while people rightly pass moral judgments for other persons' character in non-legal context, criminal law should refrain from punishing bad character.[448] The emphasis on rational choice implies that individuals determine the wrongfulness of their actions guided by the law, rather than by their moral consciousness. Hence, the law becomes a 'choosing system' that allows individuals to find out the costs of their actions.[449]

By contrast, some criminal law scholars considered that the characters of individual persons – their values, motivations and emotions – matter for the attribution of criminal responsibility.[450] On this account, the wrongful choice might constitute an occasion for punishment, but not the reason behind it. Blame and punishment are perceived as negative responses for the socially undesirable character dispositions of a person, which have resulted

[447] Hart 2008[1968]:152. See also Moore 1990.
[448] Moore 2010[1993]:54.
[449] Hart 2008:44.
[450] Kahan 1997:128-129.

in criminal behaviour.[451] This debate marks a clear division between those who consider morality and law as separate realms, and those who perceive them as inevitably interlinked. According to the choice-based model, one need not be a good man to identify what is unlawful.[452] By contrast, the character-based model stresses that the ability of individuals to reason with the law is premised on their capacity to correct their characters and make morally right choices.[453]

By implication, the two sides hold different understandings of the legality principle. Because the choice-based model does not rely on other sources of guidance, such as moral consciousness, legality is important since it ensures that the law provides fair notice regarding prohibited conducts.[454] By contrast, according to the character-based model, strict adherence to the letter of the law enables individuals to exploit the 'grey zone' between what is merely immoral and what – officially illegal. On this account, 'a good person' would avoid criminal punishment without looking to the law for excuses.[455] According to the character-based model, the rule of law is important in relation to conducts sitting on the border between socially desirable and socially undesirable behaviour, such as financial violations. But in relation to conducts, such as murder, the role of the law is not to provide notice, but to punish behaviour that is already understood as socially and morally forbidden.[456]

The controversy between the 'choice' and the 'character' model of criminal responsibility ultimately reflects 'a real tension between two different political conceptions of law and the state'.[457] The 'choice' model fits the ideology of liberal individualism and a contractual model of law and society. From this perspective, the law imposes 'fairly modest constraints', whose observance would enable individuals to pursue their own goods. The public/private sphere distinction of liberal contractualism suggests that the person's feelings and character traits may be relevant in their personal relationships, but not for criminal law as 'a system of rules which regulates our public lives'.[458] Consequently, the legality principle is considered to protect the individual's personal matters 'from the arbitrary power of the

[451] Bayles 1982:7-8.
[452] Holmes 1997[1897]:993.
[453] Arenella 1990:73.
[454] See Hart 1983:114. Moore 2009:31.
[455] Kahan 1997:129.
[456] Kahan 1994:400.
[457] Duff 1993:346.
[458] Ibid.:381.

political, the prosecutorial, or the judicial departments'.[459] By contrast, the 'character' perspective favours a communitarian vision of society, where fellow members of a community are interested in each other 'as friends' collectively building strong communal relationships, rather than as 'strangers' observing the limited terms of a social contract.[460] Notably, in ICL the character-based model of criminal responsibility and the communitarian vision of an international community of mankind have gained traction.

5.3.3.2. Morality vs. legality in ICL

In addition to the impact of human rights and humanitarian norms, the character-based model of punishment, i.e. the idea of punishing the lack of moral consciousness rather than the violation of codified legal rule, has influenced some members of the ICL community of practice to suggest that the principles of criminal law have to be interpreted in broad and flexible manner for the purpose of ending impunity. There is a general tendency in ICL to elide what is morally wrong with what is legally criminal, reminiscent of the natural law tradition.[461] The more heinous the conduct, the more permissive becomes to assume that it violates not only moral norms but also positive law.[462] In much of ICL practice, even when the conduct's criminalization has not been clearly established by the law, the decisive question has been whether the accused '*should have foreseen* it, since the conduct, in any case, violated natural law and morality'.[463] Hence, the separation of 'intuitive' morals from 'rational' criminal law in ICL has been particularly challenging.[464] Some authoritative legal scholars even suggested that in ICL at stake is 'not criminal guilt' but 'moral guilt' for violating the norms of the human community.[465]

This understanding has invited many members of the ICL community of practice to qualify the principle of legality.[466] It is argued that because the wrongfulness of mass atrocities has established 'deep roots' in the mind of every person,[467] the defendants could not simply

[459] Gallant 2008:21. See also G. Fletcher 1978:800-801. Husak 2010:203.
[460] Duff 1993: 382-383.
[461] Van Schaack 2008:157.
[462] Meron 1987:361.
[463] Ambos 2003:231, emphasis in the original.
[464] Tallgren 2002:591.
[465] Dubber 2011:933.
[466] Cassese 2008b:38-41.
[467] Tomuschat 2006:835.

evoke the legality principle, understood as the requirement of pre-existing codified law, and claim that they did not know that their conduct was wrong.[468] From this perspective, a broad range of rules and soft norms, such as human rights treaties or the general principles of law, can provide fair notice of the conduct's criminality and, thus, satisfy the legality principle, even though such instruments address mostly state parties rather than individuals.[469]

The rationale behind this argument is that ICL's legal norms merely track 'the core of "common morality"' and an individual of 'good character' would instinctively stay away from the borderline demarcating merely immoral from officially criminalized conducts when mass atrocities are concerned.[470] Consequently, some legal scholars have argued that any person who chooses to enter the 'grey zone' of internationally prohibited conduct deserves harsh treatment by the law.[471] In effect, the defendants at international trials are often perceived guilty by 'everyone' even before the judges have made a legal pronouncement.[472] While criminal law traditionally starts with the presumption of the accused's innocence, ICL is considered to proceed from a moral 'presumption of guilt'.[473]

NGOs too have displayed a preference for the character-based model of criminal responsibility in ICL. Those organizations often engage in moral-based judgements by directly 'naming' alleged perpetrators in their reports.[474] The same human rights advocates who generally favour the rehabilitative ideals of punishment at the domestic level have often pressed for retributive responses at international tribunals, where harsh legal measures against 'repressive rulers' are seen to empower the victims of human rights abuses.[475] Acquittals at international trials have often been perceived as a *failure to punish* by the broader public, even if such outcome complies with the requirements of legality.[476] This trend signifies not only the influence of human rights norms for protecting the victims, but also a moral judgement on the guilt of the defendant long before the trial verdict is delivered.

[468] Schabas 2003b:887. Luban 2010:584-585.
[469] Van Schaack 2008. Tomuschat 2006:835.
[470] Osiel 2009:139.
[471] Luban 2010:586.
[472] Osiel 2009:21-22.
[473] Dubber 2011:936.
[474] Bergsmo and Wiley 2008:23.
[475] Osiel 2005:803-804.
[476] Bertodano 2002:410.

Nevertheless, the willingness of some members of the ICL community to integrate morality with legality should not be interpreted as a rejection of legalism, or as an attempt to *compromise* the quality of legalism by imposing more lenient standards for the attribution of criminal responsibility. Indeed, to argue so would be to embrace the 'maturation' thesis discusses in chapter 2,[477] which perceived the criminal responsibility laws as objective standards against which the performance of international courts can be measured. Instead, the idea of integrating morality with legality presents a *different* vision of legalism. It is still a 'legalist' ideology because it conforms to the understanding that the perpetrators of mass atrocities have to be punished in accordance with criminal law norms, which makes the outcome of international trials uncertain. Rather, the *meaning* of those criminal law norms is subject to contestation. From the perspective of many human rights advocates, the principles of criminal law do not require blind application, regardless of their broader social implications, but a 'balance' between the interests of the victims and the rights of the accused.[478]

Overall, the integration of moral with legal judgement has had profound effect in ICL. Given the severity of international crimes and the long absence of international prosecutions, numerous commentators – NGOs, academics, and practitioners – have presumed the guilt of persons of dubious moral character before the trial judgment was delivered. Even proponents of the choice-based model in domestic law have acknowledged that the legality principle cannot be interpreted in the same manner in proceeding against *international* criminals.[479]

Nevertheless, this view has been increasingly contested by other members of the ICL community of practice. It has often been suggested that because strict compliance with the principles of criminal law should limit judicial discretion, states would be particularly keen to emphasise the importance of the legality and culpability principles in ICL.[480] However, once the political dynamics of the legal field, i.e. the competing claims over the meaning of the law, are taken into consideration, the relationship between the protection of state interests and strict compliance with the principles of criminal law becomes less straightforward. If governments seek to dispose of rebel or opposition leaders, it appears unlikely that they would insist on a

[477] Chapter 2, section 2.3.
[478] Moffett 2015:262. Women's Initiatives for Gender Justice 2018:147. Interview with Melinda Reed.
[479] Moore 2009:45.
[480] Broomhall 2016. Grover 2010:553; Schabas 2007:202.

narrow interpretation of the principles of criminal law that increases the chances of acquittal. Furthermore, if states seek to protect from prosecution certain individuals, e.g. government officials, a discussion of the legal norms on criminal responsibility would come into play only in a very limited set of situations. Governments are likely to challenge international courts at a much earlier stage of proceedings – for instance by disputing their legal obligation to arrest and surrender the accused, as some states did with respect to Al-Bashir,[481] or by contesting the court's jurisdiction over the case, like Côte d'Ivoire did with respect to the case against Simone Gbagbo.[482] Consequently, the discussion is only going to move to the question of personal culpability if, despite the state opposition, the court somehow manages to apprehend the suspects and proceed with a confirmation of the charges against them. Although such a scenario is by no means precluded, due to the lack of police force at international tribunals and their dependency on state cooperation for completing arrests, it is likely to occur less often.[483]

Crucially, an analysis that focuses on the direct state influence on the ICL field obscures the fact that other members of the ICL community of practice may favour strict and technical application of the principles of criminal law for reasons different from state interests. The so-called 'liberal critique of ICL' has sought to sustain the presumption of the defendant's innocence and insisted on restricting the scope of personal culpability.[484] Contrary to arguments prioritizing substantive over procedural justice, from the perspective of a liberal fair trial one cannot 'work backwards from the proposition that the defendant must be punished' to interpret the existing law in such manner that it will enable conviction.[485] From this perspective, while the defendants may have participated in violent conflicts, the culpability principle requires that the precise nature of their responsibility for the collective conduct is determined in accordance with penal statutes.[486] In other words, the fact that the defendant may bear moral responsibility for being implicated in the collective violent conduct does not imply that she bears criminal responsibility for specific crimes.

[481] For an analysis of the possible motivations of states to refuse to arrest Al-Bashir see Cole 2013. Mills 2012.
[482] For an analysis of the admissibility challenge in the *Simone Gbagbo* case see Heller 2016.
[483] Bosco 2014:4. Rieff 2018.
[484] Robinson 2013b:128.
[485] Ohlin 2007:72.
[486] Ibid.:72-74.

Similar to the choice-based model of punishment, the advocates of legality in ICL have rejected the conflation of illegality with immorality. While mass atrocities seem horrendous, it is considered that moral outrage alone could not constitute the basis for criminal prosecutions.[487] There are various forms of reprisal for moral wrongs, such as public shaming or compulsory contributions to victim compensation funds. But because of the severity of criminal punishment, the imposition of criminal responsibility, even when the morality is clear-cut, is argued to require a clear legal rule.[488]

Legal scholars have also noted that the social climate of normative permissiveness that accompanies mass atrocities makes it 'extremely hard to assess the character of the individual'.[489] Criminological research has revealed that it does not take 'intrinsically evil people' to commit atrocious crimes,[490] supporting Hannah Arendt's famous observations of the 'banality of evil'.[491] This makes judgements of the accused's moral worth in ICL particularly perplexing, as observed by one commentator:

> Of course, banal evil is still evil. But are we prepared to blame a character which we evaluate as banal rather than full of burning hatred, sadistic inclinations, and cruelty?[492]

Even proponents of the morality approach in ICL have acknowledged the difficulties of making moral judgements in relation to some war crimes, because when war is waged for self-defence lethal violence is said to serve 'the publicly prized end of collective self-preservation'.[493]

From the perspective of the liberal critique then, compliance with the principles of criminal law serves to protect more than the interests of ingenious criminals trying to exploit gaps in the law. Rather, on this account, the culpability principle protects the normative worth of the legal system – it is said to differentiate criminal law from both 'a purely administrative system of sanctions'[494] and from moral-based judgement.[495] Consequently, arguments for compromising the principle of personal culpability in order to avoid embarrassing acquittals

[487] May 2004:3-4.
[488] May 2008:154-155.
[489] Aukerman 2002:58.
[490] Smeulers 2019:18.
[491] Arendt 1964.
[492] Nino 1996:142.
[493] Osiel 2009:139.
[494] Weigend 2014:492.
[495] Robinson 2009:104.

have been rejected[496] and the fairness of the trial, *regardless of the trial outcome*, is perceived as necessary for preserving ICL's integrity.[497] While delivering substantive justice appears to legitimise legal proceedings for those members of the ICL community of practice who allow for balancing morality with legal formalism, the same reasoning could delegitimize international tribunals in the eyes of those who cherish the narrow and predictable application of legal rules.[498]

These are two different understandings of what the norm of legality requires in practice. Both perspectives share an agreement that the criminal law norm of 'legality', broadly understood as the predictable interpretation of laws that make it clear to the lay person what conduct is proscribed, has to be complied with in order to punish a person for international crimes, but disagree as to what 'legality' requires. For some members of the ICL field, moral norms can serve as indicia of what the law requires, while others favour the technical and dispassionate application of legal rules, regardless of the broader consequences of the judgment for the afflicted communities.

Notably, it should not be assumed that the advocates of the separation of morality from legality disregard the 'anti-impunity' norm and do not express interest in whether the perpetrators of mass atrocities are punished. But again, the meaning of 'ending impunity' is contested. The term 'ending impunity' implies a quest for accountability, but accountability does not necessarily mean punishment. It could also mean holding a fair trial. Furthermore, for those members of the ICL field who separate morality from legality the strict compliance with legal rules would contribute to ending impunity in the long-term, even if in the short term some ingenious criminals take advantage of the gaps in the law and escape punishment, because it would institute a stable and legitimate international legal order.

Just as some members of the community of practice have maintained that the special context of mass atrocities requires the relaxation of the principles of criminal law, according to others, for that same reason the principles of criminal law should be upheld even more stringently in ICL. Scholars have suggested that due to the 'highly discretionary' nature of ICL judgments, the legitimacy of international trials is particularly dependent on anchoring the

[496] Damaška 2008:355.
[497] Minow 1998:37.
[498] May and Fyfe 2017:20.

infliction of punishment to the principles of criminal law.[499] Furthermore, legal scholars have suggested that judgments based on modes of liability that expand the scope of personal culpability could leave room for doubt about the defendant's responsibility and obstruct social reconciliation within the afflicted communities.[500]

Notably, given the significant reliance of international tribunals on state cooperation, in the context of ICL strict compliance with criminal law principles has been perceived as a safeguard against the excessive politicization of international criminal justice. The legality principle has been perceived as necessary to 'restrain tyranny that arises from the arbitrary application of coercive force'.[501] Consequently, the power inequalities among states that result in the uneven enforcement of ICL are said to increase the importance of legality.[502] Furthermore, compliance with the culpability principle is considered to counter the perception of undue harshness against the individuals from vanquished nations.[503] Given the political selectivity of international prosecutions that could result in the prosecution of members of some ethnic or national groups but not others, the culpability principle becomes of particular importance in ICL because it ensures that the link between the individual defendant and the crime is established beyond doubt.[504]

Similar to the domestic debate, what appears to separate the position that balances morality with legality from the liberal critique of ICL is a different vision of society, only this time, the question concerns the idea of an international society. Significant discrepancy has been observed within the ICL field regarding the meaning of international criminal 'justice' – whether it should be constrained to the minimalistic goal of determining the guilt or innocence of individual accused or whether it should include more ambitious communitarian goals.[505] The notions of morality and ethics have become central to the idea of building an international community of 'humanity' or 'civility' around the condemnation of mass atrocities.[506] From

[499] Danner and Martinez 2005:79.
[500] Darcy 2007:400-401. Damaška 2008:348-349. Damaška 2001:477-478.
[501] Gallant 2008:21.
[502] Roth 2009:110-12. Roth 2010:235.
[503] Damaška 2008:351.
[504] Eldar 2013:346. Damaška 2008:351.
[505] Sander 2015:765.
[506] Luban 2018:136. Dubber 2011:924-925.

this perspective, morality can have a 'unifying power' at the international arena that otherwise lacks a political community defined by a world state.[507]

By contrast, from the perspective of the liberal critique, the objectification of the defendants as means to convey messages to the international community contradicts the Kantian logic of treating individuals as ends in themselves.[508] Some scholars have maintained that the liberal approach does not ignore the importance of community but simply requires that 'we justify our actions against the individual on behalf of society' by respecting the principles of legality and culpability.[509] From this perspective, because in ICL, just like in domestic criminal law, *the object of punishment* remains the individual person, the culpability principle is no less applicable in ICL than with respect to ordinary municipal crime.[510] Other scholars problematize the communitarian view that *all* international crimes 'shock the conscience' of humanity to such an extent that their criminalization is self-evident, and instead understand the international arena as site for moral pluralism.[511] From that perspective, the rule of law is necessary for promoting predictability and accountability in the exercise of power within a society beset by moral differences.[512]

Overall, while the integration of morality and criminal law has gained popularity within the ICL community of practice, especially among NGOs and some academics and practitioners, it has been significantly challenged in recent years by other legal experts. The latter have stressed the importance of the narrow and predictable application of criminal responsibility laws not just for protecting the defendants' rights, but also for upholding ICL's integrity. The significant dissonance between different sets of shared understandings with the ICL community stems from the dual nature of international criminal justice – on the one hand, ICL rests on collectivist sentiments, on the other hand, it relies on liberal individualism in order to operationalize the idea of criminal responsibility for mass crimes in practice.[513] The debate on whether morality alone provides sufficient notice in ICL or not marks a division within the ICL community of practice, which has been largely overlooked in the literature, but is of crucial

[507] Aksenova 2019:88. See also Luban 2018:135-136. Dubber 2011:926.
[508] Robinson 2008:926.
[509] Robinson 2013a:142, emphasis omitted.
[510] Jackson 2016:893.
[511] Roth 2010:285.
[512] Ibid.:236.
[513] G. Fletcher 2002.

importance for understanding the interpretation and contestation of individual criminal responsibility laws.

3.4. Conclusion

The main contribution of this chapter was to analyse in detail the multiple dimensions of the normative environment within which ICL norms are articulated, contested and justified. For simplicity, the analysis has outlined opposing sets of shared understandings, but in practice those sets often overlap as will be demonstrated in the following chapters. Some members of the ICL community of practice evoke customary international law and teleological reasoning to identify a law on the basis of which the defendant could be convicted not only because they share a humanitarian concern for the victims' welfare, but also because they appear to have already made a moral judgement about the defendant's guilt. Others cherish procedural clarity not only because it protects ICL's integrity but also because of their previous experience in highly categorized domestic criminal law systems, where legal principles are followed strictly. The schisms between sets of shared understandings also cut across different types of actors within the ICL field. For example, some legal scholars favour the technical application of criminal law principles in ICL, while others are willing adopt human rights approaches for the purpose of punishing *international* crimes. Furthermore, respect of the defendants' rights has been advocated not only by states, but also by some legal experts on the grounds that the principles of criminal law could protect ICL from excessive politicization more effectively than if legal decisions were guided by moral standards.

The analysis went beyond the commonly identified tension between human rights and criminal law norms to highlight that the latter itself does not present a unified set of shared understandings. Some disagreements among criminal law experts gain particular prominence at the international level, where the purpose of punishment exceeds retribution and includes more ambitious socio-pedagogical goals.[514] Notably, contrary to the 'maturation' thesis, the discussion showed that while the legal epistemic community shares a commitment to the broadly defined principles of criminal law, those principles do not constitute a clear objective standard against which international adjudication can be assessed. Instead, according to the

[514] Drumbl 2007. Ambos 2013:68-72.

'practice' framework, the meaning of criminal law principles, such as legality and culpability, is constantly subjected to interpretation and contestation within the legal field.

Overall, the members of the ICL community of practice have been united by virtue of their shared understandings that the perpetrators of mass atrocities should be held criminally responsible and that their punishment should be determined in accordance with the principles of liberal trials. Beyond that consensus, however, significant competition of ideas exists within the ICL field about the meaning and scope of the legal norms that regulate the assessment of the defendant's guilt or innocence. The diversity of opinion constitutes both a challenge and a favourable development for international courts and tribunals. On the one hand, the ICC cannot satisfy the often-conflicting demands of all members of the ICL community of practice. On the other hand, the availability of various sets of shared understandings regarding individual criminal responsibility for mass atrocities enables the court to choose between a broader set of approaches that would be recognized as sound legal reasoning, and thus within the remit of the 'legalism' norm that binds the ICL field, by at least some members of the ICL community of practice.[515] Critical scholars have observed that this could lead to justifying 'illiberal or hegemonic excess' of ICL.[516] But the 'practice' framework of international law suggests that completely idiosyncratic interpretations of the law, even if attempted by the judges, would likely meet significant criticism. As the following chapters discuss, despite the differences of opinion on the relationship between morality and legality at the post-Second World War tribunals, the UN tribunals, and the ICC, all of those institutions have exhibited a stable line of legal reasoning with respect to the assessment of criminal responsibility.

[515] Vasiliev 2017.
[516] Kiyani 2017:93.

4. ICL BEFORE ROME: COMMON LAW INFLUENCE AND THE MERGING OF MORALITY AND LEGALITY

Over time, specific legal theories or doctrines, known as 'modes of liability', that enabled the attribution of criminal responsibility to the accused if certain requirements were met, were developed in ICL practice. This chapter begins with an analysis of the IMT and IMTFE judgments, which placed the foundations of individual criminal responsibility in international law following the end of the Second World War. The analysis proceeds with the UN tribunals for the Former Yugoslavia and Rwanda, established in the 1990s, which significantly developed the legal norms regulating the attribution of individual criminal responsibility for mass atrocities.

4.1. The early days of ICL: the Nuremberg and Tokyo military tribunals

For the first time in international law, individual criminal responsibility was enforced at the Nuremberg IMT following the end of World War II.[517] While some aspects of the post-war trials, especially the limited case selection, appeared strongly influenced by the interests of the victorious Allies, a closer look reveals a discernible line of legal reasoning behind the judgments. That reasoning resonated with the set of shared understandings which dominated the emerging ICL community of practice, namely, that the perpetrators of atrocities should not go unpunished, even if that required a significant degree of judicial creativity in determining the applicable law. The IMT and IMTFE judges adopted an outcome-oriented *understanding* of the legality principle, according to which the law should not be applied in a technical manner, regardless of the consequences, but should aim to deliver substantive justice.

4.1.1. State politics and the birth of ICL

The IMT at Nuremberg and the IMTFE at Tokyo were established after the end of the Second World War. The IMT Charter that was annexed to the 1945 London Agreement vested the tribunal with jurisdiction over crimes against peace, war crimes and crimes against humanity.[518] The IMTFE was created by an order by the Allied Powers' Supreme Commander,

[517] *IMT Nuremberg Judgment*:466.
[518] Cassese 2002:7.

US General Douglas MacArthur, and had the same subject matter jurisdiction like the IMT.[519] The post-war tribunals largely constituted an 'American creation'.[520] The US contributed to the Nuremberg enterprise financially and with logistical support.[521] Similarly, the Tokyo tribunal was 'completely dominated by American personnel, finances, and ideology'.[522]

The influence of the political interests of the Allies were easily observable in the tribunals' limited jurisdiction. The IMT was specifically created for the 'trial and punishment of the major war criminals of the European Axis countries'.[523] Therefore, despite the efforts of the Nuremberg Defence, the Allies' conducts, such as the deliberate air attacks against civilians in Hamburg and Dresden or the use of the same types of unrestricted submarine warfare as the Axis, could not be raised at the trial.[524] One of the most contentious issues at the IMT was the presence of the Soviet judge on the bench that would adjudicate on the Axis's acts of aggression, when the Soviets had themselves invaded Poland in 1939 and later on – Finland.[525] Similarly, at the IMTFE, which was led by a US prosecutor, the fact that the American use of atomic bombs was not subject to adjudication raised concerns for one-sided justice.[526] In fact, one of the IMTFE judges, Justice Pal, dissented from the Tokyo Judgment, criticising the idea of having the victorious parties judge the vanquished nations.[527]

The selection of individual accused also revealed the influence of state interests on the post-war proceedings.[528] For instance, the decision to drop the Italian names from the list of suspects seemingly reflected the decreasing concerns about the Italian threat after Mussolini's death and the potential difficulties of proving unambiguously Italy's guilt for the war.[529] Much criticism also raised the decision not to indict the Japanese Emperor for waging an aggressive war, which appeared to reflect the Allies' considerations for rebuilding a stable Japan. It was

[519] Kaufman 2010:754-757.
[520] Bass 2000:150.
[521] Danner 2006:8-9.
[522] Kopelman 1991:389-390.
[523] *Nuremberg Charter*: Article 1.
[524] Tomuschat 2006:833, Borgwardt 2007:230-231
[525] Borgwardt 2007:230.
[526] Nesiah 2016:106. Borgwardt 2007:230.
[527] *IMTFE, Judge Pal's Dissent*: 215.
[528] De Vlaming 2012:543. Gattini 2009:113.
[529] Hedinger 2016:540.

hoped that as the symbol of the nation, the Emperor would participate in the restoration process.[530]

Finally, the selection of the charges against the accused also appeared to reflect the Allies' interests. The Nuremberg prosecutors mainly focused on crimes against peace because those crimes had most greatly affected the population of the Allies, rather than the crimes against humanity that were committed against the European Jews.[531] The Tokyo trial similarly centred around crimes against peace, despite the evidence of other Japanese wartime atrocities.[532]

Overall, the influence of the Allied governments, and especially the US, over the establishment and the operation of the post-war tribunals and the selection of defendants and charges was significant. Yet, as the following section suggests, a closer look at the Nuremberg and Tokyo judgments reveals that alongside the influence of state politics a line of distinctive legal reasoning is also observable at the tribunals. That legal reasoning resonated with the emerging debates within the still nascent epistemic community of ICL. In fact, the US influence over the tribunals was not manifested solely in terms of political power. Rather, the key role of US lawyers who brought their national expert knowledge into the ICL epistemic community enhanced the role of common law ideas about criminal responsibility in the post-war jurisprudence.

4.1.2. Legal reasoning: justifying the trials

The IMT's power to exercise jurisdiction over individual persons was derived partly from occupation law.[533] Yet, to avoid allegations of victors' justice and demonstrate the legality of their judgment, the judges made significant efforts to convince the defence and the international audience that: 'The [IMT] Charter is not an arbitrary exercise of power on the part of the victorious nations, but […] it is the expression of international law existing at the time of its creation'.[534] To prove the pre-existing criminalization of aggression, the IMT heavily relied on

[530] De Vlaming 2012:546
[531] Borgwardt 2007:223.
[532] Totani 2011:147-148.
[533] Jescheck 2004:39.
[534] *IMT Nuremberg Judgment*: 461

the 1928 Kellogg-Briand Pact that renounced the use of war as a tool for resolving international disputes.[535]

However, establishing the IMT's jurisdiction over individual persons on a basis other than occupational law was considered controversial by view of the legality principle, i.e. the requirement that the law should provide 'fair notice' about which conducts attract individual criminal responsibility. The Kellogg-Briand Pact renounced aggressive war waged by *states* but did not include a provision for prosecuting the *individual leaders* of aggressive states.[536] Hence, at Nuremberg the illegality of state practice was often interpreted to imply the criminality of individual conduct.[537]

The IMT judges' creative findings on criminal responsibility laws seemed to be guided by a strong moral impulse to punish the former Nazi generals for the horrors of the war. The Nuremberg Judgment proclaimed that:

> the maxim nullum crimen sine lege is … a principle of justice. To assert that it is unjust to punish those who … have attacked neighboring states without warning is obviously untrue, for in such circumstances the attacker *must know* that he is doing wrong, and so far from it being unjust to punish him, it would be unjust *if his wrong were allowed to go unpunished*.[538]

Consequently, the Nuremberg Judgment did not reject the legality principle per se, but understood the principle in specific manner, namely, that if legality prevented substantive justice from being delivered, it was not a principle of justice, but merely a technical rule devout from moral value. The IMT judges considered legality to be satisfied by view of the horrendous nature of the crimes, which should have provided notice to the accused that those crimes were criminal, despite the scarcity of pre-existing codified law. That line of reasoning was later followed by the IMTFE[539] and the domestic trials against Nazi fugitives, including Eichmann, Barbie, and Finta.[540] The judges in those trials, that marked the birth of ICL, considered that the principles of criminal should not be followed blindly, with disregard of the broader context of the trials.

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[535] *IMT Nuremberg Judgment*: 460:461. May 2008:147.
[536] May 2008:147. Tomuschat 2006:833. See also Jescheck 2004:41.
[537] Van Schaack 2008:128-129.
[538] *IMT Nuremberg Judgment*:462, emphasis added.
[539] *IMTFE Judgment*:[48]438-439.
[540] Lamb 2002:739-740.

Notably, the reasoning of the judges resonated with the views expressed by members of the nascent ICL community of practice outside the tribunals. Many legal philosophers at the time, including persons who held competing understandings of the law such as Fuller, Hart, and Gustav Radbruch,[541] and state officials, such as Henry L. Stimson, accepted the retroactive application as justified in order to prevent the perpetrators of mass atrocities to enjoy impunity.[542] More recent commentaries on the Nuremberg process similarly called a 'travesty of justice' the possibility of letting the leaders of aggressive states to avoid punishment 'merely because no one had previously been convicted of crime against peace'.[543] Hence, the broad interpretation of legality was justified because even before the trial, the Nazi officials were perceived as evidently guilty.[544] Similarly, despite the seeming presumption of the defendants' guilt, the IMT and IMTFE judges did not reject the principle of personal culpability, thus, demonstrating commitment to legalism. But they interpreted it in a broad way, so as to establish a *link* between each defendant and the alleged crimes.

4.1.3. Legal reasoning: modes of criminal responsibility

4.1.3.1. Nuremberg

As novel institutions, the post-war tribunals faced not only the question whether they could prosecute the Axis officials, but also how to establish their criminal responsibility in accordance with the law. Colonel Bernays from the US Department of War proposed that the unique magnitude of the Nazi crimes required a special theory of liability, that would reflect the *collective* nature of the criminal conduct.[545] He came up with a strategy, based on two concepts unknown by then in international law: conspiracy and membership in a criminal organization.[546] Bernays proposed that the Nazi leadership would be charged with "conspiracy to commit murder, terrorism and the destruction of peaceful populations".[547] Bernays's strategy did not envision proof of an overt act on behalf of the defendant towards the realization of

[541] Fuller 1958. Hart 1958:619-620. Radbruch 2006[1946].
[542] Stimson's remarks were quoted in the *'The Justice Case' Judgment*:975.
[543] Bassiouni and Ferencz 2008:214.
[544] McGoldrick 2004:461. See also Shklar 1964:160. Meron 1995:109-110.
[545] Van Sliedregt 2012a:22-23.
[546] Yanev 2015:426.
[547] Quoted in Yanev 2015:427.

specific crimes. Rather, the mere membership in the conspiracy was deemed sufficient for the allocation of criminal responsibility for the crimes committed in the course of its implementation.[548]

The 'conspiracy' concept triggered controversies during the London negotiations. Bernays drew on the Anglo-American tradition, that recognized the notion of conspiracy, but the French and the Soviet representatives who were trained in civil law, reportedly expressed strong disapproval of the broad concept of conspiracy that diluted the link between the accused and the crime.[549] Yet, the US delegation was unwilling to abandon the conspiracy concept and eventually, the notion was included in the IMT Charter.[550]

Nevertheless, the IMT judgment handed the notion of conspiracy cautiously. The judges restrained the scope of the conspiracy charge, by determining that it required the existence of a concrete plan for waging war with clearly outlined criminal purposes. Furthermore, the judges considered that only those defendants who had had direct contact with Hitler and had participated knowingly in the preparation of the plans after 1937 could be held liable for conspiring to wage an aggressive war.[551] Hence, despite the broad language of the Charter, the IMT judges sought to establish a more concrete link between the defendants and the crimes, apart from those persons' mere participation in the conspiracy, thus, demonstrating the IMT's commitment to legalism. Only eight of the twenty-two defendants charged with conspiracy were found guilty on that basis. [552]

The IMT judges showed further restraint in the interpretation of the other form of criminal responsibility included in the IMT Charter – participation in a 'criminal organization'.[553] The Charter's drafters criminalized organizational membership per se, without inquiry into the mental state, or the personal culpability, of the accused in relation to the crimes committed by the respective organization.[554] But the judges decided to restrict the application of criminal organization liability only to those persons who had had 'knowledge of

[548] Yanev 2015:427. Van Sliedregt 2012:22-23. Boister 2010:427.
[549] Dubber 2006:1323.
[550] Van Sliedregt 2012a:23.
[551] Boister 2010: 428. Ambos 2013:110.
[552] Danner and Martinez 2005:116.
[553] Elda 2013:332-333.
[554] Jescheck 2004:44-45.

the criminal purposes or acts of the organization', despite the absence of such requirement in the Charter.[555] While the concept of criminal organizations still casted a broad net of liability, the judges demonstrated restraint in its application by view of the culpability principle.

The judges' reasoning found approval within the broader ICL community of practice at the time.[556] Even Hans Kelsen, who otherwise expressed reservations regarding the IMT, commended the judges' attempts to restrict liability for membership in criminal organizations.[557] More recently, several legal scholars have commented favourably on the IMT judges' decision to respect the culpability principle when interpreting the law on 'criminal organizations'.[558]

Overall, even though the IMT Charter nowhere mentioned that the attribution of criminal responsibility depended on the defendant's personal culpability, the IMT judgment underlined that: 'criminal guilt is personal, and that mass punishment should be avoided'.[559] Legal scholars observed that by restricting the controversial modes of liability the IMT delivered convictions without leaving 'any doubt' to the defendants' culpability.[560] As observed by Kirchheimer, despite the influence of the political and military context on the establishment of the Nuremberg tribunal, the IMT was 'not a simulated trial' when it came to the decisions reached for the individual defendants.[561]

This is not to suggest that all Nuremberg judges were equally committed to the culpability principle. Some commentators considered that the Soviet judge, General Nikitchenko, saw the trial as means to *punish* the Nazi leaders, rather than to assess their guilt in accordance with the law.[562] But the final judgment recognized the importance of criminal responsibility principles, whether all judges shared that understanding or the majority simply won 'against the protests of the USSR judge'.[563]

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[555] *IMT Nuremberg Judgment*:500.
[556] Wrigth 1949:754.
[557] Kelsen 1947:166.
[558] Jain 2005:23, Van Sliedregt 2012a:30. Ambos 2003:246.
[559] *IMT Nuremberg Judgment*:500.
[560] Darcy 2007:399.
[561] Kircheimer 2015[1961]:340.
[562] Gallant 2008:79. Bass 2000:203.
[563] Kirchheimer 2015[1961]:334.

4.1.3.2. Tokyo

The legal reasoning underlying the interpretation of criminal responsibility laws in the Tokyo Judgment can also be clearly discerned, albeit the latter appeared more controversial than the Nuremberg judgment. Chief Prosecutor Keenan relied on the conspiracy charge and alleged the existence of an inner-Japanese conspiracy that aimed to wage aggressive wars in order to dominate East Asia and the Pacific. According to the prosecutor, the Japanese government officials that participated in the conspiracy were responsible for all conducts performed by themselves of by any other person in the execution of the plan.[564] All but two of the 28 defendants were convicted on the conspiracy charge at Tokyo.[565] The reliance on conspiracy to attribute criminal responsibility to such a broad range of defendants, without clearly distinguishing between the degree of responsibility of the different participants within the conspiracy appeared problematic by view of the culpability principle.[566]

The availability of evidence illuminates the question why the IMTFE relied more extensively on the conspiracy charge than their colleagues at Nuremberg. There was abundant evidence documenting the conducts of the Nazis.[567] By contrast, the IMTFE faced the 'difficulties of establishing individual responsibility for action in extensive, complex, fluid and opaque decision-making processes'.[568] Consequently, many commentators explained the decision of the Tokyo judges to rely on the conspiracy charge with their attempts to prove the indirect connection between the accused and the crimes by, firstly, establishing the accused's connection to the conspiracy and then using their membership in the conspiracy as an indication of that person's culpability for the crimes that were committed pursuant to the conspiracy.[569]

Another factor, that may have influenced the difference in the approaches of the Nuremberg and the Tokyo tribunals was the significant US influence over the latter. The restrained use of conspiracy at the IMT was as a 'partial victory' for the French judge Donnedieu de Vabres[570] who reportedly felt uncomfortable with that common law concept.[571]

[564] *IMT Indictment*:1. Boister 2010:429.
[565] Van Sliedregt 2012a:26.
[566] Boister 2010:438. Ambos 2013:111.
[567] Combs 2010:6.
[568] Boister 2010:431.
[569] Sellars 2010:1093-1094. See also Hedinger 2016:512. Boister 2010:431.
[570] Gallant 2008:117.
[571] Ibid.:127.

The fierce criticism of the German defence lawyers against the conspiracy charge may have also propelled the Nuremberg judges to exhibit restraint when employing it.[572] Despite the dissent of the French Judge at the IMTFE who found the conspiracy charge problematic because it obscured the nature of the *individual's participation* in the crimes,[573] the IMTFE Majority Judgment left 'untouched' the 'broad character and Anglo-American features' of conspiracy.[574] Nevertheless, the IMTFE Majority demonstrated certain restraint in the employment of the conspiracy charge. Even though the judges accepted the existence of the inner-Japanese conspiracy charge, they dismissed the charge of the alleged broader German-Japanese conspiracy to secure domination over the world.[575]

In addition to conspiracy, the IMTFE relied on a mode of liability that was not explicitly employed at Nuremberg – the principle of command, or superior responsibility. For the purpose of clarity, the remainder of this thesis will use the term 'command responsibility'.[576] The norm of holding military commanders accountable for the discipline and conducts of their troops has been traced centuries back in history.[577] The Tokyo tribunal extended the principle to hold accountable civilian superiors,[578] including cabinet ministers.[579] As construed by the IMTFE Judgment, command responsibility required that the defendants knew or *should have known* about the crimes that were committed by their subordinates, by virtue of their position in charge.[580] In other words, the judges determined that mere negligence on behalf of the commander was sufficient to punish that person for the crimes of their subordinates.[581]

The decision to extend the scope of command responsibility triggered criticism from legal experts by view of the culpability principle.[582] A particularly controversial judgment was that of the former Japanese Foreign Minister Koki Hirota who failed to prevent war crimes committed by Japanese troops. The Majority Judgment concluded that Hirota's 'inaction

[572] Ambos 2013:110.
[573] *IMTFE, Judge Bernard's Opinion*:4-5. Cohen and Totani 2018:392.
[574] Van Sliedregt 2012a:26.
[575] Hedinger 2016:512.
[576] For an analysis of the 'command'/'superior' responsibility terminology, see Mettraux 2006:144.
[577] Jia 1998:326-327.
[578] Cryer 2010:160.
[579] Boas, Bischoff and Reid 2008:156.
[580] Cryer 2015:64. Levine 2007:64, Lippman 2001:19.
[581] Jia 1998:334.
[582] Ambos 2002:831.

amounted to criminal negligence'.[583] Hirota's judgment was criticised for ignoring the accused's inability to do much about the crimes, because the perpetrators thereof had actually worked for another ministry.[584] According to one commentator, Hirota's death sentence alleviated the sense of personal responsibility on behalf of the military leaders for the atrocities.[585]

The rationale behind the decisions of IMTFE Majority to resort to command responsibility appeared to be the same as their reliance on the conspiracy charge – unlike Nuremberg where there was evidence of the *direct* orders of high-level accused towards their subordinates to commit crimes, at Tokyo the judges had to find a tool to establish the *indirect* link between the leadership level and the crimes.[586] This is illustrated in the IMTFE Majority's attempt to justify their reasoning:

> … the Tribunal heard evidence … to atrocities committed in all [theatres] of war on a scale so vast, yet following so common a pattern in all [theatres], that only one conclusion is possible – the atrocities were either secretly ordered or wilfully permitted by the Japanese Government …[587]

The reasoning of the Tokyo Judgment reflects the shared understanding within the nascent ICL community of practice that the concept of 'culpable conduct' had to be interpreted broadly in order to avoid impunity for the crimes committed during the war. The IMTFE Majority's intuition was that the crimes were orchestrated from above and, consequently, that the defendants were culpable. From that perspective, to interpret the law narrowly and acquit guilty individuals would have constituted an injustice.

Nevertheless, some of the Tokyo judges displayed uneasiness with the broad scope of command responsibility by view of the culpability principle. Judge Bernard accepted that negligent commanders can bear criminal responsibility but noted that their responsibility should not be treated as responsibility of equal gravity with that of the 'immediate author' of the crimes.[588] As will be discussed, the command responsibility principle continued to trigger debates among the judges with respect to the culpability principle decades later, at the ICC.

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[583] *IMTFE Judgment*:[49]791.
[584] Boas Bischoff and Reid 2008:156.
[585] Minow 1998:41.
[586] Cryer 2015:60. Bonafe 2007:601.
[587] *IMTFE Judgment*:[49]592.
[588] *IMTFE, Judge Bernard's Opinion*:15.

4.1.4. The legacy of the post-war judgments

The IMT and IMTFE charters lacked a general provision on individual criminal responsibility but instead mentioned various forms of participation in specific criminal offences in 'a seemingly accidental way'.[589] For instance, Article 6(a) IMT Charter proscribed the 'planning, preparation, initiation or waging' of aggressive war.[590] Nevertheless, the post-war jurisprudence placed the foundations for the subsequent development of individual criminal responsibility laws at the ICTY and ICTR and eventually at the ICC. Two important legacies of the post-war trials can be identified.

Firstly, the post-war judgments demonstrated the ICL's struggle to link high-level defendants to the atrocities committed on the ground in a legally convincing manner.[591] The conspiracy charge offered a tool for linking the leadership to the crimes that resonated with the popular intuition of international as a collective endeavour.[592] Likewise, the idea that the position of authority renders commanders accountable for the conduct of their subordinates is 'inherent in the very institution of armed forces'.[593] Consequently, when after fifty years of inactivity international trials were held again in the 1990s, remnants of the conspiracy charge and the command responsibility principle reappeared in ICL jurisprudence.

Secondly, despite the attempts of civil law lawyers to circumvent this, the IMT and the IMTFE remained influenced by the common law approach to assessing individual criminal responsibility, that rested on the idea of a 'partnership in a crime' as foundation for attributing liability and displayed certain disregard for the distinction between principals and accessories to the collective crime.[594] Both tribunals adopted a 'unitary' approach to perpetration that did not distinguish between principles and accessories to the crime.[595] As will be discussed, due to the significance of the Nuremberg Judgment and the subsequent US trials against Nazi officials,[596] the unitary criminal responsibility model had long-lasting impact on ICL.

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[589] Eser 2002b:784.
[590] *Nuremberg Charter*: Article 6(a).
[591] Cohen and Totani 2018:513-514.
[592] Ohlin 2007:86-87.
[593] Jia 1998:326-327.
[594] Olásolo 2009a:272-273. Ohlin 2014:109-110.
[595] Eser 2002b:784.
[596] For an analysis of those trials see Heller 2011.

4.1.5. Conclusion

Once the notion of the 'law' is unpacked and examined with reference to the shared understandings held within the community of lawyers and diplomats during the post-war period, one can discern the legal reasoning, and not just the state influence, behind the Nuremberg and the Tokyo judgments. The modes of liability used at those tribunals may appear sweeping, but the emerging ICL epistemic community nevertheless accepted those modes as legitimate for the time being, on the grounds of moral arguments, such as the perceived need to avoid impunity for the Axis's wartime atrocities. Another important factor was the influence of common law lawyers in the drafting and interpretation of the Nuremberg Charter. From a common law perspective, the 'conspiracy' concept appeared less controversial by view of the culpability principle than from a civil law perspective. In fact, several years after the Nuremberg Judgment, the *Pinkerton* conspiracy became an accepted doctrine in US domestic law.[597] Furthermore, despite the moral impulse to punish the perpetrators of war-time atrocities, the IMT and IMTFE judges did not completely disregard the principle of culpability and interpreted in a restrained manner the notions of 'conspiracy' and 'criminal organization' membership. It appeared that the judges at the post-war tribunals, rather than the states which drafted the charters, were the ones who displayed regard for the criminal responsibility principles and the defendants' rights.[598]

4.2. Post-Cold War: the ICTY and ICTR

The IMT Judgment introduced the individual criminal responsibility principle in ICL but the first thorough analysis of the laws regulating the attribution of liability for mass atrocities took place five decades later, at the UN tribunals. The ICTY and ICTR judges faced the arduous task to fill the significant gaps in the laws on criminal responsibility. During the early days of the UN tribunals in the 1990s, the judges often resorted to creative interpretations of the law to prevent the perpetrators of atrocities in the Former Yugoslavia and Rwanda to enjoy impunity simply because the legal framework was insufficiently developed at the time. However, when

[597] Yanev 2015:429.
[598] Gallant 2008:68.

a coherent ICL body developed, members of the community of practice both within and outside the tribunals began expressing concerns that the judges should interpret the culpability principle in a more narrow and predictable manner.

4.2.1. Putting 'flesh on the bones' of ICL

The ICTY was established by UN Security Council Resolution 827 of 25 May 1993[599] and the ICTR, a year later, with Resolution 955 of 8 November 1994.[600] Some commentators attributed the tribunals' creation to the sense of moral 'guilt' of the global powers for failing to intervene and stop the conflicts in the Former Yugoslavia and Rwanda.[601] The Rwandan genocide, in particular, became a symbol of 'the international community's indifference to massive human suffering'.[602] The time pressure to respond to the atrocities precluded significant deliberations on the applicable law. The urgent task of drafting the ICTY Statute was delegated to the Secretary General Boutros Boutros-Ghali and triggered surprisingly little state interest.[603] Subsequently, the ICTR Statute was drafter closely to the ICTY one.[604]

Even though its foundational principles were codified after the Nuremberg proceedings,[605] the ICL system did not advance significantly during the Cold War. The UN tribunals' statutes were not of particular assistance either. Drafted under time pressure by the Secretary General, the ICTY and ICTR Statutes included little more than general categories of crimes.[606] But instead of surrendering the attempts to end impunity by view of the lack of applicable law, the UN tribunals' judges engaged in 'full-scale refashioning of ICL'.[607]

Given the scarcity of pre-existing codified law, the judges turned to alternative sources of law in developing ICL. Commentators observed that customary international law was used at the tribunals 'as a springboard for judicial creativity'.[608] In the tribunals' early days, the term

[599] *UN Security Council Resolution 827*.
[600] *UN Security Council Resolution 955*.
[601] Schiff 2008:43-44. See also Zacklin 2004:542.
[602] Peskin 2008:155.
[603] Danner 2006:19-22.
[604] Danner 2006:23.
[605] *IMT Principles of International Law.*
[606] Grover 2010:547. Galand 2019:93.
[607] Van Schaack 2008:123.
[608] Powderly 2010:31.

'laws or customs of war' was often interpreted 'in the broadest possible sense' for the purpose of deriving applicable law.[609] The same has been observed with respect to the UN tribunals' findings on the existence of general principles of law laid down by major legal systems.[610] On occasion, the UN tribunals appeared to: 'manipulat[e] the process of abstraction of legal rules from national legal systems, so as to *create* a legal principle apt for settling the legal issue at hand'.[611] Faced with the potential *non liquet* scenario, i.e. lack of applicable law, the UN tribunals' judges engaged in a practice akin to 'judicial legislation'.[612]

This activist approach towards developing ICL appeared to be grounded in a shared understanding among the judges that: 'the principles of legality in international criminal law are different from their related national legal systems' because of the distinctive nature of international crimes.[613] The '*immorality* or appalling character' of mass atrocities was considered so great that it should have provided the accused with fair notice that the act was criminal, regardless of the lack of pre-existing codified law proscribing that act.[614] The judicial reasoning behind the early UN tribunals' judgments also appeared to be influenced by a concern for the interest of victims to see justice being served.[615] The ICTY situated itself not merely as a criminal court, but as a 'guardian' of 'humanity' within the international political context dominated by sovereign states.[616]

This is not to say that the UN tribunals disregarded the criminal responsibility principles. Like their IMT colleagues, the UN tribunals' judges proclaimed the culpability principle to be 'the foundation of criminal responsibility'.[617] Furthermore, even though the UN tribunals' statutes did not address the accused's *mens rea*, the judges considered the requirement that the accused had acted with a guilty mind an essential element of criminal responsibility.[618] Hence, the UN tribunals' judges recognized legality and its constitutive principles as 'the solid pillars' of the criminal justice system.[619] But they were generally guided by the shared understanding

[609] Lamb 2002:744.
[610] Boas 2010:204.
[611] Raimondo 2010:52, emphasis added. See also Mantovani 2003:27-28. Bantekas 2006:129.
[612] Darcy 2010:320.
[613] *Čelebići Trial Judgment*: ¶405. See also the ICTR in *Karemera et al. Judgment*:¶43.
[614] *Milutinović et al. Ojdanić's Motion Decision*:¶42, emphasis added.
[615] G. Fletcher 2011:185-187.
[616] Corrias and Gordon 2015:103.
[617] *Tadić Appeals Judgment*:¶186.
[618] Schabas 2003a:1018.
[619] *Trial Judgment Čelebići*:¶402.

that at the international level, the preservation of justice and fairness towards the accused had to be '*balance[d]*' against 'the preservation of world order'.[620] Hence, the UN tribunals had a 'political' project, in the sense that they promoted a specific vision of legalism and international criminal justice.

Furthermore, while from the perspective of criminal law, the tribunals' judges may have interpreted the legality principle too broadly, from the perspective of public international law that was not necessarily the case. One of the former ICTY presidents opined that, compared to international courts such as the International Court of Justice, the ICTY took an 'essentially conservative and traditional approach' towards the identification of the law that did not conflict with legality.[621] It has been observed that the first legal practitioners to engage with ICL in the 1990s mostly came from backgrounds in human rights law and international humanitarian law, which may have influenced their understanding of the limitations imposed by the criminal responsibility principles.[622] As more judges with background in domestic criminal courts became appointed to the ICTY over the years,[623] the practice of interpreting the law at the tribunal came to be conducted in a more restrained manner.[624] Yet, many of the milestone early-days decisions of the UN tribunals were described as 'paradoxical' from the defendant-oriented perspective of criminal law.[625]

Nevertheless, the creative reasoning exhibited at the UN tribunals was generally justified as appropriate, considering the *circumstances at the time*, namely, the perceived need to develop a system offering legal protection from human rights violations that was actively supported in the 1990s.[626] NGOs and human rights advocates saw international trials as a potential contributor to the psychological welfare of the victims and the societal reconciliation within the affected communities.[627] From the perspective of the human rights organizations monitoring the conflict areas, there was little doubt in the responsibility of certain leadership figures who had 'orchestrat[ed]' the crimes.[628] Similar to the IMT context, rendering impunity

[620] Ibid.: ¶405, emphasis added.
[621] Meron 2005:821.
[622] Robinson 2008:928.
[623] Swigart and Terris 2013:632.
[624] Danner 2006:32. See also Wessel 2006:395.
[625] Darcy 2010:331.
[626] Swart 2010:769.
[627] Amnesty International 1994a:7.
[628] Amnesty International 1994b:1. See also Hazan 2004:13.

for those persons due to the lack of applicable law would have hardly constituted a satisfactory outcome for the UN tribunals' global audience, considering the media publicization of the atrocities in the Former Yugoslavia and Rwanda.[629] From that perspective, the UN tribunals' creative interpretation of the law was perceived as 'necessary' for the purpose of responding to the challenges of modern inter-ethnic conflict.[630]

States were similarly looking forward to successful prosecutions. Supporting the operation of the UN tribunals was expensive.[631] Given the high cost of international proceedings, a significant rate of acquittals at the UN tribunals was 'apt to play poorly' in the Western countries that provided 'the bulk of the tribunals' financial and enforcement support'.[632]

Many legal scholars and practitioners recognized the implications of the tribunals' judicial activism with respect to the legality principle but, nevertheless, perceived that as a sound approach for developing a functional ICL system.[633] As often observed, the ICTY and the ICTR essentially 'put flesh on the bones of modern international law'.[634] In the words of one legal scholar, the UN tribunals' 'impressive achievements and contributions' to the ICL field can hardly be overestimated.[635] Given the scarcity of pre-existing applicable law, it was considered understandable that the tribunals would not be 'the best venue for the expression of a heartfelt belief in the fundamental applicability of legal positivism'.[636] Nevertheless, as will be discussed in the next section, once the foundations of ICL jurisprudence were put in place, many legal scholars from criminal law background became increasingly critical of the tribunals' practices.

4.2.2. Developing modes of liability

The UN tribunals' statutes contain two general provisions on individual criminal responsibility. Article 7(1) ICTY Statute and Article 6(1) ICTR Statute, respectively, provided

[629] Hazan 2004:8-9.
[630] Wagner 2003:352.
[631] Zacklin 2004:543. See also Brannigan 2011:422. Stephen 2012:60.
[632] Combs 2010:232.
[633] Van Sliedregt 2012a:14. Danner 2006:52. Schabas 2006:236.
[634] Grover 2010:547. See also Fenrick 1998:197.
[635] Sluiter 2016:117.
[636] Powderly 2010:18.

that those persons who 'planned, instigated, ordered, committed or otherwise aided and abetted' a crime' were liable for punishment.[637] The judges' interpretation of the term 'committed' under Article 7(1)/6(1) and the development of the 'joint criminal enterprise' (JCE) doctrine triggered significant debates regarding the appropriate scope of liability for international crimes both within and outside the tribunal. Next, Article 7(3) ICTY Statute and Article 6(3) ICTR Statute, respectively, codified the command responsibility principle by stipulating that commanders who 'knew or had reason to know' that their subordinates were about to commit or had already committed crimes, and 'failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof' were liable for punishment.[638] The following sections examine the interpretation and application of JCE and command responsibility at the UN tribunals.

4.2.2.1. 'Joint criminal enterprise'

JCE was first articulated in 1999 by the *Tadić* AC. The judgment became famous for the AC's 'landmark general findings' on the applicable legal norms, including those regulating the attribution of criminal responsibility.[639] After the 1999 *Tadić* appeal judgment, the JCE doctrine, or mode of liability, was used in many ICTY trials and some ICRT cases to establish the acused's criminal responsibility.[640]

In *Tadić*, the judges faced the familiar challenge of establishing *individual* guilt for a *collective* crime. There was evidence of the accused's presence at the scene of the crimes but not of his direct participation in their commission.[641] Duško Tadić was a member of the armed group that entered the village of Jaskići and killed five Muslim men, but it was not clear that Tadić had personally killed those men.[642] The judges at Nuremberg and Tokyo previously relied on the 'conspiracy' charge to link individual persons to the collective criminal conduct, but that approach proved highly controversial for many criminal lawyers, especially civil law practitioners. By contrast, the *Tadić* AC decided to develop a new mode of liability that would link the accused to the group crime.

[637] *ICTY Statute*: Article 7(1). *ICTR Statute*: Article6(1).
[638] *ICTY Statute*: Article 7(3). *ICTR Statute*: Article6(3).
[639] Sassòli and Olson 2000:734.
[640] Van Sliedregt 2007:184.
[641] *Trial Judgment Tadić*: ¶673.
[642] Ibid.: ¶373.

The AC judges evoked a teleological, or purposive, interpretation of the ICTY Statute. The judges reasoned that since the ICTY Statute aimed to extend its jurisdiction over '*all*' persons responsible for international crimes, its reach cannot be limited only to those persons who physically committed the crime.[643] Consequently, the AC concluded that the term 'committed' under Article 7(1) covered not only direct, or physical commission of a crime, but also 'participation in the realisation of a *common design or purpose*'.[644] Since the ICTY Statute did not specify the elements of the new mode of liability that would become known as 'joint criminal enterprise', the judges resorted to customary international norms for that purpose.[645] The AC concluded JCE required a) a plurality of persons, b) the existence of a 'common plan, design or purpose which amount[ed] to or involve[ed] the commission of a crime' and c) the accused's participation in the common design. Hence, under JCE the prosecutor did not have to prove that the accused had physically carried out the crime. Rather, the accused could be convicted for 'committing' a crime by merely providing 'assistance in, or contribution to, the execution of the common purpose'.[646]

The AC found that the notion of participation in a 'common design', or JCE, covered three scenarios. JCE I involved situations where all participants in the common design shared the intent to commit the crime and one or more of them physically perpetrated it. JCE II concerned crimes committed pursuant to a common design at concentration camps. Finally, under JCE III, a participant in a common design could be convicted for a crime that fell outside the scope of the common purpose, if that crime was committed by one of the group members and was 'foreseeable' by the accused.[647]

The statutory basis of JCE, and especially of its third scenario, was ambiguous. It was not straightforward that 'foreseeability' that a crime would be committed by a member of one's group fell within the meaning of the term 'committed' a crime codified in Article 7(1).[648] In fact, Article 7(1) already provided the judges with a list of applicable modes of liability, such as planning or ordering the commission of crimes, so the need for articulating a new one was

[643] *Appeals Judgment Tadić*:¶189, emphasis in the original.
[644] Ibid.: ¶188, emphasis added.
[645] Ibid.: ¶194.
[646] Ibid.: ¶227.
[647] Ibid.: ¶220.
[648] Powles 2004:611. Darcy 2007:384.

not obvious.[649] The foundations of JCE III in customary international law were also questionable.[650] Consequently, the articulation of JCE III appeared as the product of 'judicial creativity' by the *Tadić* AC.[651]

Nevertheless, many members of the ICL community of practice justified the development of JCE with the quest to end impunity for mass atrocities. One authoritative judge at the UN tribunals argued that the creative interpretation of Article 7(1) was permissible because the adoption of JCE was 'necessary for the fulfilment of the mission of the ICTY to administer international criminal justice'.[652] As specified by an expert group led by the ICTY's first president, JCE served to prevent individual perpetrators from escaping criminal accountability by hiding behind 'the fog of collective criminality'.[653] For that reason, JCE was defended as a 'useful tool' for holding criminally responsible those persons who were not directly involved in the violence on the ground, especially the 'high-level perpetrators that use their subordinates' to commit the crimes.[654]

Notably, the UN tribunals' judges considered that JCE did not violate the culpability principle. The ICTY 'took pains' to distinguish JCE from the IMT's broad concepts of conspiracy and criminal organizations.[655] The ICTY judges stressed that JCE was 'not a liability for *mere* membership or for conspiring to commit crimes'[656] because JCE required not only evidence of an agreement to commit crimes, but also proof of the commission of criminal acts in furtherance of that agreement.[657] Hence, the UN tribunals' judges sought to convince the ILC epistemic community that JCE was more compliant with the culpability principle compared to the conspiracy or organizational membership doctrines, because it required a more substantial link between the accused and the crimes.[658]

[649] Powles 2004:611. Ohlin 2007:74.
[650] Ohlin 2011:712. Darcy 2007:384. Powles 2004:616.
[651] Fletcher and Ohlin 2005:548.
[652] Shahabuddeen 2010:197.
[653] Cassese et al. 2009:294.
[654] Liu 2015:141.
[655] Eldar 2013:333, footnote 6.
[656] *Dragoljub Ojdanić's Motion Decision*: ¶26, emphasis added.
[657] Ibid.:¶23.
[658] Ohlin 2011:696. Gustafson 2007:140.

But a growing subgroup within the ICL epistemic community, who understood the principles of criminal law in ICL in a more restrained fashion, remained unconvinced that JCE, and especially its third variant, complied with the culpability principle.[659] Particularly controversial in that regard was the low *mens rea* requirement of JCE III. Legal scholars expressed concern that the attribution of criminal responsibility for crimes that were merely 'foreseeable' by the accused resembled the attribution of liability without proof of personal culpability.[660] JCE III treated so many persons as potential perpetrators that the doctrine experienced difficulties explaining 'why each fish caught deserves punishment for intentional wrongdoing'.[661] Hence, JCE was often called a 'catch-all concept',[662] with one academic proposing that the abbreviation JCE III stood for 'just convict everyone'.[663]

Furthermore, JCE's 'evisceration of the distinction between principals and accomplices' bothered many legal scholars concerned with the principle of fair labelling.[664] Participation in a JCE was considered a more serious form of liability than aiding and abetting a crime at the UN tribunals[665] but the judges did not appear to distinguish between the gravity of criminal responsibility under JCE III and that under JCE I or II.[666] Some academics reasoned that a person who merely foresaw the commission of a crime could be considered an aider but to define the participant in JCE III a 'principal' perpetrator breached the fair labelling principle.[667] There is a morally relevant difference, the argument goes, between the militia member who joined the enterprise, despite foreseeing the risk of the ensuing crimes, and the member who personally decided to torture civilians.[668] That line of criticism of JCE displayed a normative approach to criminal responsibility, according to which the terms 'principal' and 'accessory' denote the degree of the accused's blameworthiness.[669] As will be discussed in chapter 6, the ICC judges placed emphasis on the differentiation between the modes of liability.

[659] Interviews with Kevin Heller and Douglas Guilfoyle.
[660] Ambos 2007:174. See also Damaška 2008:352.
[661] Weigend 2008:477.
[662] Van Sliedregt 2007:1047. Ainley 2011:416.
[663] Badar 2006:302.
[664] Ohlin 2014:108. See also Farhang 2010:140. Robinson 2008:940.
[665] *Tadić Appeals Judgment*:¶229.
[666] Olásolo 2009a:286.
[667] Ambos 2007:168-169. Guilfoyle 2011:273. Werle and Burghardt 2014:305.
[668] Ohlin 2007:83.
[669] Werle and Burghard 2014:311. Jackson 2016:885.

The debates surrounding JCE were reminiscent of those around the conspiracy charge at Nuremberg. The low requirements of JCE and the lack of differentiation between the roles within the common enterprise, led the critics to conclude that the notion of conspiracy made a 'remarkable comeback' at the UN tribunals, 'wrapped in the cloth' of the JCE doctrine.[670] Also like the Nuremberg debates, the criticism of JCE often reflected the differences between civil and common law approaches to criminal responsibility. The central idea behind JCE, namely, the logic of collective perpetration, can be traced back to both common and civil law systems under different names, joint enterprise and co-perpetration, respectively,[671] but the notion of JCE is often associated in the ICL literature with the common law tradition.[672] In fact, the *Tadić* AC referred to the jurisprudence of the post-Second World War UK and US military courts and to the US *Pinkerton* doctrine in support of the existence of JCE.[673] Furthermore, many ICTY judges and legal officers were trained in common law, which has been said to have influenced their interpretation of JCE.[674] By contrast, legal scholars from civil law traditions strongly advocated for inserting a clear standard of differentiation between JCE I and JCE III,[675] or for substituting the doctrine with a more differentiative one altogether.[676]

Notably, some of the criticism of JCE came from within the UN tribunals.[677] In 2003, four years after the *Tadić* AC' articulation of JCE, the *Stakić* TC substituted JCE for the German-influenced doctrine of indirect co-perpetration, which posed the following requirements: (a) an explicit agreement or silent consent to accomplish a common goal, (b) coordinated co-operation, and (3) joint control over the crime.[678] The *Stakić* TC considered that their theory of co-perpetration came 'closer' than JCE to the plain meaning of the term 'committing' under Article 7(1) and, hence, was more compliant with the legality principle.[679] The TC appeared influenced by the German legal tradition, citing the work of the legal scholar Claus Roxin.[680] The professional background of the judges might have also influenced their decision to depart form JCE because the presiding Judge Schomburg previously served as a

[670] Van der Wilt 2007:96. See also Ohlin 2011:721.
[671] Van Sliedregt 2007:190.
[672] Ambos 2007:168.
[673] *Tadić Appeals Judgment*:¶¶205-213, ¶224,footnote 289.
[674] Steer 2014:45. Interview with Kai Ambos.
[675] Ambos 2007:171-173.
[676] Van der Wilt 2007.
[677] See *Simić et al., Dissenting Opinion of Judge Lindholm*:¶2.
[678] *Stakić Trial Judgment*:¶440.
[679] Ibid.:¶441.
[680] Ibid.:¶441,footnote 949.

judge at the German Federal Court of Justice.[681] Later, Judge Schomburg also defended the use of Roxin's theories of co-perpetration and indirect perpetration in ICL in the *Gacumbitsi* case at the ICTR.[682] Notably, all three judges – Schomburg, Argibay from Argentina, and Judge Vassylenko from Ukraine – were appointed as judges at the ICTY between 2001 and 2002.[683] Assuming office after the landmark *Tadić* decision, those judges appeared less convinced by their colleagues of the suitability of JCE for international trials.

But the 2003 *Stakić* TC's findings remained the minority position at the UN tribunals where the reliance on JCE had become the established practice.[684] On appeal, in 2006 the *Stakić* AC terminated the attempt to substitute JCE with indirect co-perpetration. The AC judges argued that the introduction of a new mode of liability should be consistent with the tribunal's jurisprudence, lest it generated 'uncertainty, if not confusion' about the applicable law.[685] The AC considered that unlike co-perpetration, JCE constituted a mode of liability which is 'routinely applied in the Tribunal's jurisprudence'.[686]

Nevertheless, ICTY judges did not completely disregard the criticism of JCE and in subsequent decisions revised the doctrine so as to reflect the different role of the *leadership* figures and the perpetrators on the ground. In 2007 the *Brđanin* AC found that the direct physical perpetrator of the crime did not have to be a member of the JCE in order to impute criminal responsibility for that crime to all JCE members.[687] Instead, it was sufficient that the crime formed part of the common purpose and that one of the JCE members was linked to the physical perpetrator and used the latter as a tool to commit the crime.[688] The *Brđanin* AC's version of JCE somewhat resembled the *Stakić* notion of co-perpetratorship,[689] but there were also important differences between the two approaches. It has been suggested that the *Stakić* TC assumed the existence of an overarching criminal apparatus, while the *Brđanin* AC effectively 'delink[ed]' the JCE from the physical perpetrators. Consequently, the latter seemingly imposed less strict requirements for proving the existence of coordinated

[681] Netherlands Institute of Law and Governance 2020.
[682] *Gacumbitsi, Opinion of Judge Schomburg*: ¶¶16-20.
[683] See ICTY website, 'Former Judges' at http://www.icty.org/en/sid/10572.
[684] Van Sliedregt 2012a:99.
[685] *Stakić Appeals Judgment*:¶59.
[686] Ibid.:¶62.
[687] *Brđanin Appeals Judgment*:¶¶410.
[688] Ibid.:¶¶410-413.
[689] Van Sliedregt 2012a:170.

cooperation between the JCE and the direct perpetrators.[690] The *Brđanin* AC's revision of JCE enabled the tribunals to locate the JCE entirely at the leadership level of the criminal apparatus and to avoid criticism for conflating the roles of those persons pulling the strings with the direct physical perpetrators of the crimes.

Those members of the ICL epistemic community who understood the culpability principle in a narrower sense, however, remained unconvinced of the merits of the new JCE version. The 'delinking' between the JCE members and the physical perpetrator was considered to increase the possibility of attributing guilt by association.[691] By contrast, the *Stakić* TC's adoption of co-perpetratorship in 2003 gained the approval of some members of the ICL epistemic community were worried about the broad scope of JCE.[692] As chapter 6 reveals, Roxin's indirect co-perpetration theory eventually gained acceptance at the ICC.

4.2.2.2. Command responsibility

Like the IMTFE, the UN tribunals have examined the criminal responsibility not only of those persons who participated in the commission of crimes but also of those commanders who with their inaction failed to intervene and prevent or punish the crimes of their subordinates. The post-Second World War cases left a disparate legacy concerning the elements of command responsibility, but the UN tribunals clarified the requirements of the doctrine. In a landmark judgment in 1998 the *Čelebići* TC identified three requirements for attributing criminal responsibility to commanders that were followed in subsequent case law:[693] (a) the existence of a superior-subordinate relationship, (b) the superior knew or had reason to know of the commission of the crime, and (c) the superior failed to prevent the crime or punish the perpetrator thereof.[694] While the UN tribunals' judges brought clarity to the command responsibility principle, their interpretation of the law remained contentious among advocates of the restrained interpretation of the culpability principle.

[690] Van Sliedregt 2012a:162-163. Farhang 2010:162.
[691] Farhang 2010:163.
[692] Badar 2006:298. Farhang 2010:162.
[693] Ambos 2009a:129.
[694] *Čelebići Trial Judgment*:¶346.

The UN tribunals imposed higher *mens rea* requirement with respect to attributing command responsibility than the IMTFE. In 2001 the *Čelebići* AC concluded that the commander's negligence, i.e. her failure to proactively search for and obtain information about the subordinates' conduct, was insufficient to trigger criminal responsibility.[695] Rather, the term 'had reason to know' was interpreted to require the availability of 'some specific information' to the commander, that should have put the latter on notice about the subordinates' crimes.[696] That interpretation was affirmed in later decisions at the ICTY[697] and the ICTR.[698]

But another one of the UN tribunals' findings on command responsibility proved more controversial. The *Čelebići* TC determined that '[n]otwithstanding the central place assumed by the principle of causation in criminal law,' the doctrine of command responsibility did not require proof of causation.[699] The judges considered that it would be impossible to establish a causal link with respect to command responsibility for the failure to punish the crimes of the subordinates, because the crimes needed to have already been committed before the commander could fail to punish those conducts.[700] Hence, it cannot be said that the by failing to punish the subordinates' crimes, the commander has *caused* the commission of those crimes.

Those members of the ICL epistemic community who were guided by a humanitarian concern for protecting the interests of victims justified the broad scope of command responsibility. One legal scholar argued that the commanders who fail to punish the conducts of their subordinates are culpable because they implicitly endorse their subordinates' crimes and, thus, '*add* to the injury' that is inflicted upon the victims.[701] Reminiscent of the IMTFE Majority's reasoning, other scholars praised command responsibility for providing the prosecution with an opportunity to avoid impunity in those cases where the evidence of the commander's direct orders towards the subordinates to commit crimes was lacking.[702]

The finding of the judges that command responsibility did not require a causal connection between the conduct and the crimes, however, proved controversial with respect to a narrow

[695] *Čelebići Appeals Judgment*:¶¶224-226.
[696] *Čelebići Trial Judgment*:¶393.
[697] *Blaškić Appeals Judgment*:¶62.
[698] *Bagilishema Appeals Judgment*:¶36.
[699] *Čelebići Trial Judgment*:¶398. See also *Blaškić Appeals Judgment*:¶77.
[700] *Čelebići Trial Judgment*:¶¶399-400.
[701] Sepinwall 2009:293-295.
[702] Vetter 2000:92. Kortfält 2015:555.

interpretation of the criminal responsibility principles. One ICL scholar opined that by enabling the conviction of a person for an international crime 'without contributing to the crime or having any effect on it', command responsibility breached the principles of culpability and fair labelling.[703] In a well-known article Mirjan Damaška argued that the stigma of convicting the commander *for the crimes* committed by the subordinates, such as genocide or war crimes, was disproportionate with the commander's actual conduct, which is to say, the commander's *failure to punish* those crimes.[704] Hence, command responsibility came 'dangerously close' to imposing liability without proving the culpability of the accused commander.[705]

For that reason, many scholars suggested that the doctrine of command responsibility for failure to punish the subordinates' crimes should constitute a separate offence and not a mode for the attribution of liability for other international crimes. From that perspective, the commander should be punished specifically for her failure to punish the crimes and not for the underlying crimes committed by the subordinates.[706] In fact, the question whether command responsibility for a failure to punish those crimes constituted an offence or a mode of liability triggered ardent debates among the UN tribunals' judges.[707] However, a review of the UN tribunals' judgments reveals that the commanders were generally convicted for the crimes committed by their subordinates rather than for their dereliction of duty, thus, displaying a broad reading of the culpability principle.[708]

Nevertheless, the UN tribunals attempted to ameliorate the harshness of command responsibility towards the defendant. Schabas observed that the convictions for command responsibility, such as *Strugar*, *Hadžihasanović et al.*, and *Orić*, resulted in short sentences, thus, suggesting that those cases were: 'most definitely not in the category of the most serious crimes'.[709] Furthermore, despite its broad scope, in practice command responsibility charges have generally been successful at the ICTY in cases involving traditional military-like contexts,

[703] Robinson 2008:951.
[704] Damaška 2001:480.
[705] Darcy 2007:397.
[706] Ambos 2002:851. Mettraux 2006:297. Jia 2000:161-163. Sander 2010:125.
[707] See the debate in the *Hadžihasanović et al.* case. *Hadžihasanović et al. Majority Decision*, *Hadžihasanović et al. Dissent of Judge Shahabuddeen* and *Hadžihasanović et al. Dissent of Judge Hunt*.
[708] See Robinson 2008:952.
[709] Schabas 2007:222-223.

where it is easier to demonstrate the commander's effective control over the subordinates.[710] It has also been observed that the UN tribunals' judges preferred to convict the defendant for 'committing' the crimes under Article 7(1)/6(1), rather than based on command responsibility, where the available evidence allowed such findings.[711]

But when the evidence was insufficient to conclude that the defendant had personally participated in the commission of the crime, the UN tribunals often relied on command responsibility as a form of 'fall back liability' under which a conviction could be entered.[712] In fact, command responsibility was applied in rather unconventional situations at the ICTR. Notably, in the *Media* case the defendants – the founders of the *Radio Télévision Libre des Mille Collines* and the editor-in-chief of the *Kangura* newspaper – were convicted under the civilian form of command responsibility of genocide and crimes against humanity for exhorting the Hutu population to kill Tutsis through their media outlets.[713] Consequently, command responsibility appeared to serve as a final resort for avoiding impunity at the tribunals.

The command responsibility principle sits uneasily with the principle of personal culpability. But it is also a special type of criminal responsibility that is peculiar to international crimes, one that was developed in the case law of international tribunals[714] and reflected the mixture of the humanitarian and criminal law goals aminating ICL. The harshness of the doctrine stems from the presumption that the level of authority of commanding figures and the high stakes of their actions or omissions justify the imposition of criminal responsibility, even if the commander did not personally participate in the crimes.[715] Thus, the doctrine is strongly influenced by the concern for enhancing the protection of civilians by incentivizing the commanders to keep tighter control over their subordinates. The UN tribunals demonstrated respect for the culpability principle and tried to mitigate the harshness of command responsibility, but the latter still became known as a back-up mode for the attribution of liability to the accused, or as one legal scholar called it: 'the silver bullet of the prosecution'.[716] As chapter 8 discuses, that practice was put an end to at the ICC.

[710] Bonafe 2007:602.
[711] Ambos 2007:166. Henquet 2002:819.
[712] Manacorda and Meloni 2011:161. Ambos 2003:250.
[713] *The 'Media Case' Judgment*.
[714] Van Sliedregt 2011:394.
[715] May 2004:142.
[716] Schabas 2007:222.

4.2.3. Conclusion

The UN tribunals were credited with the development of the system of modes of liability in ICL.[717] The articulation of some of those modes of liability, notably JCE, was generally the product of judicial creativity for the purpose of enabling the UN tribunals to 'dispens[e] justice'.[718] The term 'justice' in that context referred to substantive rather than procedural justice. The UN tribunals set out to bring life to ICL after five decades of inactivity and to signal that the perpetrators of mass atrocities would no longer enjoy impunity. That line of reasoning was generally accepted at the UN tribunals and within the broader ICL community of practice. But the attitudes began to shift when the jurisprudence of the UN tribunals started to settle, or in other words, when the task of 'putting flesh to the bones' of ICL seemed generally accomplished. Many legal academics and practitioners, both within and outside the UN tribunals, advocated for revising the tribunals' early practices on the assessment of criminal responsibility by adopting a more restrained interpretation of the culpability principle. As the next chapters discuss, those ideas became particularly influential during the process of drafting the ICC's RS and later on when the ICC judges interpreted the relevant statutory provisions on individual criminal responsibility.

4.3. Conclusion

This chapter revealed many common aspects of the socio-political contexts in which the post-Second World War and the post-Cold war tribunals operated. Both sets of tribunals faced the challenges of *developing* and not simply interpreting the criminal responsibility laws in international law. Furthermore, both sets of institutions operated under significant public pressure to respond to specific instances of mass atrocities, which in the case of the ICTY were ongoing. These factors appeared to influence the judges in both instances to seek balance between procedural scrupulousness and the moral impulse to punish the perpetrators when developing the laws on criminal responsibility. As the next chapter discusses, the ICC was born in a different context. The court was the product of long deliberations between states, civil society organizations, and legal experts, and not the post-war creation of a political alliance,

[717] Liu 2015:139.
[718] Shahabuddeen 2010:187.

such as the Allied powers or the UN Security Council. Furthermore, the ICC was not created to respond to particular atrocities, but to institute a potentially universal legal order to sanction such crimes. The unique context of the ICC's creation enabled new sets of shared understandings to become influential in the ICL field.

5. DRAFTING THE ROME STATUTE: THE BATTLEGROUND OF IDEAS ABOUT CRIMINAL RESPONSIBILITY

Based on a comprehensive empirical analysis of the RS drafting records and ICC jurisprudence, chapters 5-8 analyse the assessment of criminal responsibility at the Court with respect to the competition among different actors within the ICL community of practice to promote their preferred understandings of the legal norms on criminal responsibility. The analysis shows that it would be simplistic to present the restrained approach to the assessment of criminal responsibility exhibited in the RS and ICC jurisprudence as the triumph of sovereign states, seeking to shield their nationals from convictions, over non-state actors, such as judges, legal scholars and NGOs, aiming to expand the scope of criminal responsibility laws in order to enable easier convictions for the perpetrators of mass atrocities. I argue that the restrained approach to criminal responsibility can be explained *not only* with reference to state interests, but also with the belief of many members of the ICL community of practice that that particular approach constituted sound legal reasoning in accordance with *their* understanding of 'legalism'. In reality, many legal experts and practitioners inside and outside the Court saw the drafting of the RS and the establishment of the permanent ICC as a unique opportunity to institutionalize a new vision of international criminal justice that would be grounded in the fundamental principles of criminal law. As this chapter discusses, the principled approach to the assessment of guilt and innocence became influential during the Rome Conference and, as the next chapter argues, it subsequently played out in the ICC judges' findings on the meaning of the RS criminal responsibility provisions as a matter of generally applicable law. Notably, the term 'principled' does not imply that the approach to criminal responsibility that became influential at Rome and at the ICC was 'more legal' than that of the UN tribunals, even though those members of the ICL field who supported that approach may have *understood* it to be so. Rather, 'principled' here refers to the dogmatic and technical application of criminal responsibility laws, regardless of the trial outcome.

This chapter offers new insights into the detailed definitions of the general principles of law in the RS, including the criminal responsibility laws. As will be discussed, it is often observed that this detailed definition reflected the states' interests to prevent judges from taking advantage of the gaps in the law and entering creative interpretations thereof for the purpose

of making convictions easier.[719] While this argument certainly has merit, this chapter argues that there is more to the drafting history of the RS's criminal responsibility provisions beyond the interests of states, which has remained underexamined in the literature on the ICC. Specifically, the analysis in this chapter suggests that, in fact, authoritative legal experts were among the most ardent proponents of the idea to codify in detail the general principles of criminal responsibility in the RS. From the perspective of those legal experts, the inclusion of a 'General Part' in the RS marked the progress that ICL had made since its early days towards a coherent penal system. By contrast, states expressed relatively less interest in the drafting of individual criminal responsibility provisions at Rome, compared to questions such as complementarity that more directly concerned national sovereignty. The drafting of the criminal responsibility laws was perceived as a highly 'technical, *non-political*' legal issue,[720] which granted the working group of legal experts authority to determine the content of those laws. Consequently, in order to gain deeper understanding of the text of the RS criminal responsibility provisions, one needs to take into consideration not only the interests of states to protect their sovereignty, but *also* the principled beliefs about the meaning of the law that were expressed by members of the ICL community of practice.

The next chapter turns to the interpretation of those rules by the ICC judges, focusing on Article 25(3) that regulates the attribution of liability for committing a crime, Article 28 on command responsibility, and Article 30 that for the first time in ICL defined the mental element of liability. Notably, the text of those provisions left the precise meaning of many terms to be determined by the judges. Even though the ICC judges were more restrained than their colleagues at earlier tribunals in terms of the level of specificity at which the legal rules were codified, the judges at the permanent court still enjoyed significant room to manoeuvre in their interpretations. But the ICC judges did not use that room to construe the laws on criminal responsibility broadly, so as to make convictions easier, as might have been expected by a state-centred account of the politics of ICL. Instead, the *Lubanga*, *Katanga and Ngudjolo* and *Bemba* pre-trial chambers used their interpretative space to differentiate the new court from previous tribunals and to institute high threshold for the attribution of criminal responsibility at the ICC.

[719] Broomhall 2016:951. Grover 2010:552. Schabas 2007:202.
[720] Saland 1999:193, emphasis added.

The question why the judges used the ambiguities in the statutory text to present a possibly even more restrictive interpretation of those laws than envisioned by some of the drafters has not triggered significant interest in the international relations scholarship on ICL. The following two chapters aim to address this gap by analysing the normative dynamics within the ICL field, and more specifically the competing understandings of the criminal responsibility laws that were promoted at the UN tribunals and the ICC. This analysis sheds light on the rationale behind the adoption of the principled approach to criminal responsibility by ICC judges. More specifically, the ICC judges' reasoning displayed strong influence of civil law dogmatism and followed the idea that the culpability principle had to be applied strictly, regardless of the trial outcome. Those ideas failed to take hold of the UN tribunals despite the efforts of the *Stakić* TC but gained prominence at the new ICC. Thus, the politics of the legal field, i.e. the promotion and contestations of different understandings of the law rendered the principled approach to criminal responsibility influential at the ICC.

5.1. Historical background

The ICC's establishment, described as 'the most significant development' in ICL,[721] provided a forum for contesting the old practices that had previously dominated ICL and for presenting new ideas about criminal responsibility laws. For the first time in ICL, a plurality of states, legal experts from different backgrounds, and hundreds of NGOs participated in the RS drafting.[722] Furthermore, the stakes of influencing the RS drafting process were particularly high. As the statute of 'the first permanent general, future oriented international criminal court',[723] the RS would play a more profound role in the ICL field than the Statutes of the temporary UN tribunals.[724]

The drafting process took place in several stages. Of particular interest is the work of the Preparatory Committee on the ICC statute (PrepCom) from 1996 to 1998.[725] Several documents from that period provide insights into the RS's drafting history: the PrepCom report from 1996,[726] the draft statute named the 'Zutphen Draft' after the city in the Netherlands where

[721] Schabas 2001:415. See also Charney 1999:454. Broomhall 2004:67.
[722] Interview with Kai Ambos.
[723] Kaul 2012:5.
[724] Van Schaack 2008:170. McGoldrick 2004:454.
[725] Bassiouni 2005, Vol.II:xvii-xviii.
[726] *PrepCom Report 1996, Vol.I. PrepCom Report 1996, Vol.II.*

it was completed,[727] and the final 1998 draft that was negotiated at the Rome Conference.[728] At that point various working groups were organised to draft different parts of the statute.[729] Of crucial importance for this research is the work of the working groups at the PrepCom and at the Rome Conference, which drafted the General Part of the RS containing the criminal responsibility provisions.

Furthermore, legal experts found an additional venue to express their vision of what the law of the future Court should be by holding nine meetings from 1995-1998 in Italy and producing the so-called 'Siracusa Draft' statute.[730] The Siracusa Draft became highly influential for the work of the PrepCom with respect to matters of the General Part.[731] Based on an analysis of the official UN documents and the publications of legal academics involved in the RS drafting, the following sections trace the negotiation and subsequent codification of the criminal responsibility provisions in the Statute's General Part.

5.2. Codifying the general principles of ICL

A major novelty of the RS was that it included a section on the 'General principles of criminal law' that dealt with questions of non-retroactivity, individual criminal responsibility and defences.[732] Neither the Nuremberg and Tokyo Charters, nor the Statutes of the UN tribunals contained such a section stipulating the general rules that the judges had to follow in assessing criminal responsibility in every case. Indeed, as chapter 4 discussed, the UN tribunals considered judicial creativity crucial for developing ICL. Consequently, former judges at the tribunals, such as Judge Hunt, viewed the General Part of the RS with a suspicious eye because: 'If it is to fulfil its goals efficiently, international criminal law must be given space to grow, rather than kept in a straightjacket imposed by a rigid code.'[733]

Some legal experts perceived the detailed codification of the general principles in the RS as a constraint imposed on the future ICC judges by sovereign states.[734] The former ICTY

[727] *Zupten Draft*.
[728] *PrepCom 1998 Draft*.
[729] Bassiouni 2005, Vol.II:xviii.
[730] *Siracusa-Draft*. Bassiouni 2005, Vol.II:xix-xx.
[731] Ambos 1996:521. Eser 2001:20.
[732] *PrepCom 1996 Report, Vol.I*:41-47.
[733] Hunt 2004:59.
[734] Broomhall 2016:951. Grover 2010:552. Charney 1999:464. Schabas 2007:202. Pellet 2002:1058.

president Antonio Cassese suggested that the restrictive approach of the RS's drafters could be explained with the eagerness of states 'to shield their servicemen as much as possible from being brought to trial for, and possibly convicted' at the ICC.[735] There is certainly merit to such arguments. Some state representatives favoured a flexible Statute that would only contain a general mandating clause enabling the judges to elaborate the principles of liability, but the majority of states preferred that the fundamental criminal law principles were clearly articulated in the Statute to avoid conferring 'substantive legislative power' to the future ICC judges.[736]

But while most states may have preferred a more constrained court, it would be simplistic to attribute the development of the RS's General Part only to sovereignty interests and to ignore the variety of competing understandings among legal experts about what the future ICC statute should look like. The view that the detailed codification of criminal responsibility principles would prevent ICL from growing did not constitute a uniform understanding within the ICL epistemic community. The absence of a General Part in the statutes of the earlier international tribunals was attributed to the influential role of the US in their establishment and the Anglo-American preference for pragmatism over systematization of the law.[737] Consequently, when the RS drafting began, many authoritative legal scholars from civil law background began advocating for the categorization of the principles of criminal law within a 'general part' of ICL.[738] That proposition was also incorporated in the Siracusa Draft.[739] According to those legal scholars, the General Part drew on the 'time-honoured' principles of domestic criminal law and contributed towards a more 'sophisticated' ICL.[740] While the codification of the general principles might have reassured some states that their nationals would be shielded from extreme judicial creativity, to criminal law scholars from civil law background the General Part constituted a necessary component of a *criminal* code, especially at the international level.[741] In the words of one scholar, the General Part 'emancipated' ICL from the 'rudimentary nature of international law and turned it into a mature system of criminal justice.[742] To those legal practitioners who embarked upon the arduous task to synthesise general criminal law principles

[735] Cassese 2008a:526. See also Broomhall 2004:76-77.
[736] *PrepCom 1996 Report Vol.I*:42.
[737] Ambos 2006:661. See also R. Clark 2001:296.
[738] See Eser 1993. Ambos 1996.
[739] *Siracusa-Draft*:55.
[740] Van Sliedregt 2012b:852.
[741] Eser 2001:20.
[742] Militello 2007:943.

across legal systems,[743] the codification of the General Part in the RS was perceived not as a constraint on the judges but as a major achievement of ICL.[744]

For many legal experts the importance of codifying the general principles of ICL was particularly acute at the ICC. While the perceived purpose of the UN tribunals was to (re)start the engine of international criminal justice, as the first permanent court of its kind, the ICC was expected to provide a 'model' for domestic criminal justice systems worldwide of 'how a criminal court should function'.[745] Consequently, many members of the ICL epistemic community considered that the ICC should move on from considerations of substantive justice and developing the law towards the provision of high-quality procedural justice.[746] The codification of the general criminal law principles in the RS can, thus, be traced not only to state interests, but more importantly, to the shared understanding of many legal scholars at the time about the need for a more principled approach to the assessment of criminal responsibility at the future Court.

Notably, because of the importance of expert authority within the legal field, legal scholars and practitioners became particularly influential actors during the drafting of the General Part, which included the criminal responsibility laws. The General Part was perceived as the 'most technically difficult part of the Statute'[747] because it constituted a novel effort in comparative criminal law.[748] While other RS sections were drafted by military representatives and diplomats, the General Part was mainly the creation of legal experts, including members of justice ministries, who did not always deliberate with the other working groups.[749] The drafting records reveal that the main actors who influenced the content of the RS's General Part were an 'informal group' of criminal law experts at the PrepCom[750] and the official Working Group on the General Principles of Law at the Rome Conference, both of which were chaired by the Swedish representative Per Saland.[751]

[743] R. Clark 2001:296-298.
[744] Saland 1999:191.
[745] Fletcher and Ohlin 2005:540. See also Popovski 2000:412.
[746] Cassese 2008b:10,40,142-143. Grover 2010:557. Amann 2003:180-181.
[747] Bassiouni 2005, Vol.I:95.
[748] Schabas 2007:194.
[749] R. Clark 2001:314.
[750] *PrepCom 1996 Report, Vol.I*:6.
[751] Lee 1999:xviii.

The ideas presented by the working groups of legal experts were of special significance with respect to the laws on criminal responsibility. During the early days of the PrepCom in 1996, states' delegates submitted a number of different proposals concerning the question of modes of liability.[752] Eventually, Saland's 'informal group' of legal experts submitted a separate draft proposing one provision that covered all types of criminal responsibility.[753] The informal group's proposal was influential and at the Rome Conference the Working Group on the General Part officially agreed that one single article would cover the participation of 'principals and all other modes of participation (except for command responsibility)'.[754] That provision became Article 25(3) RS.

A notable example of the authority that the working groups of legal experts enjoyed with respect to the drafting of the criminal responsibility laws is the incorporation of the novel provision criminalizing indirect commission of a crime through a non-innocent agent under Article 25(3). The concept of indirect perpetration through an innocent agent, such as a minor or a person with a mental disability, was familiar in many domestic systems.[755] But Article 25(3)(a) RS expanded the concept by providing that the indirect perpetrator could bear criminal responsibility for committing the crime, even in those cases where the person used to physically perpetrate the crime was fully aware of the criminality of her conduct.[756] The drafters entered 'controversial waters' by recognising the expanded form of indirect perpetration[757] because prior to the RS no other international statute explicitly codified that mode of liability.[758]

Notably, the incorporation of the novel RS provision cannot be traced to any state proposals and appears as the creation of the informal group of legal experts at the PrepCom. In 1997 Canada, Germany, the Netherlands and the UK submitted a joint paper on the question of criminal responsibility to the PrepCom that envisaged the codification of types of commission liability: commission as an individual, joint commission and commission through an *innocent* agent.[759] Five days after the joint submission, Saland's group of legal experts submitted their own version of the text, which was almost identical with that of the four states,

[752] *State proposals 1996*:4-7.
[753] *Informal Group 1996 Proposal*:7-8.
[754] Saland 1999:198.
[755] Ambos 2016:994.
[756] Eser 2002b:795.
[757] Cryer et al. 2014:367.
[758] Eser 2002b793. Werle and Burghardt 2011:85
[759] *Joint state proposal on criminal responsibility*.

but with one important change: the concept of indirect commission through an innocent agent was substituted without any explanation with the concept of commission 'through another person, *regardless* of whether that person is criminally responsible'.[760] The writings of legal experts who later joined Saland's working group at Rome may provide some insights as to why the change to the text was made. Kai Ambos, who was part of the German delegation at Rome, noted that the specification of the text represented the drafters' awareness of the complex reality of mass atrocities where the direct executor of the crime is often a person who willingly engages in the crimes, rather than an innocent agent.[761] From that perspective, the expansion of indirect perpetration to the use of non-innocent agents suited the ICL context well because the new mode reflected the organizational dynamics of international crimes.[762] 'Surprisingly enough', the new formulation did not trigger deliberations at Rome and was adopted *en bloc* with other provisions in the General Part.[763] Thus, one of the most important ICL innovations can be traced not to states' desire to clearly delineate the set of situations in which the future ICC judges can find an accused guilty, but to the shared understanding among the legal experts working on the General Part that ICL required a mode of liability that would reflect the structures of system criminality.

The perceived depoliticization of the questions of technical legal expertise seemed to have afforded relative autonomy to the lawyers and academics working on the General Part to express their vision of the laws rather than to promote specific state interests. This conclusion is supported by the most detailed account of the ICC's legislative history, which identifies the parts of the RS concerning international cooperation and judicial assistance as the areas where deference to national sovereignty was most evident on behalf of the drafters.[764] Other authoritative commentators further observed that the most challenging negotiations with respect to states' sovereignty interests concerned the prosecutor's powers, the exercise of jurisdiction,[765] and the RS's complementarity and 'opt-out' mechanisms.[766] Similarly, when the former ICC president Hans-Peter Kaul remarked that the Rome negotiations revealed that

[760] *Working Group 1997 proposal*:1, emphasis added.
[761] Ambos 2016:994.
[762] Jessberger and Geneuss 2008:866.
[763] Jessberger and Geneuss 2008:857. Weigent in Stahn 2015:543.
[764] Bassiouni 2005, Vol.I:99.
[765] Van Sliedregt 2014:1145. See also Deitelhoff 2009.
[766] Broomhall 2004:68.

states 'did not want a strong court', he referred to the complementarity provisions, rather than the General Part.[767]

NGOs also focused on the drafting of other parts of the RS, such as enhancing the powers of the future court vis-à-vis states and the expansion of the list crimes by view of offering greater protection to the victims of atrocities. One of the main issues on which the CICC, an umbrella organisation that united more than 800 NGOs, focused its lobbying efforts was granting the ICC Prosecutor the power to initiate *proprio motu* investigations.[768] The Women's Caucus for Gender Justice was further credited with contributing to the codification of the most comprehensive list of SGBC in ICL.[769] By contrast, there is far less information about the involvement of NGOs in the drafting of the General Part, apart from the UN Children's Fund and the Children's Caucus's engagement on the issue of the appropriate lower age limit for attributing criminal responsibility.[770] The official records do not suggest that NGOs expressed similar interest in the modes of liability.

With states and NGOs preoccupied with other questions, the drafting of the 'technical' General Part of the RS was largely left to legal experts. Consequently, the drafting of the criminal responsibility laws reflected not only state interests but also the politics of the legal field – the contestation and justification of different visions of the law by members of the ICL community of practice. The rest of this chapter traces the competition of ideas about the laws on criminal responsibility during the negotiations process specifically with reference to the RS's provisions on liability for committing a crime, the command responsibility principle, and the mental elements of criminal responsibility. The main implication from the need to integrate competing visions of the laws on criminal responsibility in the RS was that, rather than being constrained by the detailed codification of modes of liability, the future ICC judges ended up with a variety of tools for establishing criminal responsibility at their disposal, which once again opened the door to the promotion and contestation of different ideas about what the relevant criminal responsibility laws required when the Court began operation.

[767] Kaul 2012:5-6.
[768] Hall 2004:125.
[769] Chappell 2014a:186.
[770] Saland 1999:200.

5.3. Article 25(3) RS: Individual criminal responsibility

The drafting history of Article 25(3) reveals that the detailed codification of the criminal responsibility laws did not significantly constrain the future ICC judges. The RS ended up providing a broad range of tools for establishing the accused's criminal responsibility, or modes of liability, resulting from the need to integrate the competing ideas of legal experts from various professional backgrounds. The discretion of the future ICC judges in interpreting the criminal responsibility laws was further enhanced by the ambiguity and overlap between some of the modes of liability listed in Article 25(3).

Article 25(3) presented significantly more detailed codification of the modes of liability compared to Articles 7(1) and 6(1) from the ICTY and ICRT Statutes, respectively. Notably, Article 25(3) RS did not leave the term 'commits' a crime undefined, but specified in subparagraph (a) that the notion of commission referred to three particular scenarios: commission of a crime 'as an individual', 'jointly with another' person or 'through another person, regardless of whether that other person is criminally responsible'. Subparagraphs (b)-(d) defined the forms of participation in a crime committed by someone else. Article 25(3)(b) concerned the criminal responsibility of a person who 'orders, solicits or induces' the commission of a crime. Subparagraph (c) covered the responsibility of a person who 'aids, abets or otherwise assists' a crime. Subparagraph (d) criminalized the conduct of a person who 'in any other way contributes' to the commission of a crime 'by a group acting with a common purpose'. Subparagraph (d) posed two requirements in the alternative: the contribution should be made (i) with the 'aim of furthering' the criminal purpose of the group, or (ii) 'in the knowledge of the intention of the group to commit the crime'. Given the level of detail, Article 25(3) was described as the 'the culmination of a process of specification of criminal participation'.[771]

While the extensive list of modes of liability may be perceived to narrow the discretion of the judges in determining which situation would trigger criminal responsibility, a closer look suggests that there is 'a wide range of individuals who might be considered criminally

[771] Van Sliedregt 2012a:74.

responsible' at the new court.[772] Firstly, subparagraph (a) may have defined the concept of 'commission' in a far more detailed manner, that the ICTY and ICTY Statutes, but those details did not necessarily constrain the set of situations in which an accused could be found guilty for committing a crime. The expansion of the concept of indirect commission of a crime to cover perpetration through a *non-innocent* agent is telling in that regard.

Secondly, Article 25(3)(b)-(d) listed a variety of other forms of participation in a crime, which enabled the attribution of criminal responsibility even if the accused had not personally committed the crime. Subparagraph (d), in particular, significantly expanded the scope of criminal responsibility in the RS. Because Article 25(3)(d) criminalized contributions to a group crime that were made 'in *any* other way' not covered in subparagraphs (a)-(c), like JCE III it was described as a 'catch-all' provision that provides for 'the weakest form of liability'.[773] The second alternative of the provision, namely that the accused's contribution was made 'in the knowledge' of the group's criminal intentions, presented a particularly low threshold for establishing criminal responsibility.[774] In the context of mass atrocities, many people make contributions to the warring parties, such as the provision of food or clothes, despite their knowledge of those parties' criminal activities.[775] Consequently, some legal experts 'fiercely criticized' the provision[776] for paying 'scant attention' to the culpability principle.[777]

Notably, subparagraph (d) ended up in the RS as a result of a compromise between different legal traditions during the negations.[778] While paragraphs (a)-(c) resembled the continental legal system, subparagraph (d) was a remnant of the common law concept of 'conspiracy' or 'enterprise' liability.[779] In 1996 some delegations at the PrepCom proposed a provision on conspiracy liability drawing up on the IMT's legacy.[780] But the proposal was unsuccessful because it caused uneasiness among civil law countries.[781] An agreement on the definition of a mode of liability that would capture the collective nature of international crimes

[772] Militello 2007:946.
[773] Werle 2007:971.
[774] Van Sliedregt 2012:146.
[775] Ohlin 2007:79
[776] Ambos 2015b:592.
[777] Militello 2007:949.
[778] Ambos 2016:1010.
[779] Jescheck 2004:51.
[780] *State proposals 1996:*18.
[781] Saland 1999:199.

was finally reached after the adoption of the International Convention of the Suppression of Terrorist Bombings of 1997.[782] The language of Article 25(3)(d) is almost verbatim repetition of Article 2(3)(c) of the Convention.[783] To the drafters it appeared 'safe to use' a provision that was already successfully negotiated elsewhere.[784] Civil law scholars, in particular, contested the necessity of incorporating subparagraph (d) in the RS, calling it a 'superfluous' provision.[785] Nevertheless, the pressure to secure consensus among different legal traditions resulted in an expansion of the set of cases in which an accused could be found guilty at the ICC by adding subparagraph (d) to the list of modes of liability and leaving the ultimate decision whether or not to rely on that provision to the future judges.

The incorporation of subparagraph (d) provides some interesting insights into the normative dynamics behind the drafting of the RS's criminal responsibility laws. Some of the most ardent critics of the broad provision were legal scholars, concerned with the protection of the culpability principle, rather than states seeking to protect their sovereignty. In fact, at the PrepCom some state delegations proposed an even broader version of criminal responsibility – the infamous conspiracy charge. Consequently, the contestation of the incorporation of subparagraph (d) reflected internal debates within the ICL field, such as the different understandings between common and civil law. The discussion also reflected the disagreement between those members of the ICL community of practice who considered that a broad form of liability was needed in order to link individual persons to the collective criminal conduct and those who considered that suggestion highly problematic because it risked the attribution of guilt by association. Therefore, the list of modes of liability in Article 25(3) can be understood as the result of the drafters' attempt to integrate the variety of ideas about the criminal responsibility laws that were presented by the participating legal experts, under the time pressure of international negotiations.[786]

The main implication from the challenging endeavour of reconciling competing ideas about the criminal responsibility laws, was the conceptual ambiguity and the overlap between some of the provisions in Article 25(3), which left the future judges with discretion to

[782] Saland 1999:199-200.
[783] *International Convention for the Suppression of Terrorist Bombings*: Article 2(3)(c).
[784] R. Clark 2008:545.
[785] Mantovani 2003:35. Eser 2002b:803.
[786] Interview with Kai Ambos.

determine the exact meaning of the law. For instance, the Statute did not provide guidance how to differentiate the notion of 'joint' commission of a crime under subparagraph (a) from e.g. instigation under (b), aiding and abetting under (c), or contribution to a collective crime under (d). That task was left to the judges, depending on their interpretation of the meaning of the terms 'jointly' and 'committing'.[787] The concepts of indirect perpetration under subparagraph (a) and 'order[ing]' the commission of a crime under (b) were also similar because both the person who orders the crimes and the person who uses another person to commit the crimes exert psychological influence over the direct perpetrator.[788] That overlap also required judicial clarification of the meaning of both provisions.

Overall, Article 25(3) is impressive in its detail compared to statutes of the UN tribunals and the IMT Charter. While that may seem as the result of states seeking to restrain the interpretative space of the ICC judges in assessing the criminal responsibility of their nationals, the drafting process was just as much the product of the competition of legal ideas. Furthermore, the differences of opinion among the legal experts at the working group ended up expanding the interpretative autonomy of the future judges and providing the latter with some very broad in scope modes of liability, such as Article 25(3)(d). As the next section discusses, the negotiations of Article 28 produced similar outcomes, even though states expressed greater interest in that provision.

5.4. Article 28 RS: Responsibility of commanders and other superiors

The drafters included one further provision 'in addition to other grounds of responsibility' in the RS: the command responsibility principle.[789] The drafting history of Article 28 suggests that states expressed more interest in the detailed codification of command responsibility, compared to other modes of liability listed in Article 25(3),[790] presumably because they wanted to provide notice about the scope of liability to their military and civilian superiors. But the compromises reached during the negotiations resulted in what was described as 'a very broad' mode of liability.[791]

[787] Eser 2002b:789-790.
[788] Van Sliedregt 2012:107-109.
[789] Rome Statute:Article 28.
[790] *Rome Conference Official Records, Vol.II*:136-138.
[791] Ambos 2003:249.

Article 28 has two subparagraphs: (a) concerning military commanders and (b) concerning non-military or civilian superiors. The article requires, firstly, that a superior-subordinate relationship exists between the accused and the direct perpetrators of the crimes. Next, the military or civilian commander should exercise 'effective command and control', or 'effective authority and control', respectively, over their subordinates. Consequently, the crimes should be the 'result' of the commander's failure to exercise control over her subordinates. Finally, only those commanders who failed to take all 'necessary and reasonable measures' within their powers 'to prevent or repress' the commission of the crimes or 'to submit the matter to the competent authorities for investigation and prosecution' are liable for punishment at the ICC.

At Rome, states were mainly concerned with the question whether command responsibility should remain restricted to military commanders or should cover civilian superiors as well.[792] According to Saland's recollections, most countries favoured the idea of extending command responsibility to non-military contexts.[793] But the question was contentious considering the differences in the nature and scope of the authority of military and non-military commanders, which led countries like China to object to the expansion of the command responsibility principle.[794] Eventually the US came up with a compromise solution: command responsibility for civilian superiors would require a higher mental element compared to the cases concerning military commanders. More specifically, the attribution of civilian command responsibility would require that some information about the subordinates' crimes was available to the superior. By contrast, on this account, military commanders could be justly subjected to the harsher negligence standard because those persons were 'in charge of an inherently lethal force' as opposed to a 'bureaucracy'.[795]

The drafting history of Article 28 renders support to the 'practice' framework of international law because it demonstrates that states engaged in the rules of legal discourse when presenting their ideas. The decision to impose a higher mental element standard for civilian commanders was not justified simply with states' preferences for protecting their

[792] *Rome Conference Official Records, Vol.II*:132.
[793] Saland 1999:202.
[794] *Rome Conference Official Records, Vol.II*:137.
[795] Ibid.:136.

bureaucrats from prosecution but with respect to the culpability principle – because by virtue of their profession civilian commanders did not possess the same level of control as their military counterparts, the link between civilian officials and the crimes needed to be more explicit. Another observation worth mentioning is the lack of uniformity in states' preferences with respect to the command responsibility principle. While China disagreed with the idea of civilian command responsibility, most states favoured the broader version of the doctrine. Consequently, perceiving the RS's modes of liability only as the product of the efforts of 'states' in general to narrow as far as possible the opportunities for convicting a person at the ICC provides an incomplete picture. *As actors within the ICL field*, states also engaged in a competition of ideas over the determination of the scope of the law on command responsibility.

Notably, the incorporation of Article 28's provision on negligent omissions demonstrated that that competition of ideas produced greater flexibility to the future ICC judges in establishing the accused's criminal responsibility. With respect to the mental element of command responsibility for *military* commanders Article 28(a) RS ended up imposing a lower requirement than the UN tribunals. Subparagraph (b) that concerned civilian commanders required that the accused 'either knew, or consciously disregarded information which clearly indicated' of the subordinates' crimes.[796] This standard appeared similar to the one found in the UN tribunals' statutes, namely, that the commander 'had reason to know' about her subordinates' crimes.[797] By contrast, subparagraph (a) of Article 28 RS that concerned military commanders required that the commander 'knew or, owing to the circumstances at the time, *should have known*' about the commission of the crimes.[798] The RS drafting records suggest that the drafters understood the words 'should have known' to denote negligence on behalf of the commander.[799] Similar interpretations of the text were made by legal experts when the court began operation.[800] Because the UN tribunals had rejected the negligence standard as applicable,[801] the RS ended up expanding the scope of command responsibility with respect to military commanders.

[796] Rome Statute: Article 28(b)(i).
[797] ICTY Statute: Article7(3). ICTR Statute: Article6(3).
[798] Rome Statute: Article28(a)(i), emphasis added.
[799] *Rome Conference Official Records, Vol.II*:136.
[800] Ambos 2002:868.
[801] See Chapter 4: section 4.2.2.2.

5.5. Article 30 RS: Mental element

Similar implications from the politics of promoting and contesting different understandings of the criminal responsibility laws during the RS negotiations can be observed with the mental element of liability defined in Article 30. The mental element of criminal responsibility could be addressed either as a general matter in the General Part of a criminal code or left to the judges to decide upon in individual cases. The second method is typical of the old common law approach[802] and the post-Second World War and the UN tribunals that were largely influenced by the common law.[803] By contrast, Article 30 RS for the first time in ICL standardized the mental element requirements that were applicable to all crimes within the court's jurisdiction.[804] As with the other RS criminal responsibility provisions, Article 30 demonstrated the desire of the legal experts working on the General Part to codify in detail the elements of liability.[805] But Saland admitted that the drafting of Article 30 was also the subject of a challenging discussion because of the conceptual differences between national systems in relation to the mental element.[806] As with the other RS criminal responsibility provisions, the ambiguity of the legal terms that resulted from the difficulties of reaching consensus during the negotiations, left the future ICC judges with discretion to determine the meaning of the law.

The most important question before the drafters was deciding on the minimum element of a guilty mind that had to be proven on behalf of the accused for the attribution of criminal responsibility at the ICC. The 1996 state proposals submitted to the PrepCom envisaged two options – the common law concept of 'recklessness' and the civil law concept of '*dolus eventualis*'.[807] Eventually, the drafters rejected recklessness as an applicable standard and determined that the attribution of criminal responsibility required the existence of 'intent and knowledge' on behalf of the accused.[808] More specifically, Article 30 RS required that the accused 'mean[t] to engage' in the crime[809] or was 'aware that it will occur in the ordinary

[802] R. Clark 2001:292.
[803] Badar 2008:473.
[804] Werle and Jessberger 2005:37. Pigaroff and Robinson 2016:1118.
[805] Finnin 2012:326-327.
[806] Saland 1999:205.
[807] *State proposals 1996:*14.
[808] Saland 1999:205.
[809] Rome Statute: Article30(2)(a).

course of events' as a result of her actions.[810]At a first glance, it may appear as if the drafters significantly narrowed the scope for serving convictions at the Court by determining that only intentional conduct triggered criminal responsibility, thus, deferring to states' interests to protect the freedom of their nationals.

But on a closer look, the situation was more complicated. The concepts of 'intentional' conduct and 'knowledge' that a crime 'will occur in the ordinary course of events' are not straightforward terms and can be interpreted to mean different standards, more or less harsh towards the accused. Specifically, the *dolus eventualis* standard, referring to the accused's acceptance of the risk that her conduct may result in the commission of a crime, has been described as the 'borderland' of intentional conduct and does not present the same obstacle to the prosecutor as proving that the accused purposefully aimed at the commission of the crime or was certain that the crime will occur.[811] Notably, the *dolus eventualis* concept was never explicitly rejected in the records.[812] Those legal experts who assumed that during the drafting procedure the concepts of recklessness and *dolus eventualis* had been treated as the same concept considered that *dolus eventualis* was dismissed as an applicable standard along with recklessness.[813] But some civil law experts identified subtle differences between the two standards.[814] While both 'recklessness' and '*dolus eventualis*' denote acting with awareness of the risk imposed by one's conduct, it is said that recklessness focuses on the gravity of that risk, while *dolus eventualis* requires personal approval of the risk-taking endeavour or reconciliation with the possible criminal result.[815] Therefore, in some civil law systems, including German and Dutch law, *dolus eventualis* is considered as a form of volitional conduct.[816] Because *dolus eventualis* was nowhere defined in the PrepCom records, nor was explicitly rejected by the drafters, the question whether the ICC would use the 'borderland' concept of intentional conduct for serving convictions was left to the judges' conceptual understanding of *dolus eventualis*.[817]

[810] Rome Statute: Article30(2)(b), emphasis added.
[811] Fletcher and Ohlin 2005:554.
[812] Eser 2002a:932.
[813] R. Clark 2001:301.
[814] Ambos 2009b:718-719.
[815] Fletcher and Ohlin 2005:554.
[816] Van Sliedregt 2012a:41.
[817] Ambos 2009b:718.

As with other provisions from the General Part of the RS, the ambiguous language of Article 30 reflected a compromise between the common and civil law understandings about the mental element of liability.[818] Concepts that were used only in particular domestic traditions, such as *dolus eventualis*, were not explicitly included in the RS. But the search for a neutral language left many questions open to interpretation by the future ICC judges. Thus, even though the codification of the mental element of criminal responsibility rendered the ICC judges more constrained compared to their colleagues at the UN tribunals, the need to reconcile competing understandings of the criminal responsibility laws during the international negotiations granted judicial discretion with respect to determining the meaning and scope of Article 30.

5.6. Conclusion

At a first glance, the RS put the future ICC judges in a more constrained position in relation to the determination of individual criminal responsibility compared to the UN tribunals, which seemingly displays deference to state interests on behalf of the drafters. The meaning of the term 'commission' was specified with reference to three scenarios: commission as an individual, jointly with another person, and through another person, regardless of whether that other person was criminally responsible. The other forms of participation in a crime and the command responsibility principle were similarly codified in detail under Article 25(3)(b)-(d) and Article 28, respectively. Furthermore, while the UN tribunals' Statutes did not specify any rules regarding the mental element of liability, the RS's Article 30 required proof of the accused' 'intent and knowledge' in relation to the crimes.

This chapter took a different approach by examining the drafting history of those RS provisions with respect to the competition of ideas that is characteristic to the legal filed. This perspective offers several insights into the origins of the RS's criminal responsibility provisions. Some modes of liability, such as indirect perpetration through a non-innocent agent, can be traced to the desire of legal experts to reflect the dynamics of system criminality. Other modes, such as Article 25(3)(d), were included by view of balancing civil and common law traditions. Even with respect to more politically sensitive provisions, such as command responsibility, on which state delegations adopted official positions recorded in the archives,

[818] Satzger 2002:269.

the drafting process exhibited sound legal reasoning in the presentation and contestation of ideas. Overall, the impressive level of codification of the RS criminal responsibility laws should be understood not only with the interests of states to protect their sovereignty, but also with the understanding, shared among many legal experts in the 1990s, that the general principles of law had to be clearly defined in the RS, and with the challenges of finding a consensus between the competing ideas about the law that were presented by members of the ICL community of practice during the negotiations.

Notably, as a result of the need to integrate competing ideas about the criminal responsibility laws, the ICC judges ended up with a broad variety of provisions pursuant to which they could asses the defendant's guilt or innocence. The revised version of indirect perpetration allowed for a conduct that was committed *through* a fully responsible person to attract liability for 'commission' of a crime at the ICC. Article 25(3)(d)(ii), which criminalised 'any other contribution' to a group crime that was made merely in 'knowledge' of the criminal purpose of that group, also significantly expanded the scope of liability. Furthermore, Article 28(a) enabled the attribution of criminal responsibility for a negligent conduct. Moreover, many terms that were included within the statutory text required 'judicial construction' in order to be applied in practice.[819] Article 30 seemingly 'raise[d] more questions than answers'.[820] The ICC judges may have had to take into consideration significantly more statutory text than their colleagues at the UN tribunals, but that also meant that the ICC judges had to engage in that much more legal interpretation.

[819] Greenwalt 2011:1080. Steer 2012:40.
[820] Werle and Jessberger 2005:37.

6. INTERPRETING THE ROME STATUTE: A NEWFOUND EMPHASIS ON CRIMINAL LAW THEORY

The ambiguities and overlaps of the RS criminal responsibility provisions meant that the concrete meaning of those laws was undetermined. Consequently, the competition for delivering an authoritative interpretation of the criminal responsibility laws continued when the Court began operation. As the following discussion reveals, the critical opinion of many legal scholars and practitioners in relation to some of the practices associated with the attribution of criminal responsibility at the ICTY and ICRT, including the lack of differentiation between the degree of responsibility of the participants in a JCE, the imposition of criminal responsibility for the mere 'foreseeability' of a crime and the rejection of the causality requirement of command responsibility, appeared to be shared by the ICC judges. More specifically, the *Lubanga*, *Katanga and Ngudjolo*, and *Bemba* PTCs employed a new approach to the assessment of criminal responsibility that borrowed from the German criminal law tradition and was perceived by many ICC judges as more compatible with the culpability principle than alternative approaches. Even though competing interpretations of the RS provisions on criminal responsibility emerged in the forms of dissenting opinions at the Court, such as that of Judge Fulford at the *Lubanga* TC, the findings of those pre-trial chambers were generally reaffirmed in subsequent decisions and became established ICC jurisprudence. This section, firstly, examines the interpretative scope of ICC judges, which provided ground for the justification and contestation of different constructions of the criminal responsibility laws, and proceeds with the legal findings of the ICC judges in relation to Article 25(a)-(d), Article 28, and Article 30. This sets the stage for chapters 7-8 which will examine the findings of the ICC judges as to whether the prosecutor's arguments submitted in specific cases meet the requirements of the relevant RS criminal responsibility provisions.

6.1. The interpretative scope of ICC judges

Even though the meaning of many terms in Articles 25(3), 28, and 30 of the RS remained ambiguous, the future ICC judges did not enjoy unlimited interpretative discretion. Commentators have generally considered that two specific RS provisions may restrain ICC judges from creative interpretations of the laws, including those on criminal responsibility:

Article 22 codifying the legality principle[821] and Article 21 listing the applicable sources of law at the Court.[822] But a closer look at those provision reveals that they could accommodate competing interpretations of the laws on criminal responsibility.

Previous international tribunals sought to balance procedural with substantive justice. The importance of legality was not neglected, but the meaning of the principle was qualified. As observed by one eminent judge at the UN tribunals, the legality principle prohibited idiosyncratic interpretations of the law according to the personal preferences of the judges but it '[did] not bar the progressive development of the law' aimed at ending impunity for mass atrocities.[823] Consequently, by view of the judicial practices of previous tribunals, some commentators considered it 'unrealistic' that the inclusion of the legality principle in the RS would restrain judicial creativity at the ICC.[824] It was observed that many RS provisions were 'susceptible to liberal overreach' if the ICC judges chose to interpret those according to the Statute's 'object and purpose', namely, to end impunity for mass atrocities.[825]

Similar observations can be made with respect to Article 21 RS that renders the Statute the primary source of law at the Court[826] and grants only secondary importance to the established 'principles and rules of international law'.[827] Hence, the RS gives precedence to its own provisions, as ratified by the State Parties, over the ambiguous norms of customary international law and general principles of law that the UN tribunals often relied on. Consequently, Article 21 was perceived by some legal experts as an attempt by states to constrain judicial independence with regard to the determination of the applicable law.[828] Nevertheless, Article 21 gave the ICC judges 'ample opportunities for judicial creativity'.[829] The drafters still conceded that the judges could resort to the general principles of law derived from national laws '*as appropriate*'.[830] Expert commentators have observed that, framed in that manner, the provision left the judges with 'a wide discretionary power' to interpret the

[821] Broomhall 2016:950. Schabas 2003b:886–887.
[822] Cryer 2009a:392. Galand 2019:128.
[823] Shahabuddeen 2004:1013.
[824] Wessel 2006:414. See also Werle 2012:1158-159.
[825] Sadat and Jolly 2014:766.
[826] Rome Statute: Article 21(1)(a).
[827] Rome Statute: Article21(1)(b).
[828] Cryer 2009a:392.
[829] Danilenko 2000:490. Viebig 2016:25.
[830] Rome Statute: Article21(1)(c), emphasis added.

general principles of national legal systems.[831] Furthermore, while Article 21 granted primacy to the RS, it could not be read *a contrario* to mean that the ICC should not resort to customary international law or the UN tribunals' jurisprudence under *any* circumstances.[832] Many legal experts considered that the interpretation of the RS in a consistent manner with the pre-existing ICL jurisprudence and customary international law would be legally convincing[833] because it would avoid the 'fragmentation' of ICL.[834]

Ultimately, it was to a large extent left to the ICC's judges to decide whether the court's case law would embody or not pre-existing ICL jurisprudence.[835] The ICC judges could have sought consistency with previous ICL practices and relied on the vast jurisprudence of the UN tribunals to help the interpretation of the relevant RS provisions.[836] Conversely, the ICC judges could construe the Court as a novel ICL system. Because there existed different sets of shared understandings on these matters within the ICL field, whichever approach the judges would chose, it was likely going to receive validation by some subgroups of the ICL epistemic community and criticism from others.

6.2. Article 25(3): to be or not to be consistent with the UN tribunals

The ICC's judges took a decidedly self-contained approach to the interpretation of Article 25(3)(a)[837] and cautioned against the mechanic application of the practices associated with the assessment of criminal responsibility derived from the UN tribunals' jurisprudence at the ICC.[838] Instead of the well-established but equally controversial JCE doctrine, the ICC judges at the *Lubanga* and the *Katanga and Ngudjolo* PTCs proposed a novel approach called 'control over the crime' that borrowed heavily from German criminal law scholarship. The novel ICC approach addressed two lines of criticism that were directed towards JCE by some members of the ICL epistemic community: the lack of differentiation between the parties to the collective crime and the broad scope of that mode of liability. In relation to the former, many chambers, including the PTC, AC and the majority at the TC in *Lubanga*, adopted a

[831] Pellet 2002:1075. See also DeGuzman 2016b:944.
[832] Van Sliedregt 2012b:849-850.
[833] Sadat and Jolly 2014:761. Satō 2012:300. Werle and Jessberger 2005:46. Finnin 2012:354.
[834] Cryer 2009b:295-296. Steer 2014:64.
[835] Greenwalt 2011:1082. Boyle and Chinkin 2007:276. Van Schaack 2009:104. Perrin 2008.
[836] Goy 2012.
[837] Van Sliedregt 2012b:849.
[838] Schabas 2007:196.

normative differentiation between the degrees of blameworthiness of 'principals' and 'accessories'. With respect to the scope of liability, the *Lubanga* PTC attempted to introduce what in their opinion constituted a less subjective basis for assessing criminal responsibility than JCE. Although that approach to the law on commission liability was contested by individual judges, including Judge Fulford and Judge Van den Wyngaert, the 'control' approach became the dominant theory of construing the requirements of Article 25(3)(a) in ICC jurisprudence.

6.2.1. The 'control over the crime' theory

Even though Article 25(3)(a) presented a far more detailed definition of 'commission' liability compared to the Statutes of the UN tribunals, the ICC judges were, nevertheless, left with notable room to manoeuvre in the interpretation of the gaps and overlaps in the law that inevitably resulted from the RS's negotiations process. Consequently, even though there is merit to the argument that the RS constrained the scope of individual criminal responsibility at the ICC compared to previous tribunals, that argument fails to explain why the ICC judges, notably at the *Lubanga* and *Katanga and Ngudjolo* PTCs, used their interpretative space to forward an *even more* principled and restrained interpretation of Article 25(3)(a) than provided by the text, and to set up more 'objective' requirements for establishing criminal responsibility at the ICC compared to the UN tribunals. This section argues that the ICC's principled approach to commission liability can be traced to the shared understandings among those judges, as well as many members of the ICL community of practice outside the Court, that the culpability principle had to be interpreted in a restrained manner and that the new ICC had to disassociate from the JCE theory.

In 2007, the *Lubanga* PTC decided to examine different approaches for differentiating between the modes of liability for committing a crime under Article 25(3)(a) and the modes of accessory liability under Article 25(3)(b)-(d). Firstly, the PTC considered the 'objective approach', according to which only the physical perpetrators of the crime were considered principal perpetrators.[839] Next, the judges considered what *they called* the 'subjective approach', which focused on the state of mind rather than the physical conduct of the accused. According to that approach, the individuals who shared the intent to commit the crime were

[839] *Lubanga* Confirmation Decision:¶328.

considered principals, regardless of the level of their objective, or physical, contribution to the crime.[840] Notably, the PTC identified JCE as a 'subjective approach' to determining principal liability because of the doctrine's emphasis on the shared intent of the JCE members to commit the crime.[841]

The ICC judges concluded that 'unlike the jurisprudence of the [UN] tribunals' the RS embraced a third approach to principal liability, called the 'control over the crime' theory.[842] According to the control theory, the notion of principal perpetrator included not only the physical perpetrators of the crime, but also the persons who 'in spite of being removed from the scene of the crime, *control* or *mastermind* its commission', by deciding where and how the crime was committed.[843] The judges noted that the control theory combined both objective elements, namely, the factual circumstances enabling the principal perpetrator to control the crime, and subjective elements – that person's awareness of such circumstances.[844] Therefore, the ICC judges adopted a theory of criminal responsibility which they perceived to be *more* objective than the widely criticised JCE.

Based on the control theory, the ICC judges interpreted the language of Article 25(3)(a). In 2007 the *Lubanga* PTC focused on the second scenario provided for in subparagraph (a), namely, that a crime can be committed 'jointly with another' person. According to the PTC, the provision referred to those situations in which two or more persons jointly shared control over the commission of the crime.[845] The PTC determined that several requirements had to be met in order to establish the existence of joint control. Firstly, the prosecutor had to prove the 'existence of an agreement or a *common plan* between two or more persons'.[846] That common plan needed to include 'an element of criminality' although it did not need to be entirely criminal in nature.[847] Secondly, the evidence needed to establish that each co-perpetrator had made a 'co-ordinated essential contribution' towards the common plan that resulted in the commission of the crime.[848] The essential contribution requirement ensured that only those

[840] Ibid.:¶329.
[841] Ibid.
[842] Ibid.:¶338.
[843] Ibid.:¶330, emphasis added.
[844] Ibid.:¶331.
[845] Ibid.:¶342.
[846] Ibid.:¶343, emphasis added.
[847] Ibid.:¶344.
[848] Ibid.:¶346.

individuals who had had the power 'to frustrate the commission of the crime by not performing their tasks' would be regarded principal co-perpetrators.[849] Thus, the *Lubanga* PTC interpreted the 'vague' RS words 'jointly with another' to constitute a theory of co-perpetration that posed very specific requirements.[850] The judges at other ICC chambers subsequently concurred with that interpretation of the Statute.[851]

Arguably, meeting the specific requirements of co-perpetration made the job of the prosecutor more complicated than the plain reading of 'joint conduct' would have. The latter appeared far broader compared to the *Lubanga* PTC's peculiar interpretation of Article 25(3)(a). Already in its first confirmation of charges decision the ICC demonstrated reluctance to follow the practices exhibited at earlier international tribunals, to ease the burden on the prosecutor by view of the challenges of establishing individual criminal responsibility for mass atrocities.[852]

A year later, in 2008, the *Katanga and Ngudjolo* PTC used the control theory to interpret another provision of Article 25(3)(a) – commission 'though another person, regardless of whether that other person is criminally responsible'. Because the group of legal experts at the PrepCom did not provide interpretative guidance on the novel ICL provision of indirect perpetration through a non-innocent agent, it was up to ICC judges to bestow those words with meaning. The *Katanga and Ngudjolo* PTC found that the provision concerned those instances when a crime was committed through a hierarchical *organization* under the control of the indirect perpetrator.[853] The judges concluded that several requirements had to be met in order to hold the indirect perpetrator criminally responsible for the crime that was physically committed by a member of that organization. Firstly, the organization had to be based on hierarchical relations and to accommodate a sufficient number of subordinates in order to guarantee that the superiors' orders would be carried out, 'if not by one subordinate, then by another'.[854] Secondly, the judges determined that the accused had to have enjoyed 'authority

[849] Ibid.:¶347.
[850] Weigend 2008:479.
[851] See *Katanga and Ngudjolo* Confirmation Decision:¶¶480-486. *Bemba* Confirmation Decision:¶¶347-348. *Al-Bashir Arrest Warrant Decision 2009*:¶210.
[852] G. Fletcher 2011.
[853] *Katanga and Ngudjolo* Confirmation Decision:¶¶512-514.
[854] Ibid.¶512.

and control' over the organization[855] and mobilised that authority and control to 'secure compliance' with their orders to commit crimes.[856]

Finally, the *Katanga and Ngudjolo* PTC concluded that the 'co-perpetration' and 'indirect perpetration' modes of liability can be combined into a new mode of liability that the judges called 'joint commission through another person',[857] which became known in ICC jurisprudence as 'indirect co-perpetration'.[858] The 'indirect co-perpetration' mode enabled the attribution of criminal responsibility to each co-perpetrator, even if only one of those persons had exercised control over the physical perpetrators of the crimes.[859]

The *Lubanga* and *Katanga and Ngudjolo* PTCs' interpretation of Article 25(3)(a) essentially did two things. Firstly, it dismissed JCE as the dominant approach to establishing liability for committing a crime in ICL. Secondly, it vested the text of Article 25(3)(a) RS with very specific meaning: the term 'commission' was interpreted to mean 'control over the crime'. The words: commission 'jointly with another' person were interpreted as making an 'essential contribution' to a 'common plan' that resulted in the commission of a crime. The phrase commission 'through another person' – as commission though a hierarchical 'organization' composed of fungible members ready to obey criminal orders. Neither the complete rejection of JCE, nor the adoption of the control approach were preordained by the statutory language. Rather, the manner in which the *Lubanga* and *Katanga and Ngudjolo* PTCs construed the modes of liability listed in Article 25(3)(a) displayed their shared understandings about the requirements of criminal responsibility for committing a crime.

The *Katanga and Ngudjolo* PTC argued that the notion of 'control over an organized apparatus of power', was 'incorporat[ed] within the legal framework of the Court'.[860] But, as observed by one dissenting ICC judge who did not share the opinion of her colleagues that Article 25(3)(a) embraced the control theory, the provision 'only speaks of commission

[855] Ibid.¶513.
[856] Ibid.¶514.
[857] Ibid.¶489.
[858] *Al-Bashir Arrest Warrant Decision 2009*:¶213.
[859] *Katanga and Ngudjolo Confirmation Decision*:¶493.
[860] *Katanga and Ngudjolo Confirmation Decision*:¶510. See also *Lubanga Confirmation Decision*:¶¶333-335.

"through another *person*"', not through an *organisation*.[861] Neither the plain language of Article 25(3), nor the *travaux préparatoires* anywhere mentioned the control theory.[862] Nor does the RS make use of the terms 'objective' and 'subjective' approaches to principal liability, as observed by one participant in the drafting of the General Part.[863] Hence, the construction of the modes of liability of Article 25(3)(a) in accordance with the control theory did not exactly present a 'literal interpretation' of the RS.[864]

Furthermore, the rejection of JCE at the ICC was not self-evident. It has been observed that the notion of 'co-perpetration' under Article 25(3)(a) resembled the basic form of JCE, or JCE I, and the concept of 'indirect perpetration' bore similarities with the revised JCE theory introduced in *Brđanin*.[865] In fact, before the ICC judges invoked the control theory, the phrase 'jointly with another' under Article 25(3)(a) RS was interpreted by the Legal Representatives of Victims at the ICC as pertaining to the notion of 'joint criminal enterprise'.[866] Some authoritative commentators also expected the judges at the new court to be 'strongly influenced' by the prolific jurisprudence of the UN tribunals on JCE.[867] Even legal experts, who otherwise considered that there were important differences between the ICC regime and the UN tribunals, acknowledged that insights from the JCE jurisprudence may be relevant for interpreting Article 25(3)(a) RS.[868] Hence, the *complete* rejection of JCE by the *Lubanga* PTC took by 'surprise' some members of the ICL community of practice.[869]

The following section analyses the ideas that were promoted within the ICL community of practice around the late 1990s and early 2000s to illuminate the reasoning behind the peculiar interpretation of Article 25(3)(a) and address the question why the judges at the *Lubanga* and *Katanga and Ngudjolo* PTC chose to interpret the law on commission liability in such principled manner, by stipulating numerous complicated requirements that the ICC prosecutor had to meet in order to convict a person for committing a crime.

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[861] *Ngudjolo Judgment, Judge Van den Wyngaert Opinion*:¶52, emphasis in the original. See also Weigend 2011:105-106.
[862] The review of all public records at the PrepCom and Rome Conference supports this conclusion. See also Van Sliedregt 2012a:86. Heller 2012. Sadat and Jolly 2014:782. Greenwalt 2011:1080-1081.
[863] R. Clark 2008:546-547.
[864] Weigend 2011:109.
[865] Van Sliedregt 2014:1156.
[866] *Lubanga Confirmation Decision*:¶325.
[867] Schabas 2007:215.
[868] Werle 2007:961.
[869] Manacorda and Meloni 2011:165.

6.2.1.1. Tracing the roots of the principled approach to commission liability

It has been observed that the adoption of the control theory and the rejection of JCE may have something to do with the presence of influential civil law-trained judges at the ICC.[870] The majority of the judges at the *Lubanga* and *Katanga and Ngudjolo* PTCs came from civil law countries[871] and those chambers often referred to German criminal law theory when interpreting the term 'commission' under Article 25(3)(a).[872] The control theory, or the 'domination of the act' theory (*Tatherrschaft*), was developed by the German legal scholar Claus Roxin in 1963.[873] Roxin was also the author of the 'control over an organization' theory (*Organisationsherrschaft*),[874] which the *Katanga and Ngudjolo* PTC relied upon in order to interpret the RS provision on perpetration through a non-innocent agent.[875] Even though the judges argued that the control theory was applied by 'numerous legal systems',[876] it has been generally accepted only in German- and Spanish-speaking literature[877] and applied in national proceedings in Germany and Latin America.[878] As observed by one authoritative ICL scholar, it was somewhat of an 'exaggeration' to imply that the control theory was 'widely representative of different legal cultures'.[879]

But the professional background of the judges presents only part of the story. The adoption of the control approach also reflected broader dynamics in the ICL field, such as the influential writings of ICL scholars coming from German background, the attempt to disassociate the ICC from the jurisprudence of the ICTY and, last but not least, the desire to reflect the complex dynamics of mass atrocities.

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[870] Steer 2014:45-46. R. Clark 2008:546-547.
[871] Specifically, Judge Sylvia Steiner from Brazil, Judge Anita Ušacka from Latvia, and Judge Claude Jorda from France. Judge Akua Kuenyehia from Ghana had a background in common law.
[872] *Lubanga* Confirmation Decision:¶348,footnote 425. *Katanga and Ngudjolo* Confirmation Decision:¶¶482-485 and footnotes 642,645-647, ¶489 and footnotes 658-659, ¶517 and footnote 684.
[873] Roxin 1963.
[874] Roxin 2011[1963].
[875] *Katanga and Ngudjolo* Confirmation Decision:¶498.
[876] *Lubanga* Confirmation Decision:¶330. See also *Katanga and Ngudjolo* Confirmation Decision:¶485.
[877] Gil and Maculan 2015:354. See also Weigend 2015:547.
[878] Ambos 2016:955.
[879] Ohlin 2015.

Prior to the 2007 *Lubanga* PTC's decision, several authoritative German scholars who published extensively on questions of ICL, including Kai Ambos, Gerhard Werle and Albin Eser, had already suggested that *Organisationsherrschaft* was an appropriate legal theory for interpreting Article 25(3)(a).[880] According to Ambos, 'unlike JCE' the *Organisationsherrschaft* theory could convincingly be used by international tribunals to construe the meaning of the term 'committing' a crime.[881] Notably, in the early decisions of the Court including the *Lubanga* and *Katanga and Ngudjolo* confirmation of charges decisions, when Article 25(3)(a) was for the first time extensively deliberated upon, the ICC judges appeared particularly attentive to such academic analyses of the RS and often referred to the writings of ICL scholars.[882] The first AC decision that discussed the matter, namely in the *Lubanga* case, also noted that the control approach to commission liability was 'supported by academic commentators'.[883] While later decisions did not *explicitly* refer to scholarship analysis, those decisions generally concurred with the theoretically-grounded findings of the *Lubanga* and the *Katanga and Ngudjolo* PTCs and the *Lubanga* AC with respect to Article 25(3)(a).[884] The 'growing influence of criminal law theory' and academic writings at the Court resembled the civil law's dogmatic approach to criminal responsibility, rather than the common law's pragmatism that was characteristic of the UN tribunals.[885] The ICC finally presented criminal law scholars with an opportunity 'to develop a comprehensive theory of individual criminal responsibility' in ICL.[886]

Consequently, it has been proposed that the rejection of JCE and the adoption of Roxin's control theory at the ICC was influenced by 'the pleas of (mainly) German legal scholars'.[887] Indeed, many authoritative academics welcomed the departure from the JCE approach and the ICC's 'path-breaking' decision to interpret Article 25(3) RS in accordance with a detailed

[880] Ambos 2006:664. Werle 2005:124,fn.196. Eser 2002b:796.
[881] Ambos 2007:182.
[882] See *Lubanga* Confirmation Decision:¶326,footnote 417. *Katanga and Ngudjolo* Confirmation Decision:¶498,footnote 659, ¶501,footnote 665. *Mbarushimana* Confirmation Decision:¶279,footnote 659.
[883] *Lubanga* Appeals Judgment:¶465,footnote 867. See also footnotes 864-866.
[884] See *Bemba* Confirmation Decision:¶¶347-348. *Al-Bashir Arrest Warrant Decision 2009*:¶210. *Ruto, Kosgey and Sang* Confirmation Decision:¶¶291-292. *Ongwen* Confirmation Decision:¶¶38-40. *Bemba et al.* Trial Judgment:¶¶62-71. *Gbagbo* Confirmation Decision:¶230. *Blé Goudé* Confirmation Decision:¶134.
[885] Ohlin in Stahn 2015:517.
[886] Jessberger and Geneus 2008:867.
[887] Van der Wilt 2009:309.

criminal law theory.[888] Legal scholars noted the higher degree of precision of the ICC's control theory compared to the approach of the UN tribunals.[889] Even commentators who were otherwise critical of the expansion of principal liability beyond the physical perpetrators of the crimes, acknowledged that the ICC's approach to commission liability offered more 'sophisticated' justifications for such expansion compared to JCE[890] and possessed the added 'attraction of clarity'.[891] In other words, to many members of the ICL field the notion of control over the crime appeared to be theoretically more rigorous than the notion of participation in a criminal enterprise.

In fact, there are curious similarities between the original purpose for which Roxin developed the control theory and the adoption of his theory in ICL. Roxin's *Tatherrschaft* was developed in an attempt to present a new, *more* 'objectivist' theory for distinguishing between principal and accessory liability.[892] To that point, German courts had generally taken the subjectivist approach to differentiation and examined the accused's intent to commit the crime as the criterion for distinguishing principals from accessories. But the subjective approach triggered concern among legal scholars that the judges were vested with too much discretion to assess the defendant's attitude to the crime.[893] After all, the 'subjective' elements of criminal responsibility, which require an inquiry into the *mind* of a person, appear 'far more vague and difficult to prove' than the 'objective' ones.[894]

In a similar manner, the *Lubanga* PTC rejected what the judges defined as the 'subjective' JCE theory for the control theory that was argued to combine 'objective' with 'subjective' elements. Whether the UN tribunals actually followed a 'subjective' approach to establishing principal liability is debatable. Some legal experts have opined that such a label did not 'do justice' to JCE because the latter required active contribution to the common design.[895] Since the UN tribunals did not use the 'subjective/objective' terminology in their jurisprudence, the *Lubanga* PTC's categorisation of JCE as a 'subjective' approach appeared

[888] Fletcher 2011. Ambos 2012b:144-146. Jessberger and Geneuss 2008:866-867. Granik 2015. Werle 2007:962-963.
[889] Manacorda and Meloni 2011:171.
[890] Guilfoyle 2011:279.
[891] Ibid.:265.
[892] Weigend 2011:95. Jain 2011:165.
[893] Weigend 2011:94-95.
[894] Olásolo 2009b:73.
[895] Weigend 2008:478. See also Haan 2005:195-196.

to be employed in order to differentiate the ICC's control theory from JCE, rather than as an accurate description of the UN tribunals' jurisprudence.[896] Moreover, to the extent that the *Lubanga* and the *Katanga and Ngudjolo* PTCs relied on the UN tribunals' jurisprudence in construing the meaning of the term 'commission', they chose the ICTY judgment that tried to substitute JCE with a control-based theory of criminal responsibility – the reformist *Stakić* TC Judgment.[897]

Notably, the ICC did not differentiate itself from all practices of the UN tribunals on the assessment of criminal responsibility, but specifically from those ones, such as the reliance on JCE, that had triggered criticism for infringing upon the culpability principle. Unlike their interpretation of the term 'committing' a crime under subparagraph (a), the ICC judges were more willing to borrow insights from the UN tribunals' jurisprudence when it came to modes of liability that were different from the infamous JCE. Even though the *Mbarushimana* PTC emphasised the differences between the ICC regime and the UN tribunals[898] and subscribed to the control theory of commission liability,[899] the PTC referred to the ICTY's jurisprudence on 'aiding and abetting' a crime when interpreting Article 25(3)(c) RS.[900] Similarly, the *Mudacumura* PTC borrowed from the UN tribunals' jurisprudence in interpreting the terms 'orders, solicits, or induces' the commission of a crime under subparagraph (b).[901] Members of the broader ICL community of practice, who otherwise highlighted the differences between JCE and the modes of principal liability under Article 25(3)(a) RS, supported the idea of relying on the prolific jurisprudence of the UN tribunals when it came to accessory modes of liability, such as Article 25(3)(b) and (c).[902] From that perspective, when it came to modes of liability that did not pertain to the controversial JCE, the ICC could '*legitimately* look at the case law of the [UN] tribunals'.[903] Unlike JCE, the accessory modes of liability in ICL were generally not considered as a source of much 'controversy or complexity'.[904]

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[896] Van Sliedregt 2012:84.
[897] *Lubanga* Confirmation Decision:¶342,footnote 422, ¶343,footnote 423, ¶346,footnote 424. *Katanga and Ngudjolo* Confirmation Decision:¶506.
[898] *Mbarushimana* Confirmation Decision:¶281.
[899] *Mbarushimana* Arrest Warrant Decision:¶30.
[900] *Mbarushimana* Confirmation Decision:¶279.
[901] *Mudacumura* Arrest Warrant Decision: footnotes 129-133. See also Ambos 2016:1001-1002.
[902] Olásolo and Rojo 2015:559. Ambos 2016:1008. Werle 2007:969.
[903] Kai Ambos's expert testimony on Article 25(3) RS during the *Mbarushimana PTC Hearing*: 10, lines 13-14, emphasis added.
[904] Boas 2010:206.

Finally, the attractiveness of the control theory compared to JCE was not merely the result of the theory's perceived objectivity, but also because of its expressivist potential to paint a convincing picture of system criminality.[905] Roxin's theory presented 'juridical acknowledgement of the *bureaucratic* nature of mass atrocity'.[906] In fact, the notion of organizational control was invoked in well-known cases against former Nazi officials, including the *Eichmann* trial in Israel and the *Justice* trial at the US court at Nuremberg.[907] The appeal of Roxin's theory was its perceived ability to communicate to the victims and the broader international community 'who was the "real" culprit' behind mass atrocities,[908] namely, the mastermind or the leader who used 'ordinary people' to commit the crimes.[909] The *Katanga and Ngudjolo* PTC observed that a person's blameworthiness often increased '*in tandem* with a rise in the hierarchy'.[910] Consequently, the judges argued that their interpretation of Article 25(3)(a) on the basis of the control theory reflected 'the blameworthiness of "senior leaders" adequately'.[911]

Nevertheless, while Roxin's theory of the bureaucracy of atrocities may have been particularly apt to describe Nazi criminality, it appeared less attuned to modern-day African conflicts that have so far constituted the bulk of ICC investigations.[912] Possibly in anticipation of that challenge, without explanation the *Katanga and Ngudjolo* PTC modified Roxin's theory, by specifying another mechanism, apart from the replaceability of the subordinates, that could enable automatic compliance with the mastermind's orders. According to the judges, the existence of 'intensive, strict, and violent training regiments', including the abductions of minors and their training to shoot, rape and pillage, could similarly ensure the indirect perpetrator's control over the organization.[913] Some legal scholars welcomed the ICC's decision to reform what was perceived as the outdated bureaucratic version of the control theory.[914]

[905] Steer 2014:52. Granik 2015:986.
[906] Osiel 2009:95, emphasis added. Van der Wilt 2009:311-312.
[907] Ambos 2016:955.
[908] Van Sliedregt 2012:80.
[909] Jain 2011:196-197. Werle and Burghardt 2011:88. Weigend 2015:542.
[910] *Katanga and Ngudjolo* Confirmation Decision:¶503,emphasis in the original.
[911] Ibid.¶492.
[912] Cryer et al. 2014:368.
[913] *Katanga and Ngudjolo* Confirmation Decision:¶518.
[914] Osiel 2009:103,111.

6.2.1.2. Contesting the ICC's reliance on the control theory

Nevertheless, not all members of the ICL community of practice shared the understanding that the control theory constituted an improvement over JCE and some legal experts within and outside the ICC challenged the new approach to commission liability, concerned that the control theory went too far in restricting the scope of criminal responsibility. Judge Fulford who sat at the *Lubanga* TC preferred a 'plain' reading of the statutory text and considered the invocation of criminal law *theory* for interpreting Article 25(3)(a) an unnecessary complication. In his opinion, the term 'commits' simply required 'an operative link between the individual's contribution and the commission of the crime', as opposed to proof of the accused's control over the crime and the ability to frustrate its commission.[915] Notably, Judge Fulford was concerned that the control theory imposed 'an unnecessary and unfair burden *on the prosecution*'.[916] By contrast, his plain reading of Article 25(3)(a) involved 'a "lesser" test' for establishing criminal responsibility.[917] Whether that was due to his common law background, to a concern for delivering substantive justice, or both, Judge Fulford preferred a more pragmatic and less theoretical interpretation of the RS. Similarly, one of the judges at the UN tribunals, Judge Shahabuddeen, observed with concern that the requirement of establishing the perpetrator's control over the crime meant that in some factual situations a defendant could be convicted under JCE, but not under Roxin's theory.[918] The reactions of Judge Fulford and Judge Shahabuddeen suggest that the adoption of the control theory signalled to the ICL community of practice that the ICC understood the culpability principle in a more restrained fashion compared to its predecessors.

But, notably, unlike Judge Fulford and Judge Shahabuddeen, many other scholars and practitioners criticised the control approach for the exact opposite reason – they considered that the theory was not restrictive *enough*. More specifically, the *Lubanga* PTC's finding that the 'common plan' between the co-perpetrators '[did] not need to be 'specifically directed at the commission of a crime', but only needed to include an element of criminality,[919] raised concern among those legal experts who advocated for strict compliance with the culpability principle.

[915] *Lubanga Trial Judgment, Judge Fulford Opinion*¶15.
[916] Ibid.¶3, emphasis added.
[917] Ibid.¶21.
[918] Shahabuddeen 2010:200.
[919] *Lubanga* Confirmation Decision¶344.

From that perspective, the PTC's finding could result in charging the defendant with crimes committed in excess of the common plan as long as those crimes were foreseeable, which advantaged the prosecution and disadvantaged the defendant.[920] Even scholars who approved of the control approach argued that the 'common plan' should include a somewhat concrete crime.[921] Some ICC judges, including Judge Van den Wyngaert, also shared that understanding.[922]

Another source of concern by view of the culpability principle was the combination of 'co-perpetration' and 'indirect perpetration' into a new mode of liability, 'indirect co-perpetration', by the *Katanga and Ngudjolo* PTC. Some academics considered indirect co-perpetration 'a way to loosen' the concept of co-perpetration.[923] Judge Van den Wyngaert similarly observed that, by enabling the mutual attribution of the crimes to each indirect co-perpetrator, even if only one among those persons had actually controlled the crimes, the indirect co-perpetration mode of liability allowed for confirming the charges against the accused in cases that would not otherwise meet the requirements of either of the modes that were explicitly recognized by the RS, namely, indirect perpetration or co-perpetration.[924]

Consequently, some members of the ICL field, including legal academics such as Elies Van Sliedregt, Jens Ohlin and Thomas Weigend, and judges such as Judge Van den Wyngaert, criticised the control approach not because they perceived JCE as superior, but because they were concerned that the ICC's preferred theory could have resulted in similar expansion of criminal responsibility like JCE, when applied in practice in specific cases.[925] Those scholars were concerned that 'the rationale for the ICC's adoption of control-theory' was to reach 'similar results as would have been possible under JCE without explicitly adopting that much-maligned doctrine'.[926] As will be discussed in the next two chapters, in practice ICC judges have generally demonstrated a restrained approach towards the application of the control theory in specific cases and a commitment to the culpability principle, even if that meant the dismissal of charges or the acquittal of the accused.

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[920] Gil and Maculan 2015:360. See also Ohlin 2011:724.
[921] Ambos 2012b:140.
[922] *Ngudjolo Judgment, Judge Van den Wyngaert Opinion*:¶34.
[923] Manacorda and Meloni 2011:174.
[924] *Ngudjolo Judgment, Judge Van den Wyngaert Opinion*:¶63.
[925] Interview with Elies Van Sliedregt. See also Van Sliedregt, Ohlin and Weigend 2013:735-739. Gil 2014:89. Cupido 2014:151.
[926] Van Sliedregt, Ohlin and Weigend 2013:738-739.

The observation that so many legal experts, within and outside the ICC, sought stricter compliance with the culpability principle is important because it demonstrates that the desire to protect the accused from the attribution of guilt by association was shared not only by states, but also by many other actors within the ICL field. Consequently, as demonstrated by both the drafting process of the RS's General Part and the *Lubanga* and *Katanga and Ngudjolo* PTCs' interpretation of Article 25(3)(a), the principled approach to the establishment of criminal responsibility was motivated by a particular set of shared understandings within the ICL community of practice that became influential at the ICC, partly as a reaction to the UN tribunals' practices, partly as a result of the ICC judges' professional background and partly due to the perceived need to reflect accurately the nature of system criminality. The judges at the *Lubanga* and the *Katanga and Ngudjolo* PTCs refrained from interpreting Article 25(3)(a) in a broad manner, for instance, such as that suggested by Judge Fulford, that would have rendered convictions easier, and instead adopted a theoretically-informed approach to the assessment of criminal responsibility for committing a crime that listed various specific requirements for the prosecutor to establish.

6.2.2. Modes of accessory liability – subparagraphs (b)-(d)

The previous section argued that the *Lubanga* and *Katanga and Ngudjolo* PTCs interpreted Article 25(3)(a) more narrowly than the UN tribunals because the judges and many members of the ICL community of practice outside the Court understood that interpretation to constitute sound legal reasoning, and not merely because the RS drafters had defined the term 'commission' in far more detail than the tribunals' statutes. This suggestion finds further support by view of manner in which the PTC, TC Majority and AC in *Lubanga* treated the modes of accessory liability listed in Article 25(3)(b)-(d). If the ICC judges had wanted to make convictions easier for the prosecutor but were constrained by the detailed language of subparagraph (a), they could have side-lined that mode of liability and instead focused on the provisions that merely required proof of the accused's *participation* in the crime committed by someone else. But the ICC jurisprudence fixated mainly on subparagraph (a) and did not attribute significant attention to the rest of Article 25(3),[927] essentially downgrading the significance of subparagraphs (b) and (c). Moreover, instead of relying on the broad text of

[927] *Lubanga* Confirmation Decision:¶321. *Katanga and Ngudjolo* Confirmation Decision:¶471.

subparagraph (d) for the purpose of delivering substantive justice when there was scarce evidence of the accused's direct connection to the crime, the *Mbarushimana* PTC raised the requirements of that provision, thus, recognizing the concerns that were expressed by advocates of stricter compliance with the culpability principle with respect to Article 25(3)(d).

6.2.2.1. A hierarchy of blameworthiness

The first chambers that interpreted extensively Article 25(3) at the ICC, including the *Lubanga* and *Katanga and Ngudjolo* PTCs, not only set up rigorous requirements of criminal responsibility under subparagraph (a), but they also elevated the normative significance of that mode of liability vis-à-vis the rest of the modes listed in the RS.[928] By contrast to the IMT, IMTFE and the UN tribunals, in 2012 the *Lubanga* TC Majority subscribed to the idea of differentiating between degrees of criminal responsibility, by interpreting the modes of liability codified in Article 25(3)(a)-(d) as a hierarchy of blameworthiness.[929] Subsequently the *Lubanga* AC concurred that the distinction between principal liability under subparagraph (a) and accessory modes of liability under subparagraphs (b)-(d) was 'not merely terminological' but carried normative significance.[930] The concept of principal liability was said to 'express the blameworthiness of those perpetrators who are the *most* responsible' for international crimes.[931]

The normative differentiation between modes of liability was not preordained by the Statute. Neither Article 25(3)(a) 'expressly' provided for the gradation of criminal responsibility,[932] nor did Article 78 regulating the determination of the sentence explicitly link the different modes of liability with specific length of punishment.[933] The *Lubanga* PTC and TC Majority could have sidestepped the detailed definition of commission liability in the RS and instead relied on accessory modes of liability for obtaining easier convictions. In fact, one of the drafters of the Statute's General Part, Roger Clark, considered that subparagraph (b), which criminalized the ordering of a crime, rather than subparagraph (a), was the provision

[928] *Lubanga* Confirmation Decisions:¶320. *Katanga and Ngudjolo* Confirmation Decision:¶¶488,¶492,¶503.
[929] *Lubanga* Trial Judgment:¶¶998-999.
[930] *Lubanga* Appeals Judgment:¶462. See also *Bemba et al. Trial Judgment*:¶85.
[931] *Lubanga* Trial Judgment:¶999,emphasis added.
[932] Ambos 2013:146.
[933] Also observed by Militello 2007:948. Werle and Burghardt 2014:306.

that would be used to deal with 'the big fry, those typically "most responsible" for what occurs'.[934]

But the *Katanga and Ngudjolo* PTC was of the opposing opinion. The PTC concluded that unlike subparagraph (a) carried special significance because it established the indirect perpetrator's principal liability for ordering a crime through a hierarchical organization that ensured almost automatic compliance with the orders, while Article 25(3)(b) concerned merely '*ordinary* cases of criminal ordering' and could be used to attribute only accessory liability to the defendant.[935] Although not explicitly quoted by the PTC, similar interpretation of Article 25(3) was forwarded earlier in ICL scholarship.[936] Nowhere did the Statute include the terms ordering crimes 'though an organization' or ordering crimes under 'ordinary' circumstances. Yet, the judges bestowed the wording of the provision with meaning by highlighting the significance of principal liability as an exceptionally blameworthy conduct and in effect downgraded the 'ordinary' criminal orders. The mode of liability of aiding and abetting a crime under subparagraph (c) received even less attention in ICC jurisprudence than subparagraph (b). Even though the mode of aiding and abetting a crime was discussed in some major cases at the UN tribunals,[937] including *Tadić*[938] and *Furundžija*,[939] at the ICC subparagraph (c) remained of far lesser importance.

The adoption of the normative approach reflected the judges' shared understandings about the appropriate manner in which criminal responsibility had to be assessed, which played out against the silence of the RS on the matter of differentiation. Legal experts with professional experience mainly in German criminal law defended the normative interpretation of Article 25(3) on the grounds that it displayed respect of the principle of fair labelling.[940] From the perspective of the Germanic system, the practice of 'labelling' the mode of participation of the accused *from the outset of proceedings,* i.e. from the moment of bringing up the charges, was crucial in civil law system.[941] Several ICC chambers specifically referred to academic publications on the matter to support their conclusion that Article 25(3) constituted

[934] R. Clark 2008:544.
[935] *Katanga and Ngudjolo* Confirmation Decision:¶517,emphasis added.
[936] See e.g. Werle 2007:974.
[937] For an overview see Ambos 2016:1003-1008.
[938] *Tadić Trial Judgment*:¶¶688-692.
[939] *Furundžija Trial Judgment*:¶¶190–249.
[940] Ambos 2013:147. Werle and Burghard 2014:311-315.
[941] Interview with Kai Ambos.

a 'value oriented hierarchy of participation'.[942] The normative approach appealed to NGOs too. Influential organizations including Human Rights Watch observed that the precise definition of individual criminal liability was essential for establishing effective accountability mechanism for human rights abuses.[943]

By introducing the normative distinction between modes of liability to ICL, the AC and the TC Majority in *Lubanga* demonstrated that they shared the concerns of those members of the ICL community of practice that the principle of fair labelling required greater accuracy in describing the accused's criminal responsibility. It was also another way of signalling to the broader ICL field that the ICC had departed from the practices of earlier tribunals – from the use of the conspiracy charge at Nuremberg and Tokyo, to the ICT's reliance on JCE, international tribunals had been criticised for failing to reflect the different degrees of blameworthiness of the participants in mass atrocities.

But because the ICL field accommodates different sets of shared understandings about the law on criminal responsibility, the normative approach of the ICC did not remain uncontested. Some scholars recognized that Article 25(3) differentiated between the forms of participation in a crime but considered that the provision did not render particular modes of liability as more or less blameworthy.[944] This view was shared by Judge Fulford sitting at the *Lubanga* TC and Judge Van den Wyngaert at the *Ngudjolo* TC, who rejected the proposition that principal liability for commission of a crime under subparagraph (a) was by default more serious than accessory liability for e.g. ordering a crime under subparagraph (b).[945] The opposition of Judge Fulford and Judge Van den Wyngaert against their colleagues' interpretation of Article 25(3) as a hierarchy of blameworthiness was described as 'a clash' between the German/Hispanic tradition of normative differentiation and the French and Anglo-American naturalistic tradition, that generally treats the degree of responsibility as a matter of

[942] See *Mbarushimana* Confirmation Decision:¶279 and footnote 659. *Lubanga* Appeals Judgment:¶462, footnote 682. The relevant paragraph of the *Lubanga* Appeals Judgment was also quoted by the *Bemba et al.* Trial Judgment:¶85,footnote 151.
[943] Human Rights Watch 2009:8.
[944] Van Sliedregt 2012a:108. Van Sliedregt, Ohlin and Weigend 2013:744. Gil and Maculan 2015:365.
[945] *Lubanga Trial Judgment, Judge Fulford Opinion*:¶8. *Ngudjolo Judgment, Judge Van den Wyngaert Opinion*:¶22.

sentencing to be addressed in each case, rather than a general rule of criminal law.[946] Before the ICC, the latter approach constituted the established practice in ICL.

It is difficult to conclude which side 'won' the battle over the determination of the correct approach to differentiating between the RS's modes of liability. In 2014 the judges at the *Katanga* TC, among whom was Judge Van den Wyngaert, found that the distinction between principles and accessories under Article 25(3) did not constitute a hierarchy of blameworthiness.[947] But subsequent decisions suggest that many ICC judges still subscribed to the normative approach to differentiation. In 2016, the *Al-Mahdi* TC interpreted Article 25(3) as a hierarchy of blameworthiness[948] and in 2019 the *Ntaganda* TC referred to the importance of a 'normative assessment of the role of the accused person' in the crime.[949]

Overall, the question of differentiation between the forms of participation in a crime by view of the fair labelling principle, something which many legal experts had called for at the UN tribunals, was taken seriously at the ICC. By defining more clearly the requirements of commission liability than the UN tribunals and downgrading the normative significance of the accessory modes of liability under subparagraphs under Article 25(3)(b)-(d), the *Lubanga* and *Katanga and Ngudjolo* PTCs, and the *Lubanga* TC Majority demonstrated commitment to a more restrained interpretation of the criminal responsibility principles. The judges recognized that the modes of accessory liability may pose lower requirements than subparagraph (a), but they also mitigated the blameworthiness of those modes, seeking proportionality of punishment, rather than easier convictions.

6.2.2.2. Interpreting subparagraph (d)

The ICC's commitment to the principled assessment of criminal responsibility also became evident in the *Mbarushimana* PTC and *Mbarushimana* AC's interpretation of the mode of liability that posed the lowest requirements in Article 25(3) – subparagraph (d). By criminalizing contributions to a crime committed by a group acting with a 'common purpose',

[946] Van Sliedregt, Ohlin, and Weigend 2013:473.
[947] *Katanga Trial Judgment*:¶1386.
[948] *Al Mahdi, Judgment and Sentence*:¶58.
[949] *Ntaganda Trial Judgment*:¶779.

Article 25(3)(d) appeared reminiscent of the controversial JCE doctrine.[950] In fact, the *Tadić* AC referred to Article 25(3)(d) RS as a legal source that supported the existence of the JCE doctrine in international law.[951] But the judges at the *Mbarushimana* PTC emphasised that 'as similar as they might appear' JCE and Article 25(3)(d) were not identical because while under JCE the accused's contribution to the collective crime triggered principal liability, under Article 25(3)(d) it triggered merely accessory liability.[952] Thus, the PTC in *Mbarushimana* implicitly suggested that subparagraph (d) was more compliant with the fair labelling principle and avoided escalation of responsibility for participation in a group's crime. Furthermore, the *Katanga* TC argued that JCE could be used to attribute liability for *all* of the crimes committed as part of the common purpose, but subparagraph (d) attracted criminal responsibility only for those crimes to which the accused had *contributed personally*.[953] Thus, the ICC judges implicitly suggested that Article 25(3)(d) presented a mode of liability that was more compliant with the culpability principle than JCE.

Moreover, the ICC judges decided to further restrict the scope of Article 25(3)(d) by adding a criterion that was not included in the RS. The *Mbarushimana* PTC acknowledged the concerns of legal experts that the statutory language of subparagraph (d) risked the attribution of criminal responsibility to every member of a community, who simply provided the criminal group with groceries or services.[954] Even though the text of subparagraph (d) did not impose a minimum threshold concerning the accused's contribution,[955] the *Mbarushimana* PTC reckoned that: 'it would be inappropriate for such liability to be incurred through *any* contribution to a group crime.'[956] To avoid the possibility of 'overextend[ing]' liability,[957] the PTC judges determined that the contribution to the crime under subparagraph (d) had to be 'at least significant'.[958] Nowhere did the language of the provision include the term 'significant'. The *Mbarushimana* PTC essentially '*added* a criterion to the wording of article 25(3)(d)'.[959] Later on, Judge Fernández de Gurmendi at the AC offered another way of restricting the scope

[950] Schabas 2007:217-218. Ohlin 2007:77. DeFalco 2013:722.
[951] *Tadić Appeals Judgment*:¶222.
[952] *Mbarushimana* Confirmation Decision:¶282.
[953] *Katanga Trial Judgment*:¶1619.
[954] *Mbarushimana* Confirmation Decision:¶277, footnote 656.
[955] DeFalco 2013:716.
[956] *Mbarushimana* Confirmation Decision:¶276,emphasis in the original.
[957] Ibid.¶277.
[958] Ibid.¶283.
[959] *Mbarushimana Appeals Judgment, Judge Fernández de Gurmendi Opinion*:¶7,emphasis added. See also Ambos 2015b:598.

of Article 25(3)(d), namely, to assess 'the normative and causal link' between the accused's contribution and the crime.[960] Both approaches, that of the *Mbarushimana* PTC and of Judge Fernández de Gurmendi, were developed with the aim to restrict the scope of subparagraph (d), even though neither approach was provided for by the RS.[961]

The downgrading of the importance of accessory liability and the incorporation of an additional requirement that raised the burden imposed by subparagraph (d) to the prosecutor may appear curious in light of the practices of previous international tribunals, including the IMTFE and the ICTY, which construed broad modes of liability, such as conspiracy and JCE, in order to make it easier to link high-level accused to the crimes. But the analysis of the normative dynamics within the ICL community of practice revealed that the PTCs in *Mbarushimana*, *Katanga and Ngudjolo*, and *Lubanga* to name a few chambers, understood the culpability principle in a more restrained manner, so as to require a more evident link between the accused and the crime, compared to the Court's predecessors. The ICC judges also placed greater emphasis on fair labelling of the accused's criminal responsibility. As discussed in chapter 7, with the notable exception of the *Katanga* TC, the ICC judges were similarly reluctant to rely on accessory modes of liability for establishing the defendant's guilt in specific cases and displayed clear preference for relying on facts that demonstrated the accused's personal involvement, as opposed to remote assistance, in the commission of the crimes.

6.3. Interpreting Article 28: narrowing the scope of command responsibility

The *Bemba* PTC adopted the same restrained approach to the interpretation of command responsibility – another mode of liability, that had triggered criticism by view of its compliance with the culpability principles as applied at the IMTFE and the UN tribunals. Notably, the ICC judges referred to the UN tribunals' extensive jurisprudence when elaborating on some of the requirements of command responsibility under Article 28 RS, including the notion of 'effective control'.[962] Those elements of command responsibility, as found in the practice of the UN tribunals, were described by legal experts as 'not conceptually controversial' in relation to the

[960] *Mbarushimana Appeals Judgment, Judge Fernández de Gurmendi Opinion*:¶12.
[961] DeFalco 2013:729.
[962] *Bemba* Confirmation Decision:¶¶414-416.

culpability principle and were even considered to pose evidentiary challenges for the prosecution.[963]

But the *Bemba* PTC took a different position in relation to the most controversial element of the UN tribunals' jurisprudence on command responsibility, namely, the lack of requirement of a causal relationship between the commander's failure to fulfil her duties and the subordinate's crimes.[964] Article 28 required that the crimes were committed 'as a result of' the commander's failure to discharge her duties and control her subordinates.[965] The question whether the words 'as a result of' found in Article 28 denoted a causality requirement triggered debates within the ICL field. Early academic commentaries on the RS suggested that unlike the UN tribunals the ICC regime incorporated a causality requirement,[966] but human rights organization were of different opinion. In an *amicus curiae* brief Amnesty International argued that no element of causality was required under Article 28.[967] The NGO expressed concern that the causality requirement would make it *harder* to convict commanders, and thus, it would obstruct the realization of the RS goals to 'end impunity' and prevent 'the most serious international crimes'.[968] Amnesty International observed that neither the RS *travaux préparatoires* explicitly discussed a causality requirement of command responsibility,[969] nor customary international law supported the existence of such requirement.[970]

The ICC judges concurred with the opinion expressed in legal scholarship and considered that the term 'as a result of' enshrined in the chapeau of Article 28(a) denoted a causal relationship between the commander's dereliction of duty and the subordinates' crimes.[971] Hence, the ICC judges did not take the lack of explicit codification of the causality requirement as an opportunity to expand the scope of command responsibility for the purpose of ending impunity, but instead decided to deal away with one of the most controversial aspects of the doctrine's interpretation at the UN tribunals, from the perspective of the restrained approach to

[963] Danner and Martinez 2005:130. See also Osiel 2009:34.
[964] See *Čelebići Trial Judgment*:¶398. *Blaškić Appeals Judgment*:¶77.
[965] Rome Statute: Article 28(a) and (b).
[966] See Triffterer 2002. Ambos 2002:860.
[967] *Bemba Amicus Curiae*:¶31.
[968] Ibid.¶41.
[969] Ibid.¶43.
[970] Ibid.¶38.
[971] *Bemba* Confirmation Decision:¶423.

the culpability principle. The new path taken at the ICC with respect to command responsibility was welcomed by legal scholars by view of the criminal law principles of fair trials.[972]

The ICC judges took a similarly restrained approach with respect to another controversial element of command responsibility, namely, the mental element of Article 28(a). While the UN tribunals' statutes required that the commander 'had reason to know' about the crimes, Article 28(a) RS required only that commander 'should have known' of those crimes, thus, bestowing upon the commander a duty to stay informed about their subordinates' conduct in order to avoid criminal responsibility.[973] Those members of the ICL field who sought to minimize wartime suffering welcomed the imposition of a lower mental element in the RS, considering that the harsh negligence standard would incentivize military commanders to monitor the behaviour of their subordinates.[974] However, from a criminal law perspective, the introduction of a stricter standard sat uneasily with the culpability principle.[975]

The *Bemba* PTC seemed to share that uneasiness. The judges noted that the term 'should have known' pertained to 'a form of negligence'[976] because the RS drafters intended to hold military commanders to a stricter standard.[977] Hence, even if the imposition of the negligence standard in ICL had been informed by humanitarian concerns and potentially contradicted the culpability principle, the ICC judges made clear that that was the *drafters*' intentions and not a form of judicial activism. Furthermore, the *Bemba* PTC narrowed the scope of the provision by concluding that the 'form of negligence' provided in Article 28(a) was not that different from the higher 'had reason to know' standard used at the UN tribunals. The *Bemba* PTC determined that the criteria developed by the UN tribunals to meet the 'had reason to know' standard: 'may also be useful when applying the "should have known" requirement'.[978] The PTC also considered that the indicia of establishing *actual knowledge* of the crimes were 'relevant' for assessing whether a commander 'should have known' about the crimes. Those indicia provided that the commander: 'had general information to put him on notice' of the subordinates' crimes and 'such available information was sufficient to justify further inquiry

[972] Robinson 2012:53.
[973] Danner and Martinez 2005:129-130. Van Sliedregt 2011:392. *Kayishema and Ruzindana Trial Judgment*:¶227.
[974] Levine 2005. *Bemba Amicus Curiae*:¶8.
[975] Ambos 2002:851. Van Sliedregt 2012:200. Meloni 2007:633. Schabas 2000:342.
[976] *Bemba* Confirmation Decision:¶429.
[977] Ibid.¶433.
[978] Ibid.¶434.

or investigation'.[979] These criteria rather resembled the higher standard of recklessness, or acting on the basis of available information, instead of a positive obligation to stay informed and discover such information.

Overall, even though the broad language of Article 28 enabled greater humanitarian protection during wartime, the *Bemba* PTC interpreted the provision in a restrained manner because the judges shared the understanding that the principles of criminal law had to be prioritized to considerations of substantive justice. As chapters 7-8 discuss, the restrictive application of command responsibility by the *Bemba* AC Majority and the *Gbagbo* TC Majority resulted in high-profile acquittals.

6.4. Interpreting Article 30: *dolus eventualis* vs. 'virtual certainty'

A final testament to the suggestion that the ICC judges construed the RS's criminal responsibility provisions narrowly because they understood strict compliance with the culpability principle to be of great importance in ICL and not only because they were constrained by the RS drafters, is the interpretation of Article 30 by the *Bemba* PTC and subsequent chambers. The text of Article 30 required proof of the accused's 'intent' and 'knowledge' in relation to the criminal conduct and its consequences but failed to provide unambiguous guidance as to what those terms meant. The ICC judges' interpretation of the provision revealed the influence of the Germanic criminal law tradition, in the form of adopting the *dolus* terminology of volition, and a concern for the culpability principle, displayed in the conclusion of the *Bemba* PTC that 'intentional' criminal conduct required 'virtual certainty' on behalf of the accused that the crime would occur as a consequence of their conduct.

The first detailed interpretation of Article 30 was conducted in 2007 by the *Lubanga* PTC. The judges finally answered the question that had been debated since the Rome Conference, namely, what was the lowest mental element standard which triggered criminal responsibility at the ICC. The PTC considered that Article 30 incorporated the '*dolus eventualis*' standard,[980] which included situations where there was a 'substantial' risk of committing the crime and the suspect 'accept[ed]' that risk and proceeded to act regardless.[981]

[979] Ibid.
[980] *Lubanga* Confirmation Decision:¶352(ii).
[981] Ibid.¶353.

The conclusion of the *Lubanga* PTC judges that *dolus eventualis* was an applicable mental element standard at the ICC was not an idiosyncratic interpretation of the law but reflected the shared understandings held by some members of the ICL community of practice. More specifically, the judges' legal findings on Article 30 RS corresponded with the opinion of several ICL experts who had suggested that the provision included *dolus eventualis* prior to the *Lubanga* PTC decision.[982] Furthermore, the position of the *Lubanga* PTC found support in relation to domestic criminal law, and in particular with reference to German criminal law practice.[983] In fact, the reformist *Stakić* TC, that had rejected the notion of JCE for the continental concept of co-perpetration at the ICTY, had also referred to German criminal law and adopted a similar interpretation of *dolus eventualis* as a form of intention.[984] Similarly to the interpretation of Article 25(3)(a) RS, the ICC judges quoted extensively legal academics and the *Stakić* TC Judgment in support of their finding of the applicability of *dolus eventualis*.[985]

However, the conclusion of the *Lubanga* PTC that Article 30 incorporated the *dolus eventualis* standard was fiercely contested by other actors with the ICL field who considered that the ICC should apply a more restrained mental element standard in order to comply with the fundamental principles of criminal law.[986] Firstly, in relation to the legality principle, the advocates of the dismissal of *dolus eventualis* found the concept incompatible with a strict interpretation of the RS. On that account, since the provision required knowledge that the crime '*will* occur' and not that it *may* occur in the ordinary course of events, it could not be interpreted to include the broad concept of *dolus eventualis*.[987] Secondly, with respect to the culpability principle, some experts were concerned that by adopting *dolus eventualis* the *Lubanga* PTC had 'watered down' the subjective element of criminal responsibility and left the objective 'control' element to do 'all of the heavy lifting' of establishing principal liability at the ICC.[988] The dismissal of *dolus eventualis* essentially meant that the ICC would end up imposing higher requirements for the attribution of criminal responsibility compared to national systems. But

[982] Jescheck 2004:45.
[983] Badar 2008:490
[984] *Stakić Trial Judgment*:¶587.
[985] *Lubanga* Confirmation Decision:¶¶352-354 and footnotes 434-436.
[986] Eser 2002a:915. See also Van der Vyver 2005:66. Nerlich 2007:675. R. Clark 2001:301.
[987] Eser 2002a:915, emphasis added. Van Sliedregt 2012a:47.
[988] Ohlin 2011:724.

that outcome was justified for some members of the ICL epistemic community by view of the seriousness of international crimes and the nature of the ICC as a court of last resort.[989]

The ICC judges demonstrated receptiveness to the concerns that were expressed by legal experts in relation to *dolus eventualis*. Two years after the decision delivered by the *Lubanga* PTC, in 2009 the *Bemba* PTC determined that the concept fell outside the ambit of Article 30.[990] The *Bemba* PTC judges emphasised that they employed a textual interpretation of the RS[991] and concluded, like some legal experts had done, that because Article 30 included the words 'will occur' rather than 'may occur', the provision posed a standard that was 'undoubtedly higher' than *dolus eventualis*.[992] According to the *Bemba* PTC, the words 'will occur in the ordinary course of events' required that the occurrence of the criminal result was 'close to certainty'. Consequently, the judges concluded that at the ICC a person can be convicted for committing a crime only if the prosecutor had proven that the accused had acted with 'virtual certainty' or 'practical certainty' that the commission of the crime would follow from her conduct, 'barring an unforeseen or unexpected intervention that prevent[ed] its occurrence'.[993]

The *Bemba* PTC judges emphasised that their restrained interpretation of Article 30 complied with the principles of legality and personal culpability, even if it limited the opportunities for obtaining convictions for mass atrocities. The judges were unwilling to 'wide[n]' the scope of the law by accepting the *dolus eventualis* standard as applicable, only for the sake of 'capturing a broader range of perpetrators.'[994] The *Bemba* PTC also referred to the work of authoritative legal scholars to support the new interpretation of Article 30.[995] Consequently, the interpretation of Article 30 presented by the *Bemba* PTC displayed the judges' understanding that, contrary to the balanced approach to criminal responsibility displayed at the post-Second World War tribunals and the UN tribunals, at the ICC the principles of criminal law had to be applied in a restrained and predictable manner, regardless of the trial outcome.

[989] Finnin 2012:349.
[990] *Bemba* Confirmation Decision:¶358.
[991] Ibid.¶362.
[992] Ibid.¶363.
[993] Ibid.¶362.
[994] Ibid.¶369.
[995] Ibid.: ¶636, footnote 455.

Even though the *Lubanga* PTC and the *Bemba* PTC reached different conclusions regarding the meaning of Article 30, both interpretations found support among different subgroups of the ICL community of practice. The advocates of strict compliance with the principles of criminal law in ICL welcomed the decision to restrict the scope of the mental element at the ICC.[996] But the possibility that the restrained interpretation of Article 30 by the *Bemba* PTC would have likely resulted in more acquittals triggered concerns among those members of the ICL epistemic community who sought a balance between procedural and substantive criminal justice.[997] One authoritative ICL scholar explicitly called upon the ICC to bring back the concept of *dolus eventualis* in the interpretation of Article 30 from a humanitarian perspective, and more specifically to ensure greater protection for the civilian population during wartime.[998] After the *Bemba* PTC decision, ICC jurisprudence could have followed either of the two competing understandings of the law that were presented within the ICL community of practice – that *dolus eventualis* had to be dismissed in order to ensure greater compliance with the principles of criminal law, or that *dolus eventualis* must be preserved to prevent the perpetrators of mass atrocities to enjoy impunity by exploiting the harder to prove 'virtual certainty' standard.

Three years after the *Bemba* PTC's decision, in 2012, the *Lubanga* TC took a middle approach. The TC followed the *Bemba* PTC and dismissed *dolus eventualis* as an applicable standard at the ICC.[999] However, the *Lubanga* TC provided its own interpretation of the words 'awareness that […] a consequence will occur in the ordinary course of events'. According to the *Lubanga* TC, those words meant that the suspect had engaged in a prognosis about the consequences of her actions that involved 'consideration of the concepts of "possibility" and "probability", which are inherent to the notions of "risk" and "danger"'. The Majority further specified that a prognosis of 'low risk' that a crime would be committed was not sufficient to meet the requirements of Article 30.[1000] The definition of Article 30 by the *Lubanga* TC essentially substituted the 'virtual certainty' definition forwarded by the *Bemba* PTC with a *prognosis of the risk* that one's conduct could result in the commission of the crime. Arguably,

[996] See e.g. Ambos 2009b:718.
[997] Wirth 2012:992.
[998] Badar 2009:467.
[999] *Lubanga* Trial Judgment:¶1011.
[1000] Ibid.¶1012.

the accused's prognosis of the risk of her conduct was easier to prove in a given case than her virtual certainty of the criminal consequences. The *Lubanga* TC dismissed the controversial *dolus eventualis* standard, thus, appealing to the proponents of legality in ICL. However, it also provided an interpretation of Article 30 that was less harsh on the prosecutor than the one forwarded by the *Bemba* PTC.

Nevertheless, subsequent Trial Chambers and the Appeals Chamber generally endorsed the more restrictive interpretation of Article 30 that was proposed by the *Bemba* PTC, despite its implications in terms of narrowing down the opportunities for delivering substantive justice at the ICC. The TCs in *Katanga*,[1001] *Bemba et al.*,[1002] and *Ntaganda*, all found that the correct interpretation of Article 30 required that the accused was 'virtually certain' that the crimes will result from their conduct in the ordinary course of events.[1003] Notably, the *Lubanga* AC also affirmed the 'virtual certainty' standard.[1004] Not only did those chambers dismiss the notion of *dolus eventualis*, but they also abandoned the balanced approach of the *Lubanga* TC and ultimately signalled to the broader ICL community of practice that protecting the accused from the attribution of guilt by association was of utmost importance at the ICC.

Overall, similar to the observations made with respect to Article 25(3) and Article 28, the narrow interpretation of Article 30 by the *Bemba* PTC, also adopted by subsequent chambers, affirms the conclusion that the restrained approach to determining the meaning of the law on criminal responsibility exhibited at the ICC can convincingly be traced to the principled belief of members of the ICL community within and outside the ICC in the importance of protecting the integrity of the criminal law process, even if that came at the expense of substantive justice. Both the adoption and the dismissal of *dolus eventualis* could have been justified as sound legal reasoning, with reference to different shared understandings about Article 30 that were held by different members of the ICL community of practice. The *Bemba* PTC's restrained approach reflected the competitive dynamics of the legal field, i.e. the dominance of one vision of the law over another.

[1001] *Katanga* Trial Judgment:¶776.
[1002] *Bemba et al.* Trial Judgment:¶29.
[1003] *Ntaganda* Trial Judgment:¶776, footnote 2348.
[1004] *Lubanga* Appeals Judgment:¶447.

6.5. Conclusion

This chapter traced the narrow approach to criminal responsibility displayed at the ICC to the understanding shared by many members within the ICL community of practice that as a criminal justice institution, the Court had to follow strictly the principle of personal culpability and to avoid the attribution of guilt by association to the accused, even if that meant restricting the set of situations in which a conviction can be served. This line of reasoning was displayed both during the drafting of the RS's provisions on criminal responsibility and the subsequent interpretation of those provisions at the ICC. Many legal experts sought greater codification of the general principles of criminal law in the RS because they believed that the principled approach to criminal responsibility was the key to a functioning liberal system of justice.

When the Court began operation, the judges at the *Lubanga*, *Katanga and Ngudjolo* and *Bemba* PTCs, and at subsequent chambers that followed their findings, demonstrated that they shared the understanding of the importance of following criminal law principles, regardless of the trial outcome. The ICC judges sought greater compliance with the personal culpability principle, by avoiding expansive interpretation of the statutory language for the purpose of ensuring greater protection to civilians and easier convictions of the perpetrators of mass atrocities. The ICC judges also recognized the importance of fair labelling, by explicitly differentiating between the different forms of participation in a crime. In principle, the combined interpretation of Article 25(3)(a) based on the control theory and of Article 30 that excluded the concept of *dolus eventualis*, imposed a higher threshold for the attribution of criminal responsibility than JCE. Furthermore, the ICC judges concluded that, unlike the jurisprudence of the UN tribunals, the RS required a causal connection between the commander's failure and the subordinates' crimes. Consequently, the ICC developed 'a reputation for analytical rigor with regard to criminal law theory', something which was largely absent from the pre-existing ICL jurisprudence, which often relied on common law pragmatism.[1005] The references to legal scholarship at the ICC were generally made in the first decisions that deliberated on the relevant RS provisions on criminal responsibility, such as the confirmation of charges decisions in *Lubanga* and *Katanga and Ngudjolo* and the TC and AC judgments in *Lubanga*. While subsequent Chambers did not explicitly quote those academic

[1005] Van Sliedregt, Ohlin, and Weigend 2013:738.

texts, they often strictly followed the theoretically supported legal findings that were made in earlier decisions.

These findings illustrate the importance of examining the dynamics of the ICL field for understanding the assessment of criminal responsibility at the ICC. The time pressure of international negotiations and the challenges of integrating laws from different legal traditions left the ICC judges with plenty of opportunities to decide whether they would follow the principled approach to criminal responsibility and mark a new era in ICL, or seek consistency with the jurisprudence of the UN tribunals by interpreting the gaps and overlaps in the RS in a creative manner by view of ending impunity for mass atrocities. The theoretically rigorous and restrained interpretation of the criminal responsibility laws, especially evident in the findings of the *Lubanga*, *Katanga and Ngudjolo*, *Mbarushimana* and *Bemba* PTCs, reflected the advancement of a new vision of legalism that had become influential within the ICL field: a vision that prioritised the quality of the process before the outcome of that process. That vision was already observable in the idea, promoted by some legal experts long before the Rome Conference, that codifying a comprehensive General Part in the RS would turn it into a sophisticated criminal law system. Another clear illustration of that trend is the fact that some legal scholars expressed concern that even the ICC's approach to criminal responsibility was not restrained *enough*, because the requirements of 'control over the crime' theory could be interpreted in a broad manner when applied with respect to the available evidence in specific cases.

As the next two chapters discuss, in many decisions, including the acquittals in *Gbagbo and Blé Goudé* and the conviction delivered in *Ntaganda*, the ICC judges demonstrated commitment to the principled approach not only when making general determinations about the meaning of the laws on criminal responsibility, but also when examining the facts and evidence presented with respect to the alleged criminal responsibility of individual accused. Notably, even in the cases of accused with no politically powerful 'friends' left, the judges did not compromise the quality of the process for the purpose of obtaining easier convictions.

7. AN OVERVIEW OF ICC CASES: APPLYING THE PRINCIPLED APPROACH TO CRIMINAL RESPONSIBILITY IN PRACTICE

The previous chapter argued that the ICC judges chose to interpret the RS criminal responsibility provisions in a restrained manner out of a principled belief in the importance of strict compliance with the culpability principle in ICL. Consequently, the analysis revealed that the assessment of criminal responsibility at the ICC displayed a distinctive line of legal reasoning, that appeared sound to many members of the ICL community of practice within and outside the Court. While that line of reasoning did not remain uncontested, as illustrated in dissenting opinions at the ICC and academic publications, that contestation resembled the competition of ideas about the appropriate scope and meaning of the criminal responsibility laws that characterises the legal field. Specifically, legal scholars and some judges, such as Judge Van den Wyngaert, expressed concern that the interpretation of the RS's criminal responsibility provisions by the *Lubanga* and *Katanga and Ngudjolo* PTCs did not restrain enough the scope of liability.

The proponents of strict compliance with the principles of criminal law within the ICL field feared that while in principle the 'control' theory appeared more theoretically rigorous and demanding from the prosecutor, compared to JCE, when applied in practice in individual cases, the control theory could result in similar expansion of liability like its ICTY counterpart. Indeed, there were good reasons to think that – the control over the crime theory appeared to suggest a 'yes' or 'no' answer while in reality domination is a matter of degree.[1006] Consequently, the question whether a particular accused had exercised control over the crime, and therefore can be convicted, ultimately rested with the judges' discretion in applying the concepts of 'control', 'essential contribution' to the crime, 'common plan' among the co-perpetrators, and 'virtual certainty' of the criminal result, to the facts and evidence presented in specific cases. If the judges decide to ease the burden on the prosecutor, they can accept scarce evidence of the accused's involvement in the crime as sufficient to meet the control theory's requirements. Conversely, if the judges enforce a narrow definition of the requirements of the control theory, that could significantly hamper the prosecutor's ability to obtain a conviction, given the challenges of investing mass atrocities.

[1006] Weigend 2011:100.

Precisely this indeterminacy of legal concepts has prompted critical scholars to suggest that international law risks collapsing into a mere 'apology' for politics when applied in practice.[1007] By contrast, in accordance with the 'practice' framework of ICL, the decisions of judges are influenced by identifiable legal norms, even if the meaning of that norms is intersubjective and constantly subject to contestation, rather than objective. Therefore, to examine whether a distinguishable line of reasoning with legal norms can be identified at the ICC regarding the assessment of criminal responsibility, the following two chapters turn to the findings of ICC judges with respect to the alleged criminal responsibility of specific accused. The analysis looks to the facts and evidence presented by the prosecutor in individual cases and the conclusions of the judges as to whether those facts meet the requirements of the RS modes of liability.

The following overview of ICC jurisprudence demonstrates that the assessment of criminal responsibility at the Court follows a particular line of reasoning with legal norms. Specifically, in practice ICC judges have applied the modes of liability based on the control theory, the modes of accessory liability, and command responsibility, in a highly restrictive manner over the years. The first ICC judgment, in *Lubanga*, employed a relatively broad notion of the 'common plan' requirement of co-perpetration under Article 25(3)(a), but in subsequent cases the judges specifically analysed the *criminal elements* of the alleged common plans that the accused was party to. Furthermore, the ICC judges in *Ngudjolo*, *Katanga*, *Abu Garda*, *Mbarushimana* and *Ngaïssona* to name a few cases, demonstrated preference for evidence of the accused's direct participation in the crimes, and after enduring some criticism of their first judgment in *Lubanga*, exhibited increasing reluctance to treat the accused's rank as evidence of his control over the crimes. Consequently, when the charges against an accused under Article 25(3)(a) were confirmed, e.g. in *Banda and Jerbo*, or when an accused was found guilty for committing a crime under that provision, such as in *Ntaganda*, the judges made very clear that person's involvement in the crimes. Moreover, while some ICC judges, including Judge Van den Wyngaert, and legal scholars were concerned that the mode of indirect co-perpetration would stretch the boundaries of principal liability too far, in practice only one defendant was convicted under that mode of liability and the charges of indirect co-perpetration against several other persons, including Mbarushimana, Gbagbo and Blé Goudé, were dropped. The ICC judges also generally refrained from relying on accessory modes of liability, that imposed

[1007] Koskenniemi 2006.

lowed burden on the prosecution. Apart from Germain Katanga, no other accused was convicted for international crimes at the ICC under any of the provisions of Article 25(3)(b)-(d).[1008] Furthermore, as evident in *Bemba* the ICC judges demonstrated reluctance to use command responsibility as a back-up mode of liability for convicting the defendants in case their direct participation in the crimes was not proven.

Overall, the empirical analysis reveals that the majority of the ICC judges, as evident at the *Bemba* AC and *Gbagbo and Blé Goudé* TC, have adopted an internal shared understanding about the *role* of the court in the international society, according to which procedural excellence upheld the integrity of the liberal system of criminal justice and provided an antidote to the false information dominating the modern political world. The UN tribunals considered the trial outcome to be of special significance because it would ensure substantive justice for mass atrocities. By contrast, at the ICC the quality of the process has been cherished as the ultimate prerequisite for 'ending impunity' for those crimes.[1009]

Therefore, this chapter argues that the assessment of criminal responsibility at the ICC can convincingly be traced to the politics of the legal field, namely, the competition of ideas with respect to the scope and meaning of the RS's modes of liability. More specifically, while some members of the ICL community of practice, such as Judge Herrera-Carbuccia and NGOs, have contested the highly restrained approach to the assessment of individual criminal responsibility, the latter vision of the law has dominated the ICC decision-making. This analysis, thus, provides new insights for understanding the outcomes of ICC trials.

This chapter provides an overview of the ICC judges' factual findings in relation to the modes of liability listed under Articles 25(3) and 28 and the mental element under Article 30 of the RS. The analysis includes all cases concerning international crimes in which the defendant was apprehended or appeared voluntarily at the court and the judges had the opportunity to conduct a confirmation of charges hearing. The next chapter analyses in detail two cases: one case that ended up in acquittals, namely, *Gbagbo and Blé Goudé*, and one case that ended up in conviction, namely *Ntaganda*. The analysis demonstrates that in both cases,

[1008] The analysis excludes cases for offences against the administration of justice. But see *Bemba et al.* where the accused were convicted for, *inter alia*, soliciting and abetting crimes related to witness tampering. *Bemba et al. Trial Judgment*.
[1009] Interview with Judge Morrison.

the judges applied the elements of Article 25(3)(a) in an equally restrained manner. The TC in *Ntaganda* did not lower the requirements in order to convict the accused. Rather the facts of the case appeared more apt to meet the strict requirements of the ICC judges. Consequently, a solid line of legal reasoning with respect to the assessment of criminal responsibility can be identified across ICC cases, that emphasises the quality of the process, regardless of the trial outcome or the accused's political background. These findings render support to the conclusion that at any given point legal norms exert identifiable influence over decision-making at Courts, even if the precise scope and meaning of those norms is subject to continuous contestation within the ICL field.

7.1. Applying the modes of principle liability in practice

By view of the practices of the UN tribunals, the challenges of investigating international crimes and the need to demonstrate institutional efficiency, many members of the ICL community of practice expected that the ICC judges would apply the RS in a manner that would render convictions easier.[1010] Commentators cautioned that the 'inordinate concern with securing convictions' could come at the expense of producing 'bad law' at the court.[1011] Instead, this chapter argues that the ICC chambers have applied in a restrained manner the modes of principal liability, regardless of the trial outcome. The readiness to dismiss the charges against the accused if the prosecutor's evidence did not meet the strict requirements of ICC jurisprudence, even if those accused lacked apparent political backing, suggests that the outcomes of ICC trials need to be understood not only with respect to state interests, which may explain the selection of suspects, but also in relation to the competition of ideas about the meaning and purpose of the criminal responsibility laws that are promoted by various actors within the ICL field.

7.1.1. The 'common plan' among the (indirect) co-perpetrators

The first aspect of the ICC judges' interpretation of the modes listed in Article 25(3)(a) that could have been interpreted in broad or narrow manner in specific cases, depending on the judges' preferences, was the *Lubanga* PTC's conclusion that the 'common plan' pursuant to

[1010] Jessberger and Geneuss 2012:1083. Popovski 2000:417.
[1011] Greenwalt 2011:1111. See also Bibas and Burke-White 2010:662.

which the (indirect) co-perpetrators allegedly committed the crimes did not need to be intrinsically criminal, but could only contain an 'element of criminality'.[1012] That conclusion triggered concern among some ICC judges and legal scholars because it obfuscated the link between the individual accused who had participated in what could have been a largely political or military plan, and the *specific* crimes that resulted from the implementation of that plan.[1013]

In the first ICC trial, which took place from 2009 to 2012, the ICC judges seemed somewhat willing to accept that the commission of the crimes resulted from predominantly non-criminal plans, thus, easing the burden on the prosecutor. The defendant, Thomas Lubanga Dyilo, was the leader of the *Union des Patriotes Congolais* (UPC) rebel organization that operated in the Ituri region of North-eastern DRC. Lubanga was convicted for *co-perpetrating* along with other senior UPC figures the crimes of conscripting, enlisting and using child soldiers to participate in hostilities during the 2002-2003 conflict in Ituri.[1014] The TC judges did not find that Lubanga and the UPC leadership had *specifically* planned the recruitment and use of child soldiers, but that the accused had entered an agreement, or a 'common plan' with the other co-perpetrators 'to build an effective army in order to ensure the [UPC's] political and military control over Ituri.' The crimes that were committed were considered merely 'consequences' that were foreseeable 'in the ordinary course of events' by the accused and his co-perpetrators.[1015] The judges' conclusion that the accused could be convicted for the crimes resulting from a plan, that was generally aimed at political or military goals, triggered criticism from some criminal law scholars.[1016] Relying on a broad reading of the co-perpetration mode of liability in the first ICC trial seemed to favour the conclusion that the Court had taken advantage of a politically favourable trial against a rebel leader in order to demonstrate its efficiency to punish the perpetrators of mass crimes.

But crucially, other ICC chambers focused specifically on establishing the *criminal* elements of the alleged common plan. For instance, in 2011 the *Banda and Jerbo* PTC concluded that the accused were part of a common plan 'to attack' the peacekeeping personnel at the Hashkanita compound in Darfur.[1017] Moreover, in 2016 the *Ongwen* PTC confirmed the

[1012] *Lubanga* Confirmation Decision:¶344.
[1013] See Chapter 6: section 6.2.1.2.
[1014] *Lubanga* Trial Judgment:¶¶1270-1272.
[1015] Ibid.¶1136.
[1016] Ambos 2012b:140. Cupido 2014:147-147.
[1017] *Banda and Jerbo* Confirmation Decision:¶149.

charges against the accused in relation to not one, but *several* plans that were allegedly agreed upon by Dominic Ongwen and leaders of the Lord's Resistance Army (LRA). The judges found that each of those plans was directed at the commission of specific crimes, namely the attacks on camps for internally displaced persons,[1018] the abduction of women to serve as 'forced wives' to LRA fighters,[1019] and 'the abduction of children to replenish the LRA combat forces'.[1020] Finally, in the most recent confirmation of charges decision, delivered in 2019 in *Yekatom and Ngaïssona*, the judges did not even examine the notion of the common plan, but simply assessed the available evidence regarding the link between the accused and each of the alleged criminal incidents.[1021]

Notably, in all of those cases the accused constituted rebel commanders without significant political backing. Banda and Jerbo were members of insurgent groups who fought against the Sudanese government forces in Darfur.[1022] With respect to *Ongwen*, the Ugandan government had itself referred the situation concerning LRA's crimes to the ICC[1023] and had provided the OTP with incriminating evidence against Ongwen.[1024] Finally, Yekatom and Ngaïssona were commanders of Anti-Balaka groups in the CAR, which were reportedly loyal to the deposed president François Bozizé.[1025] The existing international relations scholarship discussed in chapter 2 helps explain why those persons may have ended up at the ICC, but falls short of enquiring what happens with their trials afterwards.

An analysis behind the legal reasoning reveals that most ICC judges shared the understanding that the 'common plan' element of (indirect) co-perpetration had to be handled in caution, lest it became a vehicle for imputing guilt by association to the accused. This shared understanding has implications for the outcome of proceedings in that most ICC chambers specifically looked to the relationship between the accused and the *crime*, rather than between the accused and the *common plan* – an arguably more challenging standard for the prosecutor to meet. The *Yekatom and Ngaïssona* PTC judges even referred to the concerns expressed by Judge Van den Wyngaert with respect to the common plan element of liability, when

[1018] *Ongwen* Confirmation Decision:¶66.
[1019] Ibid.¶137.
[1020] Ibid.¶143.
[1021] *Yekatom and Ngaïssona* Confirmation Decision:¶60.
[1022] *Banda and Jerbo Summons to Appear*:¶¶11-13.
[1023] Nouwen 2013:113-114.
[1024] *Ongwen Trial Hearing (Transcript 26)*:42, lines 19-20.
[1025] Wakabi 2020a.

explaining their decision to focus specifically on the link between the accused and the criminal incidents.[1026] This is not to say that there were no other factors, including but not limited to the availability of evidence, which affected the outcomes of those proceedings, but simply to shed light on one of the contributing factors, namely, the judges' understanding of how the criminal responsibility laws should be applied.

7.1.2. The accused's control over the crimes

The other aspect of the control theory that could have been interpreted narrowly or broadly, depending on the case, was the question of how the accused's actual control over the crime could be proven. That was a pertinent issue in *Lubanga* because while the accused was the UPC's leader and the face of its political campaign, his direct involvement in the organization's military wing, the *Forces patriotiques pour la libération du Congo* (FPLC), that carried out the alleged crimes of recruiting and using child soldiers was less evident. The defence argued that Lubanga only enjoyed *de jure* but not *de facto* control over military affairs.[1027] Nevertheless, the judges concluded that whether or not Lubanga was involved in day-to-day military affairs was not determinative of his control over the crimes.[1028] The TC reasoned that delegation of certain tasks to other UPC members was an 'inevitable result' of Lubanga's leadership position.[1029] Instead, the judges focused on the witness testimony, according to which Lubanga had 'the final word on everything'[1030] and was regularly informed about the organization's military operations.[1031] Based on such evidence, the TC concluded that Lubanga had enjoyed 'ultimate control' over the UPC,[1032] which prompted some legal experts to express concern that the judges had inferred Lubanga's control over the crimes from his official position rather than from his actual involvement in the crimes.[1033]

Notably, however, other ICC chambers displayed preference for evidence of the accused's *direct* involvement in the crimes, rather than their official position. Particularly illustrative in that regard are the 2010 and 2011 confirmation of charges proceedings in the

[1026] *Yekatom and Ngaïssona* Confirmation Decision:¶60,fn.106.
[1027] *Lubanga, Prosecutor's Reply*:¶18.
[1028] *Lubanga* Trial Judgment:¶1215.
[1029] Ibid.¶1219.
[1030] Ibid.¶1056.
[1031] Ibid.¶1219.
[1032] Ibid.¶1169.
[1033] See Jain 2005:88-89. Cupido 2014:147.

Abu Garda and *Banda and Jerbo* cases, concerning the 2007 attack on Hashkanita that was carried out by the Justice and Equality Movement splinter group and the Sudan Liberation Army-Unity.[1034] The prosecution argued that the alleged commanders of the attacking groups, Bahar Idris Abu Garda, Abdallah Banda Abakaer Nourain 'Banda' and Saleh Mohammed Jerbo Jamus 'Jerbo' bore principal responsibility as co-perpetrators or indirect co-perpetrators for the attack on Hashkanita.[1035] With respect to Abu Garda's control over the attack, the prosecutor relied on evidence of the accused's alleged participation in preparatory meetings.[1036] But the PTC judges were not convinced of the allegations against Abu Garda,[1037] mainly because there was no 'reliable' evidence that the accused had personally participated in the attack.[1038] Consequently, the PTC dismissed all charges against Abu Garda.[1039] By contrast, the participation of Banda and Jerbo in the preparatory meeting[1040] and the fact that Banda and Jerbo had personally led their troops in the attack and participated in the looting of goods at the compound was confirmed by many witnesses.[1041] Because the accused's *personal* participation in the attack was established, the PTC judges confirmed the charges of co-perpetration against Banda and Jerbo.[1042]

More recently, in 2019, similar dynamics occurred in *Yekatom and Ngaïssona*. Yekatom was a commander of an active Anti-Balaka armed group that allegedly committed crimes against the Muslim population in the CAR. Ngaïssona was a senior figure with political and diplomatic functions who held the position of a National General Coordinator of the Anti-Balaka structure.[1043] The PTC confirmed the charges under Article 25(3)(a) against Yekatom[1044] but were not convinced that Ngaïssona had 'control' over the Anti-Balaka armed groups, which enjoyed 'a high degree of autonomy' in operational matters.[1045] Hence, the judges confirmed the charges of principal liability only against the defendant who had been positioned closer to the scene of the crimes.

[1034] *Abu Garda* Confirmation Decision:¶21. *Banda and Jerbo* Confirmation Decision:¶1.
[1035] *Abu Garda* Confirmation Decision:¶22. *Banda and Jerbo* Conformation Decision:¶124.
[1036] *Abu Garda* DCC:¶126,¶132.
[1037] *Abu Garda* Confirmation Decision:¶173.
[1038] Ibid.¶¶203-209.
[1039] Ibid.¶232.
[1040] *Banda and Jerbo* Confirmation Decision:¶131.
[1041] Ibid.¶146-147.
[1042] Ibid.¶162.
[1043] *Yekatom and Ngaïssona*, Confirmation Decision:¶65.
[1044] Ibid.¶99,¶125,¶140,¶155.
[1045] Ibid.¶164.

The comparative analysis of the confirmation decisions in *Abu Garda* and *Banda and Jerbo*, and the analysis of *Yekatom and Ngaïssona* demonstrates that the ICC judges were willing to commit to trial only those persons against whom there was solid evidence of direct involvement in the alleged crimes. The analysis of the influence of legal norms reveals that the ICC judges in those chambers refrained from inferring the accused's 'control' from their rank at least in part because that risked the attribution of guilt by association and, hence, infringed upon the culpability principle.

7.1.3. Indirect co-perpetration in practice

Another interpretative decision of the ICC judges that triggered concerns, within and outside the Court, for stretching the scope of principal liability too far was the combination of indirect perpetration with co-perpetration into a new mode of liability. Indirect co-perpetration attributed the crimes committed pursuant to the common plan to each of the co-perpetrators, even if only one of those persons had exercised control over the physical perpetrators of the crimes.[1046] At first it may have appeared that indirect co-perpetration introduced the *Brđanin* version of JCE under a different name at the ICC, thus, suggesting that the ICC's principled approach to commission liability constituted merely a rhetoric, while in reality the judges at the new court sought to render convictions easier. However, the overview of ICC cases suggests that *in practice* the ICC judges have demonstrated significant restraint in the application of that mode of liability and required that all elements of *both* co-perpetration and indirect perpetration were established by the prosecutor. In effect, the incriminating evidence often failed to meet the requirements of indirect co-perpetration.

In *Ngudjolo*, the TC judges were unable to conclude that the accused had controlled the militant group that had attacked a village in North-eastern DRC.[1047] The judges considered that the available evidence 'in no way' allowed the Chamber to 'even contemplate' the accused's responsibility as an indirect co-perpetrator.[1048] The charges of principal liability under Article 25(3)(a) were also dropped against Ngudjolo's alleged indirect co-perpetrator, Germain Katanga. According to the judges, the prosecutor failed to establish key elements of indirect

[1046] *Katanga and Ngudjolo* Confirmation Decision:¶493,¶¶519-520.
[1047] *Ngudjolo Trial Judgment*:¶ 110.
[1048] Ibid.

co-perpetration, such as Katanga's ability 'to ensure the execution of orders' through the organization or the existence of any 'centralised command' within the militia.[1049]

The ICC judges have also dismissed the prosecutor's charges of indirect co-perpetration before a case even reached the confirmation of charges proceedings. For instance, in *Mbarushimana*, already in the decision to issue an arrest warrant, the PTC judges concluded that the prosecutor had failed to establish that the accused had 'had the power, by not performing his tasks, to frustrate the commission of the crimes'.[1050] Thus, the PTC reaffirmed that instead of expanding the set of situations in which the defendant's guilt could be established, in practice the requirements of indirect co-perpetration were hard to meet.

7.1.4. Conclusion

The *Lubanga* TC appeared more willing to rely on a generally non-criminal common plan for imputing criminal responsibility to the accused and to infer the latter's control over the crimes from, *inter alia*, evidence of his position, compared to other ICC Chambers. Notably, *Lubanga* was the first ICC trial in which Article 25(3) was applied for delivering a verdict. As one commentator put it, the *Lubanga* judgment inaugurated the adolescent period of ICL.[1051] Consequently, for many legal experts, the significance of the trial lied in the interpretation of the applicable law by the judges, rather than in the factual findings of the case.[1052] The successful outcome for the prosecutor in the first ICC trial was moreover of symbolic importance for the human rights community as it signaled the 'first step' to combatting impunity at the new court.[1053] This is not to suggest that the *Lubanga* judgment was legally unfounded, as observed by some legal experts who favor the principled approach to criminal responsibility.[1054] On the contrary, the TC spent some 150 pages to discuss the link between Lubanga and the crimes. Rather, the analysis demonstrated that *other* ICC Chambers have been even more restrictive in the application of the control theory in practice, even if that meant the dismissal of some or all charges against the accused, as was the case in *Abu Garda*, *Ngaïssona* and *Ngudjolo*.

[1049] *Katanga Trial Judgment*:¶1419.
[1050] *Mbarushimana* Arrest Warrant Decision:¶36.
[1051] Kaoutzanis 2013:311.
[1052] Schabas and Stahn 2008:431.
[1053] The New Humanitarian 2012.
[1054] Interview with Kevin Heller.

7.2. Applying the 'mental element' standard in practice

The rejection of *dolus eventualis* as an applicable standard at the ICC and its substitution with the requirement of 'virtual certainty' on behalf of the accused, further narrowed the scope of criminal responsibility and reaffirmed the Court's commitment to the principled assessment of criminal responsibility, regardless of the trial outcome. For instance, the inability to establish the mental element of liability was the reason why in 2009 the *Bemba* PTC dismissed the charges under Article 25(3)(a) against the accused. Jean-Pierre Bemba Gombo, a Congolese political figure[1055] and the Commander-in-Chief of the *Mouvement de Libération du Congo* (MLC),[1056] was accused of failing to prevent, repress, or investigate the crimes that the MLC troops had committed while on a mission in the CAR.[1057] The prosecutor inferred Bemba's intention to commit the crimes from, *inter alia*, the prior violent behaviour of the MLC troops and the continuation of the MLC's deployment in the CAR despite the fact that Bemba was informed of the troops' crimes via international media and internal communication channels.[1058] It is possible that under the *dolus eventualis* standard the PTC might have confirmed the charges against Bemba as a 'co-perpetrator' of the MCL's crimes. The judges found that Bemba 'may have *foreseen* the risk of occurrence of such crimes as a mere possibility and *accepted it*' when sending his troops to the CAR, but the evidence was insufficient to prove that Bemba had been virtually certain that the MLC would commit the crimes.[1059] Hence, the *Bemba* PTC employed a highly restrictive interpretation of Article 30 RS not only in words but also in practice, which resulted in the failure to confirm the charges of principal liability against the accused.

The *Yekatom and Ngaïssona* case presented another example of the difficulties of meeting the high mental element threshold imposed by the ICC judges. With respect to the charges of recruiting child soldiers by the Anti-Balaka groups, the prosecutor submitted that Ngaïssona was 'aware of the presence of child soldiers among the Anti-Balaka' and that the situation was 'widely reported' by media and NGOs.[1060] But the PTC judges were not

[1055] *Bemba Amended DCC*:¶1,¶6.
[1056] *Bemba* ADCC:¶¶4-5.
[1057] *Bemba* ADCC:¶86.
[1058] *Bemba* Confirmation Decision:¶373.
[1059] Ibid.¶400,emphasis added.
[1060] *Yekatom and Ngaïssona*, Confrimation Decision:¶158.

convinced by the evidence, which they considered 'too general' in order to establish the accused's 'knowledge' of the crimes under Article 30.[1061] Consequently, the PTC dismissed the charges of recruiting child soldiers against Ngaïssona.[1062] Overall, the application of Article 30 in individual cases provides further support to the argument that the ICC judges applied the modes of liability in a restrained manner, regardless of the outcome.

7.3. Applying the modes of accessory liability in practice

Despite the difficulties of meeting the requirements of Article 25(3)(a), the ICC judges were left with a variety of modes of accessory liability pursuant to which an accused could be convicted. The judges adopted a restrained approach to the modes of commission liability under Article 25(3)(a) but they could still rely on subparagraphs (b)-(d) or Article 28 in order to punish the accused and, thus, demonstrate efficiency in politically favourable cases. But the Court has generally refrained from such practices, reflecting the influence of the shared understanding among members of the ICL community within and outside the ICC that the modes of accessor liability should not be used as a safety net for delivering convictions.

Despite the availability of a wide range of accessory modes of liability, as of September 2020 only one person, Germain Katanga, was convicted for mass atrocities on the basis of accessory liability at the ICC. Even in that case, which concluded in 2014, the TC judges appeared hesitant to rely on Article 25(3)(d)(ii), the provision that had already triggered much criticism among the advocates of strict compliance with the criminal responsibility principles. One of the three trial judges, Judge Van den Wyngaert, dissented from the judgment and argued that she would have acquitted Katanga from all charges because she did not think that the prosecutor's evidence met even the requirements of Article 25(3)(d)(ii).[1063] The dissenting Judge considered that subparagraph (d) posed fundamentally different requirements from subparagraph (a) and that the evidence that the prosecutor had relied on with respect to subparagraph (a) cannot be forced to fit the requirements of Article 25(3)(d).[1064] In brief, Judge Van den Wyngaert did not consider that subparagraph (d) could be used as the less demanding version of subparagraph (a) for the purpose of obtaining a conviction.

[1061] Ibid.¶¶160-161.
[1062] Ibid.¶163.
[1063] *Katanga Judgment, Judge Van den Wyngaert Opinion*:¶6.
[1064] Ibid.¶¶18-20.

The majority of the judges were less harsh towards the prosecutor and concluded that there was sufficient evidence to convict Katanga under Article 25(3)(d)(ii), but not for all charges that were brought against him. More specifically, the Majority acquitted Katanga of rape and sexual slavery.[1065] Those judges found that Katanga had contributed to the common purpose of a militia to attack a civilian village by providing the combatants with weapons.[1066] But the Majority concluded that in order to avoid the imposition of guilt by association, Katanga could only be held criminally responsible for those crimes which he had known, and not merely foreseen, that the militia would commit during the attack.[1067] The judges specified that the accused's knowledge must be established in view of 'each specific crime' and that 'general criminal intention' to support the militia would be insufficient for conviction.[1068] The Majority concluded that when he armed the militia for the attack Katanga knew that the militia would murder civilians and pillage their property during that attack, but he did not know with certainty that the combatants would also rape and sexually enslave the civilians.[1069] Thus, the *Katanga* judgment applied in a restrained fashion one of the broadest criminal responsibility provisions in the RS.

Another illustration of that trend was the 2011 confirmation of charges proceedings in *Mbarushimana*. The suspect, Callixte Mbarushimana, was among the leadership of the *Forces démocratiques pour la libération du Rwanda* (FDLR), a militia operating in Eastern DRC, partly constituted of exiled Rwandans but drawing most recruits from Congolese Hutu communities.[1070] The prosecutor alleged that Mbarushimana had contributed to the FDLR's common purpose to create a 'humanitarian catastrophe' in Eastern DRC by view of attracting international attention to the political demands of the group.[1071] More specifically, the OTP alleged that Mbarushimana's contribution, as understood under Article 25(3)(d), consisted of denying FDLR's responsibility for the attacks and portraying the organization as a peaceful actor in front of the international public.[1072] But the PTC Majority was not convinced that the conduct of issuing press releases was sufficient to confirm the charges against

[1065] *Katanga* Judgment:¶¶1643-1644.
[1066] Ibid.¶1680.
[1067] Ibid.¶¶1620-1621.
[1068] Ibid.¶1642.
[1069] Ibid.¶1663.
[1070] *Mbarushimana* Confirmation Decision:¶3.
[1071] Ibid.:¶6.
[1072] Ibid.:¶8.

Mbarushimana[1073] and expressed concern that the OTP had established 'no link' between the accused and the FDLR soldiers on the ground who had allegedly committed the crimes.[1074] The Majority concluded that 'the Suspect did not provide any contribution' to the commission of the crimes and dropped all charges against Mbarushimana.[1075]

Finally, in 2019 the PTC confirmed the charges of accessory liability under Article 25(3)(c) and 25(3)(d) against Ngaïssona.[1076] It remains to be seen whether the TC would enter a conviction on the basis of any of those modes of liability.

Crucially, the majority of the ICC judges demonstrated the same restraint towards the mode of liability that was considered the most favourable to the prosecutor at the IMTFE and the UN tribunals, namely, command responsibility. Even though Article 28(a) posed the lowest mental element standard in the RS – that the accused merely 'should have known' about the crimes of their subordinates, in practice no conviction under Article 28(a) has been upheld on appeal at the ICC.

The most notable case in that regard was *Bemba*. Even though the PTC rejected the charges against Bemba under Article 25(3)(a), the judges, nevertheless, considered that the accused's alleged criminal responsibility could be examined under the less demanding Article 28.[1077] In March 2016 the TC convicted Bemba as a superior pursuant to Article 28(a) for the crimes of murder, rape and pillaging, that were committed by his troops in the CAR.[1078] However, in June 2018 the AC by majority acquitted Bemba of all charges.[1079]

The AC Majority was not convinced that the evidence was sufficient to support one of the requirements of Article 28(a), namely, that the commander had failed to take 'all necessary and reasonable measures' to prevent, repress, or submit for investigation the crimes of their subordinates.[1080] According to the AC Majority, the TC judges who convicted Bemba had

[1073] Ibid.:¶299.
[1074] Ibid.:¶297.
[1075] Ibid.¶292.
[1076] *Yekatom and Ngaïssona*, Confirmation Decision:¶104,¶112,¶128,¶143.
[1077] *Bemba* Confirmation Decision:¶479.
[1078] *Bemba* Trial Judgment:¶742.
[1079] *Bemba* Appeals Judgment.
[1080] Ibid.¶194.

mistakenly focused on Bemba's *moral character*, and more specifically, his desire to protect the MLC's public image rather than to genuinely repress and investigate the crimes of his troops, as indication of the adequacy of the measures that Bemba had taken to address the MLC's crimes.[1081] By contrast, the AC Majority's 'dispassionate' assessment of the facts[1082] concluded that Bemba's motives were neither 'intrinsically' negative, nor necessarily precluded the effectiveness of the measures he took.[1083] The AC Majority took a very restrictive approach in assessing the reasonableness of the measures taken by Bemba that focused on the accused's 'material ability' to do something about the crimes.[1084] According to the AC Majority, Bemba's conviction under Article 28(a) rested on an 'unrealistic assessment' of the measures[1085] that a '*remote* commander' like Bemba could have taken with respect to the crimes, which his subordinates committed in a foreign country.[1086]

While other factors, such as the availability of evidence, have probably also influenced the trial outcome in *Bemba*, the ideological legal battles taking place in the ICL field also provide insights into this ICC decision. The Majority's decision to acquit Bemba revealed a strong belief in the separation of legality from morality in the assessment of criminal responsibility. According to those judges, while the strict application of legal principles 'may in some cases lead to *the acquittal of persons who may actually be guilty*' that was 'the price that must be paid in order to uphold fundamental principles of fairness and the integrity of the judicial process'.[1087] This statement demonstrated the differences between the shared understandings that dominated the UN tribunals and those that took hold at the ICC. While the former may have tolerated some evidentiary deficiencies and the use of broad theories for the attribution of liability, such as command responsibility, the *Bemba* AC Majority prioritized the legality of proceedings even if that meant impunity for some of the perpetrators of abhorrent international crimes. In other words, from the AC Majority's perspective, it was not sufficient that the defendant *intuitively* seemed guilty. Rather, what mattered in a criminal trial was the prosecutor's ability to *prove* the defendant's guilt. The discussion of *Gbagbo and Blé Goudé*

[1081] Ibid.¶¶176,178.
[1082] *Bemba Appeals Judgment, Judges Van den Wyngaert and Morrison Opinion*:¶79.
[1083] *Bemba* Appels Judgment:¶179.
[1084] Ibid.¶167.
[1085] Ibid.¶173.
[1086] Ibid.¶171, emphasis added.
[1087] *Bemba Appeals Judgment, Judges Van den Wyngaert and Morrison Opinion*:¶ 5, emphasis added. Interview with Judge Morrison.

will provide further illustration of the judges' restraint in the application of the modes of accessory liability under Article 25(3)(b)-(d) and Article 28 RS.

Notably, the restrained application of the modes of accessory liability at the ICC did not remain uncontested within the ICL community of practice. Gender justice advocates were particularly dissatisfied with the *Katanga* judgment.[1088] NGOs also considered the failure to sustain the charges against Mbarushimana a 'great loss for victims/survivors' in Eastern DRC 'who may not have other opportunities to access justice'.[1089] Similarly, NGOs called the decision to acquit Bemba 'a devastating outcome'[1090] and 'an insult to the thousands of victims' in the CAR.[1091] Some legal experts also expressed concern that the AC Majority's interpretation of command responsibility was so narrow that it 'dilut[ed] the very doctrine by which the law may call to account a person who has accepted the burden of high rank'.[1092] At the ICC, Judge Monageng and Judge Hofmański also criticised the novel approach of the *Bemba* AC Majority.[1093]

By contrast, those judges and legal scholars who prioritized strict compliance with the criminal responsibility principles considered the acquittal simply as an indication that the ICL system was functioning properly.[1094] The AC Majority did not dismiss anti-impunity as a noble cause. Rather, the judges suggested that substantive justice was not the responsibility of a criminal court and that the ICC should be 'relieve[d]' from the 'pressure' to 'secure convictions at all costs'.[1095] For the judges, the high quality of procedural justice was crucial to ensure a fair society. To quote Judge Morrison, 'nobody benefits of an unfair trial'.[1096]

Overall, the analysis of the application of the modes of liability at the ICC suggests that the later understanding has generally dominated the Court, although that vision of the criminal responsibility laws has been contested by actors within and outside. Hence, the enquiry into the politics of the legal field – the interaction between competing ideas of the law – proves

[1088] Kortfält 2015:579. Women's Initiatives for Gender Justice 2014a:2. Stahn 2014:821.
[1089] Women's Initiatives for Gender Justice 2012.
[1090] REDRESS 2018.
[1091] FIDH 2018.
[1092] Amann 2018. See also Jackson 2018b. Sadat 2018b.
[1093] *Bemba Appeals Judgment Dissenting Opinion*.
[1094] Interviews with Judge Howard Morrison, Elies Van Sliedregt, and Kai Ambos.
[1095] *Bemba Appeals Judgment, Judges Van den Wyngaert and Morrison Opinion*:¶75.
[1096] Interview with Judge Morrison.

illuminating of the ICC's trial outcomes. As the next sections discus, the legal norms of the ICL fields also interact with other factors determining trial outcomes, such as the availability of political support for investigations and of high-quality evidence.

7.4. Assessment of evidence

The belief in the importance of high-quality criminal law process, regardless of the trial outcome or the background of the accused, is further illustrated in the unwillingness of many ICC chambers to rely on incriminating evidence of questionable credibility. The prosecutor supports her arguments, including with respect to the accused's form of criminal responsibility, by presenting the judges with evidence. In turn, the judges have the authority to rule on the 'relevance and admissibility' of all evidence submitted by the prosecutor.[1097] The difficulties of investigating mass atrocities and the lack of documented orders to commit crimes prompted the UN tribunals to use 'distortive methods' in the evaluation of the available evidence, such as relying on eyewitness testimony that is harder to verify than documentary or forensic evidence [1098] or NGOs' reports, the validity of which has been questioned by criminal law experts.[1099] By contrast, the ICC judges have prioritized the defendant's rights to a fair trial, rather than tolerated the investigatory hurdles of the prosecutor.

This became evident already in the first ICC trial – *Lubanga*. Due to the difficulties of conducting investigations in North-eastern DRC, the prosecution resorted to the assistance of 'intermediaries', or informants for collecting evidence on the ground.[1100] The resort to intermediaries was deemed problematic by the TC judges who considered that due to a lack of oversight by the prosecution, the intermediaries were able to 'take advantage of the witnesses'[1101] and even encouraged some witnesses to give false testimony.[1102] For that reason, the TC stopped the *Lubanga* proceedings twice[1103] and dismissed the testimony of nine former child soldiers as unreliable.[1104] The rupture between the judges and the prosecutor on the issue

[1097] ICC Rules of Procedure and Evidence: Rule63(2).
[1098] Combs 2010:20. Mcdermott 2017a:684-685. Zahar 2014.
[1099] Bergsmo and Wiley 2008:9.
[1100] De Vos 2011:218.
[1101] *Lubanga* Trial Judgement:¶482.
[1102] Ibid.¶483.
[1103] *Lubanga, First Decision to Stay Proceedings*:¶94. *Lubanga, Second Decision to Stay Proceedings*:¶31.
[1104] *Lubanga* Trial Judgement:¶479.

of intermediaries was so significant that, as one commentator observed, Lubanga's conviction was put in question.[1105]

Other ICC Chambers displayed similarly strict approach to the evaluation of evidence. The *Ngudjolo* TC criticised the prosecutor's heavy reliance on witness statements and UN and NGO reports.[1106] The judges did not find credible the testimony of the prosecutor's key witnesses[1107] and expressed particular concern in relation to OTP's reliance on hearsay evidence.[1108] Notably, the TC judges personally travelled to the DRC for the purpose of verifying specific facts of the case that were referred to by witness testimony.[1109] The *Mbarushimana* PTC was even more critical of the OTP. The judges were concerned that the investigator had put leading questions and showed 'resentment, impatience or disappointment' whenever the witness's replies did not match the investigator's expectations. The judges '*deprecat[ed]* such techniques' and assigned low probative value to that evidence.[1110] As will be discussed, the TC Majority in *Gbagbo and Blé Goudé* approached with similarly 'hypersceptical' attitude the prosecutor's incriminating evidence.[1111]

Not every member of the ICL community of practice was convinced by the ICC's meticulous approach to evidence. Some legal experts outside the Court expressed concerns that the ICC judges advanced 'the goal of a fair trial *at the expense* of future convictions'[1112] by precluding 'the possibility of easier future investigations'.[1113] But others considered the strict control over the prosecution's investigative practices as 'important and necessary'.[1114] In the opinion of one ICC judge, the burden of proof clearly rested with the prosecutor.[1115]

[1105] Freedman 2017.
[1106] *Ngudjolo* Trial Judgment:¶117.
[1107] Ibid.¶343.
[1108] Ibid.¶496.
[1109] Ibid.¶¶68-70.
[1110] *Mbarushimana Confirmation Decision*:¶51, emphasis added.
[1111] Robinson 2019. Robinson 2013a.
[1112] Kaoutzanis 2013:306, emphasis added.
[1113] Ibid.:310.
[1114] Safferling 2012:430.
[1115] Interview with Judge Morrison.

7.5. The politics of the legal field, evidence, and state cooperation

The shared understanding among ICC chambers that the burden on the prosecutor in establishing the defendant's link to the crimes should not be eased, can influence trial outcomes in conjunction with other factors, such as the availability of evidence and of state cooperation with investigations. A thorough analysis of these other factors falls beyond the scope of this thesis, not least because, as discussed in chapter 2, they have been examined in detail in the scholarship of international criminal justice. Nevertheless, this section will provide a brief discussion that can be developed in future research about different ways in which these factors can influence trial outcomes in conjunction with the norms of the legal field, in this case – the restrained approach to the assessment of criminal responsibility.

The cases against Kenyan nationals present an interesting illustration in that regard. The prosecution went after representatives of both sides to the 2007 post-election conflict in Kenya. The case against Uhuru Muigai Kenyatta and Francis Kirimi Muthaura concerned crimes allegedly committed by the Mungiki group and pro-Party of National Unity youth[1116] and the case against William Samoei Ruto and Joshua Arap Sang concerned crimes that were allegedly committed by a rival organization called the 'Network'.[1117] Even though the suspects appeared voluntarily at the Court,[1118] in practice the OTP's investigation faced significant opposition by the Kenyan government.[1119] Eventually, in 2013 the OTP themselves withdrew the charges against Muthaura and Kenyatta because the prosecutor concluded that the evidence was insufficient to obtain a conviction,[1120] citing the Kenyan government's failure to assist the prosecution's investigations.[1121] In 2016 the charges against Ruto and Sang were vacated by the trial judges[1122] on the grounds that there was 'hardly' any concrete evidence that showed the existence of either the Network organization or their common plan to commit the alleged crimes.[1123] Nevertheless, the majority of the judges did not *acquit* the accused but merely

[1116] *Kenyatta, Muthaura and Ali* Confirmation Decision:¶102.
[1117] *Ruto, Kosgey and Sang* Amended DCC:¶25,¶¶43-44.
[1118] *Kenyatta, Muthaura and Ali Confirmation Decision*:¶4.
[1119] Peskin 2017:413-422.
[1120] *Muthaura and Kenyatta, Withdrawal of Charges against Muthaura:*¶10. *Muthaura and Kenyatta, Withdrawal of Charges against Kenyatta:*¶2.
[1121] *Muthaura and Kenyatta, Withdrawal of Charges against Muthaura*:¶11.
[1122] *Ruto and Sang Trial Decision:*¶131,¶143.
[1123] *Ruto and Sang Trial Decision,* Reasons of Judge Fremr:¶33.

discharged those 'without prejudice to their prosecution afresh in future'.[1124] Judge Fremr noted that 'in a normal state of affairs' he would have acquitted the accused, but given 'the *special circumstances* of the case', namely the fact that the accused profited from the witness interference, the judge agreed to only vacate the charges.[1125] Given the lack of co-operation by the Kenyan government, one may suggest that the proceedings against the Kenyan defendants were terminated (partly) as a result of political pressure on the Court, which played out in the inability to collect evidence. Therefore, it appears that in the Kenyan trials state politics had an indirect impact on the outcome of proceedings, by obstructing the prosecutor's efforts to collect evidence, which given the principled belief of many ICC judges that the burden of proof on the prosecutor should not be eased, resulted in the dismissal of the charges against the accused.

Indeed, the converse situation can also be observed – states having an indirect impact on the outcome of proceedings by providing abundant evidence to the prosecutor when the case concerns a rebel commander, as seen in *Ongwen*.[1126] But again, the impact of state politics is not the only factor influencing trial outcomes and an inquiry into the judges' principled understanding about what the laws on criminal responsibility require can provide additional insights. As will be discussed, despite the availability of government cooperation in *Gbagbo and Blé Goudé*, the collected evidence still proved insufficient to meet the high criminal responsibility standards enforced by the TC. Another example of the benefits of looking at the influence of legal norms on judgment for obtaining a broader picture of trial outcomes is the *Bemba* AC judgment. Even if it is difficult to assess the interests of all states in the region concerning the *Bemba* trial, it appeared politically expedient for the DRC and CAR governments.[1127] After the trial judgment, some commentators observed that Bemba's conviction prevented him from going back home and mobilizing political opposition in the DRC.[1128] It was also speculated that Bemba's arrest was welcomed by the European states that were involved in the political dynamics of Central Africa.[1129] Hence, the accused's acquittal 'surprised' many outside commentators.[1130] But as discussed in this chapter, once the

[1124] *Ruto and Sang Trial Decision*:1.
[1125] *Ruto and Sang Trial Decision* Reasons of Judge Fremr:¶148, emphasis added. See also *Ruto and Sang Trial Decision*, Reasons of Judge Eboe-Osuji:¶8.
[1126] Chapter 7: section 7.1.1.
[1127] Wakabi 2011.
[1128] Carayannis 2016. Seay and Broache 2016.
[1129] Carayannis 2016.
[1130] Peniguet 2018. Sadat 2018a:356.

normative dynamics of the ICL epistemic community are taken into account, these decisions appear less surprising.

Hence, while the findings of this thesis do not negate that a variety of other factors, not least state interests, may influence trial outcomes in different ways, they can help provide additional insights into the latter. The analysis revealed that different sets of shared understandings about the meaning of the criminal responsibility laws have gained authority at the UN tribunals and the ICC. The ICC's approach to criminal responsibility can be understood with the influence of the understanding, shared by many ICC judges, such as the *Mbarushimana* PTC, the *Bemba* AC Majority and, as will be discussed, the *Gbagbo and Blé Goudé* and *Ntaganda* TCs, that as a criminal justice institution the ICC needs to protect foremost the defendant's rights. Because much of the international relations scholarship on the ICC fails to enquire into the competing ideologies of the ICL field, it also fails to explain why some of the accused at the Court are acquitted, while others are convicted.

8. THE *GBAGBO AND BLÉ GOUDÉ AND NTAGANDA CASES*: SAME PROCESS, DIFFERENT OUTCOMES

This chapter examines the practices of the ICC judges with respect to the application of Article 25(3)(a)-(d), Article 28 and Article 30 in detail in relation to the *Gbagbo and Blé Goudé* and the *Ntaganda* cases. I will use these cases to argue that the ICC judgments display a distinctive line of legal reasoning with respect to the assessment of criminal responsibility that prioritized the quality of the process, namely the narrow application of the modes of liability and the meticulous assessment of evidence, regardless of the trial outcome – acquittals in the *Gbagbo and Blé Goudé* case and conviction in *Ntaganda*.

8.1. *Gbagbo and Blé Goudé*

The *Gbagbo and Blé Goudé* case presented a particularly politically favourable environment and a unique opportunity to hold accountable a high-profile defendant. The former Ivoirian president, Laurent Gbagbo, lost the support of other African or European governments and the new Ivoirian government assisted the ICC investigation against him. But the majority of ICC judges were committed to a restrained application of the modes of liability and proved uncompromising in relation to the quality of the incriminating evidence. The prosecutor faced such challenges already during the confirmation of charges proceedings. Eventually, the OTP was unable to convince the judges that Gbagbo or his former aid Charles Blé Goudé had participated in the alleged crimes in any way, thus providing evidence for my argument that the assessment of criminal responsibility at the Court was guided by the belief in the importance of high-quality process, regardless of the outcome.

8.1.1. Case background

The ICC has a long history of involvement in Côte d'Ivoire. After in 2003 the UN High Commissioner for Human Rights publicly mentioned the possibility of an ICC investigation into alleged human rights abuses in the country, the president Laurent Gbagbo personally requested the UN Security Council to refer the situation to the ICC for a 'competent'

investigation that, he insisted, would clear him.[1131] Even though Côte d'Ivoire was not an ICC State Party at the time, in a special Declaration the country accepted ICC jurisdiction over crimes committed after 19 September 2002.[1132] Throughout the following years, Gbagbo's presidency was marked by significant domestic political polarization and increasingly deteriorating international legitimacy,[1133] a situation that was described as 'neither war, nor peace'.[1134]

When Gbagbo lost the 2010 elections to his opponent Alassane Ouattara and refused to cede power, violence rapidly escalated in Côte d'Ivoire and the ICC intervened.[1135] During the post-election crisis at least 3,000 people were killed, and more than 150 women were raped.[1136] On 30th March 2011 the Security Council passed Resolution 1975 authorizing the UN Operation in Côte d'Ivoire (UNOCI) to take any measures necessary to protect civilians and on 11 April Gbagbo, his wife and members of his staff were apprehended in the presidential residency.[1137] In June 2011 the prosecutor requested an authorization to start a *proprio motu* investigation into the crimes committed during the period of post-election violence in Côte d'Ivoire.[1138]

The request was granted by the PTC[1139] and the court soon issued arrests warrants against Laurent Gbagbo,[1140] his wife Simone Gbagbo,[1141] and Charles Blé Goudé.[1142] Simone was a 'prominent figure' within Gbagbo's political party, the *Front populaire ivoirien* (FPI).[1143] Charles Blé Goudé was Minister of Youth during Gbagbo's presidency and controlled youth organizations such as the *Fédération estudiantine et scolaire de Côte d'Ivoire* (FESCI).[1144] Blé Goudé was surrendered to the Court in March 2014.[1145]

[1131] McGovern 2009:71-72.
[1132] *Côte d'Ivoire, Further Information:*¶1.
[1133] Charbonneau 2012:512-516
[1134] McGovern 2011:203-204
[1135] Rosenberg 2017:477.
[1136] Human Rights Watch 2011a:4.
[1137] Novosseloff 2015:713-714.
[1138] *Côte d'Ivoire, Investigation Request*:¶1.
[1139] *Côte d'Ivoire, Decision to Open Investigation*:¶212.
[1140] *Gbagbo* Arrest Warrant.
[1141] *Simone Gbagbo*, Arrest Warrant.
[1142] *Blé Goudé* Arrest Warrant.
[1143] *Simone Gbagbo*, Arrest Warrant Decision:¶15.
[1144] *Blé Goudé* Arrest Warrant Decision:¶15.
[1145] *Blé Goudé* Confirmation Decision:¶4.

The only suspect who did not reach the ICC was Simone Gbagbo. The Ivoirian government initially provided full assistance to the ICC investigation, but refused to surrender Simone Gbagbo to the Court and held two domestic trials against her instead. Some commentators observed that Simone's recent acquittal by the Ivoirian court could be seen as an attempt by the government to 'foster appeasement' among the political opposition in Côte d'Ivoire.[1146] Others suggested that by suddenly positioning itself in favor of domestic proceedings, the Côte d'Ivoire government indirectly tried to shelter key members of the ruling coalition from future ICC indictments.[1147]

The complex political environmental of the ICC enabled the court to proceed with the trials of only two of the three suspects. Nevertheless, those persons provided the ICC with a unique opportunity to demonstrate that high-level political figures were not immune to criminal responsibility and the ICC could have used this case to establish an image of institutional efficacy. But the ICC distanced itself from the practices of the UN tribunals which relied on broad modes of liability and tolerated evidentiary deficiencies. Given the ICC's restrained approach to criminal responsibility, despite the lack of political opposition towards the trials of Gbagbo and Blé Goudé, the question of the defendants' guilt was far from resolved.

8.1.2. Pre-trial: myriad of inferences

The *Gbagbo and Blé Goudé* case presented a clear illustration of the difficulties created for the prosecutor by the ICC judges' narrow reading of the 'control' theory. The cases against Laurent Gbagbo and Blé Goudé involved almost identical charges of crimes against humanity, including murder, rape, persecution and inhumane acts.[1148] The charges involved several major accidents, including the attack on demonstrators at the building of the state-sponsored radio-television *Radiodiffusion Télevision Ivoirienne* (RTI), that was carried out by the Ivorian Defence and Security Forces (FDS), the attack against a pro-Ouattara women's demonstration in the Abobo commune in Abidjan, the shelling a densely populated area near the Abobo market by the security forces under Gbagbo's alleged command, and the attack on civilians in

[1146] Semien 2017.
[1147] Hillebrecht and Straus 2017:178-179. P. Clark 2018:291.
[1148] *Gbagbo* Arrest Warrant Decision:¶4. *Blé Goudé* Arrest Warrant Decision:¶4.

the Yopougon commune in Abidjan by youth organizations, militia and mercenaries.[1149] Subsequently, another attack on Yopougon was added to the charges against Blé Goudé.[1150]

Establishing the link between high-level officials such as the former Ivoirian president and the crimes on the ground, however, proved particularly challenging to the prosecutor. There was no evidence that Gbagbo was *directly* involved in any of the alleged crimes. [1151] The prosecutor observed that Gbagbo had told the armed forced during the RTI demonstration to 'Deal with the situation'[1152] and had 'declared that the FDS must not lose Abobo'.[1153] Yet, none of those statements constituted explicit orders from Gbagbo to the forces on the ground *to commit specific crimes*.[1154]

Consequently, the prosecutor relied on the control theory to build a complex case against Laurent Gbagbo that would link the accused to the physical perpetrators of the crimes. The OTP alleged that the former president was an indirect co-perpetrator, who had planned and executed the crimes alongside Blé Goudé, Simone Gbagbo and other members of his entourage,[1155] or 'inner circle'.[1156] The physical perpetrators of the crimes that Gbagbo and his inner circle allegedly controlled were generally identified as the 'pro-Gbagbo forces' and included the FDS, pro-Gbagbo youth organizations, militias and mercenaries.[1157]

Thus, the OTP linked Gbagbo to the alleged *common plan* among him and his 'inner circle' rather than to the specific *crimes*. The rationale behind that approach was that the 'common plan' did not have to be criminal in itself but could be generally aimed at a political goal and only include an element of criminality. While Gbagbo's direct involvement in the crimes on the ground was hard to establish, there was abundant evidence of Gbagbo's intention to stay in power as the President of Côte d'Ivoire,[1158] including numerous public statements

[1149] *Gbagbo Amended DCC*:¶¶217-219.
[1150] *Blé Goudé* Confirmation Decision:¶26.
[1151] The PTC concluded that: 'every single mode of liability, except direct personal perpetration, under article 25(3)(a) is met'. *Gbagbo PTC Hearing (Transcript 17)*: 28, lines 15-16.
[1152] Ibid.:10, lines 14-16.
[1153] Ibid.:13, line 10.
[1154] *Gbagbo Confirmation Decision, Dissenting Opinion*:¶7.
[1155] *Gbagbo Amended DCC*:¶¶74-78.
[1156] *Gbagbo* Confirmation Decision:¶78.
[1157] *Gbagbo* Amended DCC:¶4.
[1158] *Gbagbo* Confirmation Decision:¶110.

made by him and Simone.[1159] Thus, the OTP alleged that once the former president and his inner circle realized that they were about to lose the elections, they agreed to a common plan to retain power by all means, including though the use of force against civilians.[1160] Therefore, in order to convict Gbagbo, the notion of 'common plan' needed to be interpreted broadly, so as to include generally non-criminal plans.

Another challenge to the OTP was establishing that Gbagbo had enjoyed control over the various groups that allegedly comprised the pro-Gbagbo forces. As the president, Gbagbo enjoyed authority over the FDS.[1161] But no similar links seemed to exist between Gbagbo and the youth organizations, the militias and the mercenaries. The OTP relied on the indirect co-perpetration mode of liability to link the accused to those crimes that were committed by persons who were not under Gbagbo's personal control. The indirect co-perpetration mode enabled the mutual attribution of the crimes to each indirect co-perpetrator, even if only one of them had enjoyed control over the physical perpetrators of the crimes.[1162] Specifically, the OTP alleged that Gbagbo 'controlled' the youth organizations '*through Blé Goudé*.'[1163] Blé Goudé was presented as the leader of the pro-Gbagbo youth who had extraordinary power to mobilize them.[1164] Furthermore, Blé Goudé was allegedly involved with the militias[1165] and the recruitment and funding of mercenaries to support the pro-Gbagbo forces.[1166] Hence, *Blé Goudé's* link with those elements of the pro-Gbagbo's forces was used to infer *Gbagbo's* control over the crimes.

Because the notion of 'control' was of ambiguous meaning, the ICC judges could have accepted the prosecutor's myriad of inferences to meet the requirements of Article 25(3)(a). Nevertheless, the OTP attempted to rely on modes of accessory liability as a back-up for securing the charges in case the judges employed a restrained reading of Article 25(3)(a). In the *Gbagbo* DCC the prosecutor listed several *alternative* modes of liability pursuant to which the accused could be linked to the crimes, including accessory liability under Article 25(3)(b)

[1159] Ibid.:¶¶111-116.
[1160] *Gbagbo* Amended DCC:¶39. *Gbagbo and Blé Goudé Trial Hearing (Transcript 9)*: 57, lines 7-9.
[1161] *Gbagbo* Confirmation Decision:¶96.
[1162] *Katanga and Ngudjolo* Confirmation Decision:¶493,¶¶519-520.
[1163] *Gbagbo PTC Hearing (Transcript 17)*:15, lines 14-15.
[1164] *Blé Goudé* DCC:¶231.
[1165] *Blé Goudé* DCC:¶236.
[1166] *Blé Goudé* DCC:¶257.

and (d) and command responsibility under Article 28.[1167] Similarly, the *Blé Goudé* DCC proposed that in the alternative, the defendant's responsibility could be examined under Article 25(3)(b)-(d).[1168] Essentially, the prosecutor used 'every possible liability mode' at her disposal to link the accused to the crimes.[1169]

Even though the charges against the accused were eventually confirmed,[1170] the PTC judges did not make that easy for the prosecutor, thus, demonstrating their commitment to the protection of the defendants' rights. Similar to *Mbarushimana* and *Ngudjolo*, the PTC judges in *Gbagbo* were very demanding of the quality of the incriminating evidence. The PTC judges expressed 'serious concern' that the prosecution 'relied heavily on NGO reports and press articles', generally based on anonymous hearsay,[1171] which placed a burden on the defense in assessing the trustworthiness of that information.[1172] The judges concluded that the prosecution's evidence was 'apparently insufficient' to proceed to trial and adjourned the confirmation of charges hearing until the OTP collected more evidence. [1173] Only after the OTP submitted an amended DCC,[1174] in 2014 the PTC confirmed by majority the charges against Gbagbo.[1175]

The OTP also faced challenges in the *Blé Goudé* case, this time as a result of the judges' strict interpretation of the notion of 'control'. The PTC Majority confirmed the indirect co-perpetration charges against the accused in relation to the crimes that were committed during the two attacks on Yopougon.[1176] The primary actors involved in those incidents were youths and militias which Blé Goudé appeared to have been involved with.[1177] But Blé Goudé's link to another element of the pro-Gbagbo forces, the FDS, was less evident. The prosecutor argued that the accused had participated in the integration of some of the pro-Gbagbo youth within the

[1167] *Gbagbo* Amended DCC:¶6.
[1168] *Blé Goudé* DCC:¶171.
[1169] Knoops 2016:389.
[1170] *Gbagbo* Confirmation Decision. *Blé Goudé* Confirmation Decision.
[1171] *Gbagbo, Decision Adjourning the Hearing*:¶35.
[1172] Ibid.¶29.
[1173] Ibid.¶15.
[1174] *Gbagbo* Confirmation Decision:¶11.
[1175] Ibid.:¶230.
[1176] *Blé Goudé Confirmation Decision*.¶158.
[1177] *Blé Goudé Confirmation Decision*:¶32,¶¶35-37,¶¶48-49.

armed forces.[1178] But the PTC judges were not convinced that Blé Goudé had enjoyed control over the crimes that were committed in the course of 'primarily FDS operations', including the repression of the RTI demonstration and the Abobo attacks,[1179] and confirmed only the charges of *accessory* liability under Article 25(3)(b)-(d) against Blé Goudé in relation to those incidents.[1180]

Finally, as an indication of the challenges that the OTP was about to face at trial due to the judges' restrained approach to criminal responsibility, in a dissenting opinion at the PTC Judge Van den Wyngaert argued that by view of the persistent evidentiary deficiencies in the *Gbagbo* case, there was 'no point in confirming the charges' against the accused.[1181] The Judge remained unconvinced that there was an 'explici[t] or implicit[t]' *criminal* element of the alleged common plan between Gbagbo and his inner circle.[1182] Judge Van den Wyngaert also remained unconvinced that Blé Goudé could be considered a principal perpetrator under Article 25(3)(a) in relation to *any* of the crimes that constituted the charges[1183] because, in her words, Blé Goudé had not been 'at the appropriate level' to control the commission of those crimes.[1184]

Demonstrating a belief in the separation of morality from legality, Judge Van den Wyngaert stressed that she did not deny that 'horrendous crimes' were committed by forces loyal to Laurent Gbagbo. But in her opinion, the mandate of the judges at the ICC was limited to assessing whether the case against the accused, 'as formulated by the prosecutor' was sufficiently strong to go to trial.[1185] Hence, Judge Van den Wyngaert upheld the understanding that as a criminal court, the ICC should be first and foremost concerned with the defendant's right to a fair trial, rather than the plight of the victims, an understanding that was also shared by the *Gbagbo and Blé Goudé* TC Majority.

[1178] *Blé Goudé*, Arrest Warrant Decision:¶33. *Blé Goudé* DCC:¶179.
[1179] *Blé Goudé* Confirmation Decision:¶148.
[1180] Ibid.:¶161,¶171,¶181.
[1181] *Gbagbo* Confirmation Decision Dissenting Opinion:¶4.
[1182] Ibid.¶5, emphasis added.
[1183] *Blé Goudé Confirmation Decision*, Partly Dissenting Opinion:¶2.
[1184] Ibid.¶7.
[1185] *Gbagbo* Confirmation Decision Dissenting Opinion:¶12.

8.1.3. Trial: no case to answer

In March 2015 the cases against Gbagbo and Blé Goudé were joined.[1186] Over the course of two years, from January 2016 to January 2018, the OTP presented its arguments against the accused.[1187] Following the prosecutor's presentation, the defence teams of both accused filed requests to acquit their clients from all charges on the grounds that the OTP had not proven their allegations.[1188] Notably, the prosecution also seemed to be aware that the available evidence could not support all charges and agreed with the defence that the charges against Blé Goudé concerning the Abobo attacks can be dismissed.[1189]

But the TC Majority's narrow approach to criminal responsibility, that displayed the judges' determination to comply strictly with the culpability principle, had even more profound implications. In January 2019 the Majority decided that the prosecution's evidence was insufficient to establish beyond reasonable doubt *any* of its allegations.[1190] Notably, the judges were so unconvinced by the OTP's complicated arguments that they determined that the OTP had failed to prove their allegations without even having heard the defence's arguments against those allegations.[1191] In other words, the ICC judges concluded that there was 'no case' for the defendant to 'answer' because the OTP had not succeeded in presenting convincing arguments against the accused. The Majority explained that the prosecutor's case suffered from 'pervasive' evidentiary problems.[1192] The judges were concerned that most documentary exhibits would not have passed 'even the most rudimentary admissibility test in many domestic systems'[1193] and that an 'extraordinary amount of evidence' rested upon anonymous hearsay.[1194]

Instead of taking the opportunity to convict high-profile accused for international crimes and demonstrate the Court's institutional efficacy in front of state parties, as a state-centred

[1186] *Gbagbo and Blé Goudé, Decision to Join the Cases*.
[1187] *Gbagbo and Blé Goudé, Reasons for Oral Decision on 15 January 2019*:¶20.
[1188] *Gbagbo and Blé Goudé, Gbagbo Defence Motion*. *Gbagbo and Blé Goudé, Blé Goudé Defence Motion*.
[1189] *Gbagbo and Blé Goudé, Prosecutor's Response*:¶25.
[1190] *Gbagbo and Blé Goudé, Trial Decision*.
[1191] Ibid.:3 lines 2-4.
[1192] *Gbagbo and Blé Goudé* Reasons of Judge Henderson:¶36. See also *Gbagbo and Blé Goudé* Opinion of Judge Tarfusser¶89.
[1193] *Gbagbo and Blé Goudé* Reasons of Judge Henderson:¶36.
[1194] Ibid., ¶¶ 42-43.

approach would have predicted, the TC Majority acquitted both persons. An analysis of the Reasons for the acquittal, presented by Judge Henderson,[1195] Judge Tarfusser concurring,[1196] support the conclusion that the majority of the ICC judges had developed an internal shared understanding about the *role* of the court in the international society, according to which procedural excellence, regardless of the trial outcome, constituted the antidote to false information. Judge Henderson explained that in the era of 'fake news' it was important that the judiciary maintained its 'rationality and transparency' by giving sound and well-reasoned decisions.[1197] A similar comment was made in 2018 by the *Bemba* AC Majority.[1198] Hence, unlike previous international tribunals that sought to balance procedural with substantive justice, many ICC judges considered that a criminal court should be concerned only with the quality of the process. As the following sections discuss, the *Gbagbo and Blé Goudé* TC Majority employed a narrow approach to criminal responsibility, which resulted in the accused's acquittal, despite the availability of state cooperation during the investigations.

8.1.3.1. Assessing the charges of principal liability

Like Judge Van den Wyngaert, the TC Majority employed a narrow reading of the requirements of the control theory. The Majority were critical of the fact that '[u]pon the pretext that the Common Plan/policy must not be exclusively' criminal, the OTP had presented a lot of evidence regarding the non-criminal aspects of Gbagbo's alleged plan to stay in power, but offered nothing to specifically prove the criminal elements of that plan.[1199] The TC Majority were determined not to let the prosecutor play a 'cat and mouse game with the content (and putative criminality)' of the common plan on which depended the imputation of crimes to the accused.[1200]

Judge Henderson was also not convinced that the prosecutor's evidence demonstrated Gbagbo's 'control' over the 'pro-Gbagbo forces', which the accused had allegedly exercised through the main FDS chain of command and through 'parallel' structures.[1201] The Judge

[1195] *Gbagbo and Blé Goudé Reasons of Judge Henderson*.
[1196] *Gbagbo and Blé Goudé, Opinion of Judge Tarfusser* ¶1.
[1197] *Gbagbo and Blé Goudé* Reasons of Judge Henderson:¶4.
[1198] See *Bemba Appeals Judgment, Judges Van den Wyngaert and Morrison Opinion*:¶5.
[1199] *Gbagbo and Blé Goudé* Reasons of Judge Henderson:¶85.
[1200] Ibid., ¶85.
[1201] *Gbagbo* Amended DCC:¶143. *Gbagbo* Confirmation Decision:¶96.

considered such claims paradoxical. In his opinion, if the FDS was an organized apparatus that ensured automatic compliance with the leadership's orders, there would have been no need for a parallel structure of command. Conversely, if the establishment of the parallel structure was necessary to ensure the 'inner circle's' control over the troops, then all FDS crimes that were not commanded through the parallel structure of control could not be attributed to the accused.[1202] The judges were also not convinced by the available evidence that the accused were able to control the variety of groups, such as youths and militias, that had allegedly 'complemented' the FDS.[1203] Consequently, while the notion of 'control' by itself may seem abstract and broad, in *Gbagbo and Blé Goudé* the judges interpreted all inconsistencies in the OTP's allegations in favour of the accused, following their narrow understanding of the criminal responsibility principles. Consequently, the prosecutor failed to meet key requirements of the indirect co-perpetration mode of liability.[1204]

8.1.3.2. Assessing the charges of accessory liability and command responsibility

The TC could have still convicted the accused under accessory modes of liability, including under Articles 25(3)(b)-(d) and 28 RS, which posed lower requirements than the modes of principal liability. Indeed, Article 28 appeared particularly relevant for describing the nature of the responsibility of a high-level official such as the former head of state who did not personally took part in the criminal activities. Convicting the accused only as accessories to the crimes, but not as the *perpetrators* of those crimes, may have balanced the demonstration of institutional efficiency with the fair labelling principle. But while Judge Herrera-Carbuccia found that approach legally sound, the TC Majority remained committed to strict compliance with the principles of criminal law.

The Majority was unwilling to rely on broad modes of accessory liability that had previously triggered concern among the proponents of legality in the ICL field, such as Article 25(3)(d), for securing conviction. The Reasons noted that the prosecutor's arguments with respect to Article 25(3)(d) that criminalized contributions to the crime of a group acting with a 'common purpose' were identical with her arguments in relation to Article 25(3)(a).[1205] Since

[1202] *Gbagbo and Blé Goudé* Reasons of Judge Henderson:¶1923.
[1203] Ibid.¶1902.
[1204] Ibid.¶1908.
[1205] Ibid., ¶ 1954.

the alleged 'common purpose' of the group appeared to be the same as the alleged 'common plan' between Gbagbo and his inner circle, the judges concluded that the charges under subparagraph (d) were equally unsupported as those under subparagraph (a).[1206] That was a notable departure from the 2014 *Katanga* Judgment where the TC Majority convicted the accused under subparagraph (d) after determining that the prosecutor's evidence did not meet the requirements of indirect co-perpetration. The *Gbagbo and Blé Goudé* TC seemingly took note of Judge Van den Wyngaert's dissent in *Katanga*, where she opined that Article 25(3)(d) codified a fundamentally different type of criminal responsibility and not simply a less demanding version of subparagraph (a).[1207] The *Gbagbo and Blé Goudé* decision signalled to those members of the ICL community of practice who called for narrow and predictable application of the law that Article 25(3)(d) was not regarded as a safety net for obtaining a conviction.

The TC Majority was similarly critical of the prosecutor's attempt to use Article 28 'as a fall-back to secure a conviction at any cost'.[1208] That impression resulted from the OTP's 'half-hearted' efforts to present clear arguments against Gbagbo that met the specific requirements of command responsibility.[1209] Similar to the *Bemba* AC Majority, the *Gbagbo and Blé Goudé* TC Majority placed significant emphasis on Gbagbo's material capability to do something about the behaviour of his subordinates. According to Judge Henderson, the OTP failed to specify what particular measures Gbagbo should have taken in that regard.[1210] Judge Tarfusser added that the prosecution did not explain how, even though Gbagbo fell in captivity in April 2011, he was expected to prevent, repress or investigate those crimes that were committed '*following* his arrest'.[1211] Thus, the *Gbagbo and Blé Goudé* TC Majority joined the efforts of their colleagues at the *Bemba* AC to rebuke the image of command responsibility as a legally controversial doctrine that was only used for the purposes of convicting the defendants in the cases containing scarce evidence of the accused's personal involvement in the crimes.

The TC Majority was also reluctant to conclude, based on the prosecutor's evidence, that Blé Goudé bore accessory liability for instigating or aiding the crimes of the pro-Gbagbo

[1206] Ibid.¶1955.
[1207] Chapter 7: section 7.3.
[1208] *Gbagbo and Blé Goudé* Reasons of Judge Henderson:¶2032.
[1209] Ibid.¶2030. See also *Gbagbo and Blé Goudé* Opinion of Judge Tarfusser:¶17.
[1210] *Gbagbo and Blé Goudé* Reasons:¶2031.
[1211] *Gbagbo and Blé Goudé* Opinion of Judge Tarfusser:¶17,emphasis in the original.

forces. The judges were again critical of the fact that the OTP had relied on the same evidence with respect to all modes of liability, rather than focused on the specific requirements of each provision listed in Article 25(3)(a).[1212] For instance, the Majority concluded that Blé Goudé's criminal responsibility under subparagraph (b) was not established because the prosecutor failed to give examples of perpetrators who were 'demonstrably influenced' to commit crimes by Blé Goudé's speeches.[1213] Judge Henderson critically observed that the link between the accused's contribution and the crimes was so 'tenuous' that it was 'difficult to imagine' that the physical perpetrators were conscious of Blé Goudé's 'alleged generic contributions'.[1214]

Overall, the Majority of the TC judges refused to treat Articles 25(3)(b)-(d) and 28 RS as a back-up for obtaining convictions. They emphasised that each of those provisions posed *different* requirements, and not merely *lower* requirements than subparagraph (a). While the IMT, IMTFE and the UN tribunals had relied on enterprise-type modes of liability and command responsibility to balance the moral impulse of punishing for the crimes high-level officials who intuitively seemed guilty but had been removed from the scene of the crimes, the vision of the law that dominated the ICC, namely, the idea that the rules of criminal law have to be applied in a technical manner, regardless of the trial outcome, precluded such practices.

8.1.3.3. Judge Herrera-Carbuccia's dissent

Notably, some ICC judges contested that vision of international criminal justice and sought a different approach to the assessment of criminal responsibility. Judge Herrera-Carbuccia considered that the evidence presented against Gbagbo could have met the requirements of Article 28[1215] and that Blé Goudé could have been convicted for inducing crimes under Article 25(3)(b).[1216] Her approach demonstrated due regard to the fundamental principles of criminal law but also a humanitarian concern for the inability of the victims in Côte d'Ivoire to see justice being served.

[1212] *Gbagbo and Blé Goudé* Reasons of Judge Henderson:¶2017.
[1213] Ibid.¶1995.
[1214] Ibid.¶2020.
[1215] *Gbagbo and Blé Goudé, Judge Herrera-Carbuccia Dissenting Opinion*:¶486.
[1216] Ibid.¶18.

Like her colleagues, Judge Herrera-Carbuccia refrained from concluding that Gbagbo or Blé Goudé had *committed* the alleged crimes under Article 25(3)(a), thus, maintaining a narrow reading of the 'control' theory. Nevertheless, Judge Herrera-Carbuccia considered that the trials concerning mass atrocities had to *balance* the strict application of the rule of law with the interests of victims to see justice being done.[1217] In her opinion, the command responsibility principle was an 'original creation' of ICL and international human rights law that departed from the 'traditional' criminal law principles.[1218] The purpose of that departure was reportedly 'to prevent impunity for those in power – those who, *by traditional criminal law standards*, would have escaped justice'.[1219] From that perspective, the *Gbagbo* case was an example of the purpose for including Article 28 in the RS.

Judge Herrera-Carbuccia was still mindful of the culpability principle. She noted that Gbagbo could not be held criminally responsible for failing to prevent or punish those crimes that were committed after his arrest.[1220] Nevertheless, unlike her colleagues, Judge Herrera-Carbuccia considered that the accused could have been convicted for the rest of the charges under Article 28. According to her, the ICC should not '*allow*' a president 'to target citizens' and 'commit crimes against humanity with impunity'.[1221] Hence, from Herrera-Carbuccia's perspective, the ICC's mandate was not limited to the assessment of individual criminal responsibility, but included broader goals such as deterrence and social restoration.

Yet, like the *Bemba* AC, the *Gbagbo and Blé Goudé* TC Majority rejected that balanced position and prioritised the narrow and predictable application of the law. Judges Henderson and Tarfusser considered their mandates to be limited to assessing the available evidence and stressed that in their role as judges they could not take 'position on the accused's *moral* or *political* responsibility'.[1222] Thus, *Gbagbo and Blé Goudé* became another illustration of the understanding shared among many ICC judges that their judgements cannot be guided by 'political or even humanitarian goals', lest the ICC was to become 'a court in name only'.[1223]

[1217] Ibid.¶7.
[1218] Ibid.¶492.
[1219] Ibid.¶493, emphasis added.
[1220] Ibid.¶17.
[1221] Ibid.¶6.
[1222] *Gbagbo and Blé Goudé* Reasons:¶8, emphasis added. See also *Gbagbo and Blé Goudé* Opinion:¶124.
[1223] *Gbagbo and Blé Goudé* Reasons:¶10.

The Majority's reasoning and the dissenting opinion illustrate two different visions of international criminal justice, promoted within the ICL community of practice. Both of those visions respect the main shared understandings of the ICL field – that the perpetrators of mass atrocities need to be punished through a fair trial. But the two positions disagreed on the relationship between the moral impulse to punish and the legal requirements of fair trial. The outcome of the trial suggested that the principled approach to criminal responsibility, understood as the technical application of the law, regardless of the trial outcome, dominated the ICC.

8.1.4. Concluding remarks: the politics of the ICL field

Gbagbo and Blé Goudé's acquittal demonstrated the importance of taking into consideration the internal dynamics of the ICL field if one wants to go beyond an analysis of the selection of suspects and to examine what happens within the case – the assessment of the accused's guilt or innocence. The critical international relations literature on the ICC provides important insights into the selection of suspects in the Ivoirian investigation. By the time Gbagbo was arrested, a consensus had been reached among African states that he had to be ousted from the presidency.[1224] The new Ouattara government sent two letters to the ICC that declared its support for international investigations in the country.[1225] The proceedings against members of the former regime appeared politically favorable to the new government. It was observed that Gbagbo's transfer to the Court two weeks before the legislative elections in Côte d'Ivoire weakened the political opposition there.[1226] Furthermore, the prosecutor did not start proceedings against members of the new government even though abuses by pro-Ouattara forces were documented,[1227] which left the impression of 'one-sided justice'.[1228] Some commentators suggested that the ICC merely *prioritized* the case against Gbagbo as more expedient,[1229] while others opined that the OTP was too dependent on the cooperation of the Ivoirian government for the investigation to target its officials. [1230] In any case, the lack of proceedings against government members seemed to open an opportunity for successfully

[1224] Hunt 2016:700
[1225] *Côte d'Ivoire, Decision to Open Investigation:*¶¶11-12.
[1226] Ricard 2017:517
[1227] 2011b. Straus 2011:487
[1228] Segun and Traoré 2019.
[1229] Rosenberg 2017:472
[1230] Hillebrecht and Straus 2017:180.

prosecuting Gbagbo. The Ouattara government provided the prosecutor with a vast amount of evidence, including documents seized from Gbagbo's private residency,[1231] government documents, video footage, visitor logbooks from Gbagbo's presidential palace,[1232] and evidence from many insider witnesses.[1233]

Consequently, the selection of suspects from the Ivoirian investigation renders support to the argument that state politics affect ICL proceedings. But it fails to inquire into the subsequent developments of the case. While it falls beyond the scope of this thesis to disentangle the complex web of state interests surrounding the trial, it is interesting to note that the Ivoirian government opposed Gbagbo's release on the grounds that his return home would destabilize the country.[1234] Some news agencies even proposed that Gbagbo's acquittal 'pave[d] the way for his possible return to political life in Côte d'Ivoire'.[1235]

In order to get a deeper understanding of what happened next in the case, one has to look to the politics of the legal field, and more specifically, to the understanding shared among the Majority at the *Gbagbo and Blé Goudé* TC that providing a high-quality process, regardless of the outcome, was of key importance for safeguarding the integrity of ICL. The ICC judges not only abstained from convicting a former head of state with seemingly no friends left among governments, but they openly criticised the prosecutor for presenting a 'rather one-sided version of the situation in Côte d'Ivoire' by focusing only on the crimes committed by Gbagbo's supporters.[1236] Judge Henderson was dissatisfied with the prosecutor's uncritical acceptance of the statements of the Ivoirian authorities that no one had tampered with the documents found in the Presidential Palace, which were used as evidence against Gbagbo and Blé Goudé.[1237] Judge Tarfusser expressed concern that the prosecution started conducting interviews in Abidjan merely four days after the PTC authorised the investigation and that contacts with key witnesses *predated* the authorization.[1238] These remarks implicitly suggested that the prosecution was guided by a particular understanding of the events from the outset that affected its selective approach to evidence – an unacceptable practice for a court that, as the

[1231] *Gbagbo PTC Hearing (Transcript 17)*:6, lines 15-16.
[1232] *Gbagbo and Blé Goudé, Trial Hearing (Transcript 9)*:46, lines 14-18.
[1233] Ibid.:64, lines 1-3.
[1234] Wakabi 2020b.
[1235] Aboa 2019.
[1236] *Gbagbo and Blé Goudé* Reasons:¶66,¶¶105-108. See also *Gbagbo and Blé Goudé* Opinion:¶116.
[1237] *Gbagbo and Blé Goudé* Reasons:¶35.
[1238] *Gbagbo and Blé Goudé* Opinion:¶116.

TC Majority claimed, aimed to provide rational assessment of the facts and combat 'fake news'.

The acquittals of Gbagbo and Blé Goudé reflected the complex politics of the legal field, i.e. the internal debates between different subgroups of the ICL community of practice regarding the meaning and purpose of the law. The Majority's reasoning resonated with those members of the ICL community of practice, such as Judge Van den Wyngaert, Judge Morrison, and legal scholars including Kai Ambos, Elies Van Sliedregt and Kevin Heller, who advocated for a narrower interpretation of the criminal responsibility principles in international trials.[1239]

By contrast, Judge Herrera-Carbuccia's dissent displayed the humanitarian concern for the plight of the victims that was shared by many human rights advocates. Major NGOs called the decision to acquit the accused 'a bitter pill to swallow'[1240] and a 'crushing disappointment' for the victims in Côte d'Ivoire who had invested their hopes in the trial.[1241] That opinion was shared by the Ivoirian national coalition for the ICC.[1242] Commentators also expressed concern about the Court's capabilities to prosecute high-level accused.[1243] The Executive Director of the International Bar Association argued that in comparison with the ICTY's record of convictions, the ICC was 'struggling to sustain any perceptible notion of success'.[1244]

Eventually those concerns would be somewhat relieved by the conviction of Bosco Ntaganda. But as the following section discusses, the conviction did not mark a change in the perception of the majority of ICC judges of their mandates or a broad reading of the modes of liability for the purpose of delivering a conviction in a politically convenient case. Rather, because there was significant evidence available of Ntaganda's *personal* involvement in the alleged criminal conducts, the judges were finally convinced by the prosecutor's arguments.

[1239] See Twitter posts by Barrie Sander: https://twitter.com/Barrie_Sander/status/1085140843525230592 and Kevin Heller: https://twitter.com/kevinjonheller/status/1085294583104327681. Interview with Elies Van Sliedregt.
[1240] Segun and Traoré 2019.
[1241] Amnesty International 2019a.
[1242] Coalition for the ICC 2019.
[1243] Batros 2019.
[1244] Ellis 2019. See also Moffett 2019.

8.2. *Ntaganda*

After the 2012 *Lubanga* judgment, in 2019 the ICC convicted another UPC member, Bosco Ntaganda. The decision is pending appeal, but for the time being the judgment constitutes a landmark for the court, because it marks the conviction for the highest number of charges at the ICC yet, namely 18 counts of crimes against humanity and war crimes. The most notable difference between the *Ntaganda* case and the cases which ended in acquittal, was that unlike Bemba and Gbagbo, Ntaganda was not far removed from the scene of the crimes. In fact, Ntaganda had personally committed some of the crimes charged. Ntaganda's proximity to the crimes convinced the judges that the accused had exercised control over the crimes. Consequently, the *Ntaganda* TC did not lower the requirements of the control theory to obtain a conviction. Instead, the prosecutor finally managed to meet those requirements. The comparison between *Gbagbo and Blé Goudé* and the *Ntaganda* demonstrates a stable line of legal reasoning across ICC judgments, regardless of the defendant's political position.

8.2.1. Case background

The *Lubanga* and *Ntaganda* cases originated from the OTP's investigation into crimes that were committed during the 2002-2003 conflict in the Ituri region in Northeastern DRC. The ethnic tensions in the region exacerbated in 1998-1999 when the Hema and the Lendu ethnic groups created self-defense forces. From 1999 to the middle of 2003 a number of opposing rebel groups struggled to gain control of Ituri, including through violent means.[1245] In 2000, the organization *Union des Patriotes Congolais* (UPC) was created,[1246] mostly comprising of Hema members.[1247] In September 2002 a UPC-controlled government took hold of Ituri under Lubanga's leadership.[1248]

The DRC ratified the RS in April 2002 and referred the situation on its territory in 2004.[1249] In 2006 the OTP submitted a joint application for two arrest warrants for war crimes

[1245] *Lubanga* Trial Judgment:¶¶74-80.
[1246] *Lubanga* Trial Judgment:¶81.
[1247] *Lubanga* 2006 DCC:¶12.
[1248] *Lubanga* 2006 DCC:¶9.
[1249] *Ntaganda Case Information Sheet*:1.

against members of the UPC leadership, namely, the President Thomas Lubanga and Bosco Ntaganda.[1250] The latter had served as the Deputy Chief of Staff of the UPC's armed wing, the *Forces Patriotiques pour la libération du Congo* (FPLC).[1251] Bosco Ntaganda ranked third in the UPC hierarchy – he was a subordinate to the Chief of Staff Floribert Kisembo, who answered to Thomas Lubanga. Ntaganda only took over Kisembo's position as the FPLC's Chief of Staff in December 2003, at the very end of the period covered by the charges.[1252]

Lubanga was immediately available for transfer to the ICC when the arrest warrant against him was issued, because he was already in custody in the DRC and the confirmation of charges against him was held in 2007.[1253] But Ntaganda's situation was different. After leaving the UPC/FPLC, Ntaganda went on to lead other armed groups in the North Kivu region of the DRC, including the *Congrès national pour la défense du peuple* (CNDP), that were allegedly implicated in numerous crimes. For a long time, the DRC government was reluctant to hand him over to the ICC, claiming that Ntaganda was a crucial figure in the peace process in Eastern DRC. Ntaganda was even integrated into the DRC army and rose to the position of a colonel in 2004.[1254] It was not until 2012 when Ntaganda defected from the DRC army and created the rebel group *Mouvement du 23 mars* (M23), that president Kabila called for his arrest. Following the loss of a power struggle within the M23, in 2013 Ntaganda finally surrendered himself to be transferred to the court in what was described as 'an act of self-preservation'.[1255]

8.2.2. Pre-trial stage

8.2.2.1. Revisiting the charges

The time lapse between the apprehensions of Lubanga and Ntaganda proved crucial for collecting evidence against the latter suspect. Originally, the arrest warrants against Lubanga and Ntaganda included the same charges, namely, for the war crimes of enlistment, conscription and the use of children to participate actively in hostilities, that were allegedly committed by the UPC/FPLC between July 2002 and December 2003.[1256] But after the

[1250] *DRC, First Arrest Warrants Decision*.
[1251] Ibid.¶78.
[1252] Ibid.¶79.
[1253] ICC, Office of the Prosecutor 2006:8-9.
[1254] P. Clark 2018:226.
[1255] Dale 2019.
[1256] *Ntaganda 2007 Arrest Warrant Decision*:¶47. *Lubanga Arrest Warrant*:2-3.

Lubanga judgment was issued, the prosecutor decided to bring new charges against Ntaganda.[1257] The prosecutor explained that decision with the significant amount of evidence concerning UPC activities that was gathered during the *Lubanga* proceedings.[1258]

The DCC against Ntaganda, that was filed after his apprehension by the prosecutor in 2014, further included UPC/FPLC crimes that were allegedly committed during two attacks on civilian villages in Ituri in 2002-2003. In relation to the first attack, the prosecutor argued in the DCC that Ntaganda had commanded the takeover of the town of Mongbwalu and *personally* participated in the battle and instructed the UPC brigades. Under his leadership, the troops allegedly killed, raped and displaced civilian members, pillaged and destroyed their property.[1259] With respect to the second attack, the prosecutor alleged that Ntaganda and his co-perpetrators had launched a large-scale attack on over 40 villages. Ntaganda allegedly served as the overall operational commander of the attacks,[1260] during which troops under his control killed, raped and sexually enslaved civilians, pillaged homes and destroyed houses and protected objects.[1261] Gender-based crimes featured prominently in the charges,[1262] including atrocities that were committed against girl soldiers within the UPC/FPLC.[1263]

8.2.2.2. Ntaganda's personal involvement in the crimes

The prosecutor brought a broad range of charges against Ntaganda that reflected the spectrum of the UPC/FPLC's criminal conduct. But the OTP also had to *link* Ntaganda to those crimes. The key difference between *Ntaganda* and other cases, such as *Bemba* or *Gbagbo*, was that the latter concerned persons who were removed from the scene of the crimes. By contrast, as the commander of a military brigade, Ntaganda's personal involvement in the alleged crimes was more easily discernible. Overall, the prosecution submitted 69,000 pages of evidence for consideration by the judges.[1264]

[1257] *Ntaganda, Second Arrest Warrant Application*.
[1258] ICC, Office of the Prosecutor 2012.
[1259] *Ntaganda* DCC:¶¶64,67.
[1260] Ibid.¶77.
[1261] Ibid.¶78.
[1262] *Ntaganda Second Arrest Warrant Application*:¶¶100-115.
[1263] *Ntaganda DCC*:¶¶103-105.
[1264] WIGJ 2014b.

Notably, much of the available evidence pointed to crimes that were allegedly perpetrated by Ntaganda himself. There was evidence that during the first attack listed in the charges Ntaganda had personally committed crimes, including murder, persecution, pillaging and attacking protected objects.[1265] For instance, Ntaganda had allegedly shot dead the priest of Mongbwalu,[1266] used child soldiers as bodyguards[1267] and personally recruited child soldiers to participate actively in hostilities.[1268] Furthermore, there was available evidence that Ntaganda himself raped and sexually enslaved women in the UPC/FPLC, which the DCC described as an act of official approval of such crimes that furthered their commission by Ntaganda's subordinates.[1269] Hence, Ntaganda's personal criminal conduct was used to infer that the accused knew of and even encouraged the commission of such crimes by the UPC/FPLC.

The allegations against Ntaganda were also supported by evidence of similar crimes that were committed by the accused on other occasions but fell outside the scope of the charges.[1270] Even though the crimes that were allegedly committed during Ntaganda's stay at the CNDP and the M23 were not prosecuted at the ICC, the OTP referred to those crimes as an indication of 'a continuing pattern of conduct' by the accused.[1271]

But the OTP was also cautious to avoid the impression that Ntaganda was merely one of the soldiers on the ground, which could have led the judges to conclude that the UPC/FPLC crimes were controlled by a more senior figure and that Ntaganda's role was not essential to their execution. In fact, the main challenge to the prosecutor's allegations was the defense's claim that Ntaganda merely held a deputy position throughout most of the period relevant to the charges and did not have significant authority within the organization.[1272] The prosecution countered those claims with the observation that, in addition to his military duties, Ntaganda

[1265] *Ntaganda* Confirmation Decision:¶36.
[1266] *Ntaganda, Trial Hearing (Transcript 23)*:41, lines 6-18.
[1267] *Ntaganda DCC*:¶99.
[1268] Ibid.¶8.
[1269] Ibid.¶105.
[1270] *Ntaganda, Trial Hearing (Transcript 23)*:44, lines 15-17.
[1271] *Ntaganda* DCC:¶140.
[1272] *Ntaganda, Trial Hearing (Transcript 24):*40, lines 5-9, p. 70, lines 8-12.

also engaged in devising and implementing the UPC's policy[1273] and that he was a trusted officer and adviser of Lubanga.[1274]

Hence, unlike previous cases, Ntaganda's position within the UPC/FPLC provided the prosecutor with a potent opportunity to link the accused to the crimes. Unlike the top leadership figures that are generally removed from the crimes, Ntaganda's position within the UPC's military wing rendered him at the forefront of many operations. At the same time, the accused was not an ordinary soldier but a commander in power, which enabled the court to examine his alleged criminal responsibility for the broader conduct of the FPLC troops, rather than simply for his own criminal conducts. Consequently, in the DCC the prosecutor argued that the accused could be held accountable not only as a direct perpetrator of his own crimes, but also as a direct/indirect co-perpetrator under Article 25(3)(a) of the crimes committed by UPC/FPLC troops.[1275]

With regard to the charges of (indirect) co-perpetration, the OTP argued that the UPC/FPLC crimes were committed pursuant to the same 'common plan' that was outlined in *Lubanga*, namely, that the UPC leadership sought to assume military and political control of Ituri.[1276] But this time, the *Ntaganda* DCC clearly set out the *criminal* elements of that plan. The prosecutor alleged that the implementation of the UPC's plan envisaged the occupation of non-Hema dominated areas and the expulsion of the civilian population there, including by means of murder, rape, sexual slavery, persecution, pillaging and using child soldiers.[1277] The *Ntaganda* DCC, thus, marked a notable departure from the prosecutor's complex and abstract arguments concerning the 'common plan' among the co-perpetrators in *Gbagbo and Blé Goudé*.

Other requirements of indirect co-perpetration, such as the accused's 'essential contribution' to the common plan and his 'control' over the physical perpetrators of the crimes, were also easier to deduce from the facts in *Ntaganda*, compared to other ICC cases, such as *Ngudjolo* or *Katanga*. Ntaganda's alleged contribution to the implementation of the UPC's

[1273] *Ntaganda, Second Arrest Warrant Application*:¶120.
[1274] Ibid.:¶122.
[1275] *Ntaganda* DCC:¶109.
[1276] See Chapter 7: section 7.1.1.
[1277] *Ntaganda* DCC:¶1.

plan involved planning attacks, issuing orders to the UPC/FPLC soldiers and Hema civilian supporters to commit crimes, and recruiting and training young persons into the FPLC.[1278] The OTP also noted that by personally committing some of the crimes, Ntaganda acted as a criminal 'role model' for his subordinates.[1279] With regard to the control over the UPC/FPLC troops, the DCC observed that unlike many other rebel organizations where the locus of control was hard to identify, the FPLC 'mirrored the conventional structure of a traditional army' with a straightforward chain of command and control and that Ntaganda 'discharged significant military functions' within the organization.[1280]

The availability of evidence of Ntaganda's direct involvement in the alleged crimes made that case more promising for the prosecutor compared to the complex arguments presented in *Gbagbo and Blé Goudé*. As the following section discusses, the evidence was sufficient to support each of the elements of criminal responsibility as construed in the ICC jurisprudence, even though the judges applied those elements to the facts of the case in same restrained manner as they had done in other ICC cases.

8.2.3. The trial

8.2.3.1. Ntaganda's direct perpetration of crimes

Unlike the *Gbagbo* case where there was no evidence that the accused had directly committed by himself any of the alleged crimes, Ntaganda's personal involvement in the FPLC's military activities enabled the TC judges to find Ntaganda guilty as a *direct* perpetrator with respect to eight counts of charges, including for murder, attacking and persecuting civilians, pillaging and recruiting child soldiers.[1281] Notably, the judges found that Ntaganda had committed those crimes 'as an individual', rather than 'jointly with another' person. In other words, Ntaganda had 'personally' carried out the crimes, rather than having contributed to a common effort to commit the crimes.[1282]

[1278] Ibid.¶126.
[1279] Ibid:¶2.
[1280] Ibid.¶123.
[1281] *Ntaganda* Trial Judgment:¶734.
[1282] Ibid.¶735.

This constituted the first time at the ICC when the accused was found guilty of *physically* carrying out the crimes *by himself*, pursuant to the first alternative of Article 25(3)(a).[1283] The TC in the *Al-Mahdi* case made similar findings based on the available evidence of the accused's personal participation in the destruction of five buildings of protected cultural heritage in Mali[1284] and Al-Mahdi's own admission of his guilt.[1285] But the judges concluded that Al-Mahdi's criminal responsibility would most accurately be described as direct *co*-perpetration because his personal conduct constituted an 'essential contribution' to the collective effort of the Ansar Dine insurgent group to destroy 10 protected buildings of cultural heritage.[1286] In 2019 during the confirmation of charges procedure against another Malian citizen, Al-Hassan, the prosecutor also submitted evidence that the suspect had personally committed some of the crimes listed in the charges.[1287]

Notably, neither Ntaganda, nor Al-Mahdi or Al-Hassan were among the 'big fish' of international suspects. Al-Mahdi was described as a 'little-known defendant'[1288] and even though Al-Hassan's role within Ansar Dine evolved over time, the suspect never became one of its senior figures.[1289] Initially, in 2006, Ntaganda's case was dismissed by the ICC judges on the grounds that he was not 'a core actor' during the Ituri conflict.[1290] The PTC finally agreed to issue an arrest warrant against Ntaganda a year later, in 2007.[1291] While some commentators expressed the opinion that Ntaganda was an 'important player in the conflict' in Ituri,[1292] he largely rose into prominence *after* he left the UPC/FPLC.[1293] Whether in the future the prosecutor is going to establish a similarly strong link between a high-profile defendant, such as a leadership figure or a state official, and the charges ultimately depends on the quality of evidence obtained and the possibilities for conducting investigations.

[1283] See Chapter 5, section 5.3.
[1284] *Al Mahdi*, Judgment and Sentence:¶40.
[1285] Ibid.¶43.
[1286] Ibid.¶61.
[1287] *Al Hassan Confirmation Decision*:¶709.
[1288] Sterio 2017:66-67.
[1289] *Al Hassan*, Confirmation Decision:¶766.
[1290] *DRC, First Arrest Warrants Decision*:¶87.
[1291] *Ntaganda 2007 Arrest Warrant Decision*.
[1292] Bueno 2015.
[1293] See Tampa 2019.

8.2.3.2. Ntaganda's indirect co-perpetration of crimes

Ntaganda's active role on the ground during the UPC/FPLC attacks enabled the prosecutor to link the accused not only to the crimes that the latter had directly committed, but also to the ones that were *indirectly* perpetrated through the soldiers under his control.[1294] In *Ngudjolo*, *Katanga*, and *Gbagbo and Blé Goudé*, indirect co-perpetration proved to be a mode of liability with particularly challenging requirements. But in *Ntaganda*, there was sufficient evidence to establish the existence of the 'common plan' among the co-perpetrators, the accused's 'essential contribution' to the crimes, his 'control' over the direct perpetrators thereof, and his 'intent and knowledge' with respect to the crimes. The *Ntaganda* TC did not have to lower the requirements of the control theory to convict the defendant – rather, the prosecutor's evidence met those requirements.

In *Lubanga*, the evidence with respect to the existence of a 'common plan' among the UPC/FPLC leadership primarily focused on the group's establishment and its aspirations to take control over Ituri.[1295] But the *Ntaganda* TC was able to make considerably more specific conclusions about the *criminal* aspects of the UPC/FPLC's 'plan':

> … the co-perpetrators meant the destruction and disintegration of the Lendu community, which inherently involved the targeting of civilian individuals by way of acts of killing and raping, as well as the targeting of their public and private properties, via acts of appropriation and destruction.[1296]

Furthermore, based on the prosecutor's submissions, the judges observed that the 'ethnical claims' bound the UPC/FPLC leadership to the implementation of the common plan.[1297] The available evidence convinced the judges that the commission of the crimes was an integral part of the UPC/FPLC's strategy, rather than an unfortunate consequence of an otherwise legitimate political campaign.

With respect to the requirement that the accused had made an 'essential contribution' to the implementation of the common plan, of crucial significance was the evidence of Ntaganda's 'proximity to the commanders and soldiers deployed' during the attacks and 'his own personal

[1294] *Ntaganda Trial Judgment*:¶764.
[1295] *Lubanga* Trial Judgment:¶¶1128-1136.
[1296] *Ntaganda Trial Judgment*:¶809.
[1297] Ibid.:¶808.

violent conduct towards civilians'.[1298] The judges noted that Ntaganda had issued direct orders to target and kill civilians, but also 'illustrated for his troops how the orders were to be implemented' by committing such crimes himself.[1299] Furthermore, the judges found that the first attack listed in the charges was 'launched and conceived' by Ntaganda.[1300] In relation to the second attack, the judges noted that even though Ntaganda had not participated on the ground, the accused still made an essential contribution by participating in the planning of the attack[1301] and maintaining contact with the commanders in the field during the attack.[1302] Finally, it was established that the accused had been 'personally and actively involved' in the recruitment of child soldiers.[1303] The evidence demonstrated that Ntaganda regularly visited training camps[1304] and 'personally' taught recruits.[1305] Thus, the prosecutor accomplished in *Ntaganda* what it could not accomplish in *Gbagbo*, namely, to convince the judges in the existence of the common plan that included an evidently criminal goal, and in the accused's essential role in the implementation of that plan.

With regard to the other crucial element of indirect co-perpetration – the control over the physical perpetrators of the crimes, the TC in *Ntaganda* noted that the operations on the ground were executed in line with the orders issued by Ntaganda and his co-perpetrators and that the leadership could rely on the UPC/FPLC troops to implement those orders.[1306] Contrary to the defense's argument that Ntaganda's superior, Floribert Kisembo, had been the one in charge, the judges concluded based on the available evidence that in practice Ntaganda had enjoyed 'control over *military* planning and operations', while the role of Kisembo had been 'predominantly administrative or political'.[1307] The judges also recalled evidence that Ntaganda had 'inspired fear' and respect amongst the troops, which ensured compliance with his orders.[1308]

[1298] Ibid.¶855.
[1299] Ibid.¶851.
[1300] Ibid.¶836.
[1301] Ibid.¶837.
[1302] Ibid.¶846.
[1303] *Ntaganda Trial Judgment*:¶830.
[1304] Ibid.¶365,¶¶369-370.
[1305] Ibid.¶372.
[1306] Ibid.¶816.
[1307] Ibid:¶322,emphasis added.
[1308] Ibid.¶322.

Furthermore, the TC judges did not take for granted that the Hema civilians who had participated alongside the troops in the killings and lootings,[1309] were similarly controlled by Ntaganda. Instead, the judges carefully examined whether those civilians, like the UPC/FPLC soldiers, were used 'as a tool of the co-perpetrators', because otherwise the crimes of the Hema civilians could not be attributed to Ntaganda and his co-perpetrators.[1310] The judges were satisfied in that regard because the evidence suggested that the Hema civilians were so strictly controlled by the UPC/FPLC soldiers that the former's personal will had become 'irrelevant'.[1311] Thus, the factual findings of *Ntaganda* closely resembled the strict requirements of Roxin's *Organisationsherrschaft* theory. Consequently, the ICC employed a more principled and theoretically rigorous approach to the assessment of criminal responsibility than the UN tribunals not only in words, i.e. by substituting 'JCE' with '*Organisationsherrschaft*', but also in practice, by construing the requirements of that theory in a narrow fashion. In some cases that resulted in acquittal but because Ntaganda was situated closer to the operation on the ground, compared to the more senior UPC/FPLC leadership that generally dealt with political matters, it was easier to establish the accused's control over the troops and the supporting civilian groups.

Finally, Ntaganda's active involvement in the military campaign rendered sufficient evidence for the prosecutor to meet the high mental element standard that was set by the *Bemba* PTC's interpretation of Article 30. The *Ntaganda* TC concluded that: 'the occurrence of these crimes was not simply a risk that [the co-perpetrators] accepted, but crimes they foresaw with virtual certainty'.[1312] Hence, the *Ntaganda* TC demonstrated fidelity in practice to the strict legal findings of the *Bemba* TC. The judges were not interested in whether Ntaganda had simply foreseen the risk that the troops under his command would commit the crimes, but whether he had been certain they would do so.

Overall, the *Ntaganda* judgment demonstrated that the ICC judges were willing to convict the accused as an indirect co-perpetrator only after a careful assessment of the available evidence in relation to each of the requirements of that mode of liability. Consequently, Ntaganda's conviction did not appear as the opportunistic conviction of a former rebel

[1309] Ibid.¶820.
[1310] Ibid.¶822.
[1311] Ibid.¶824.
[1312] *Ntaganda* Trial Judgment:¶811.

commander against whom there was no substantial evidence available. On the contrary, the meticulous assessment of the facts by the judges clearly established the link between the accused and the crimes.

8.2.3.3. Reactions to the judgment

The *Ntaganda* judgment was well-received by advocates of procedural justice and advocates of substantive justice alike. On the one hand, the judges' 'methodically, even dully' assessment of the facts demonstrated that the ICC was 'acting *as a court*, and nothing more'.[1313] The judgment reassured some of those members of the ICL epistemic community who expressed concern that the indirect co-perpetration mode of liability infringed upon the principle of personal culpability. One of those legal scholars praised the *Ntaganda* TC's 'extensive' explanations and 'transparent approach' regarding the evaluation of evidence.[1314]

On the other hand, the judgment received positive reactions among civil society organizations. After a series of acquittals, the judgment was called 'a rare sweeping win' for the OTP.[1315] Human Rights Watch observed the potential deterrent impact of Ntaganda's conviction, calling it a 'strong message that justice awaits those responsible for grave crimes' in the DRC,[1316] and Amnesty International noted the positive outcome for the victims of the UPC/FPLC crimes.[1317] Furthermore, commentators noted that if the conviction was upheld on appeal, it would become the first ICC conviction for gender-based crimes.[1318] Women's organizations also welcomed the *Ntaganda* trial,[1319] but other commentators lamented that the crimes that were allegedly committed by the M23 under Ntaganda's command were not included in the charges.[1320] It was also observed that, apart from Ntaganda, many of those persons who were responsible for the violence in Ituri were still at large.[1321]

[1313] Carlson 2019, emphasis added.
[1314] Guilfoyle 2019b.
[1315] Van den Ber and Sengenya 2019.
[1316] Human Rights Watch 2019.
[1317] Amnesty International 2019b.
[1318] Grey 2019.
[1319] Women's Initiatives for Gender Justice 2019.
[1320] Tampa 2019.
[1321] Human Rights Watch 2019. Van den Ber and Sengenya 2019.

Consequently, the conviction was a favorable outcome to the entire community of ICL practice – both those who prioritized high-quality process and those who sought substantive justice – but also a reminder of the limited capacity of the ICC to hold accountable the perpetrators of mass atrocities. Notably, those limitations resulted not only from the OTP's dependence on state cooperation but also from the difficulties of meeting strict criminal responsibility requirements when mass atrocities, involving numerous perpetrators, are concerned.

8.2.4. Conclusions from the Ntaganda trial

Overall, the Ntaganda judgment constituted a notable example of a case in which a variety of interests coincided. Firstly, the political interests of the DRC government coincided with the interest of the ICL community to put Ntaganda on trial. Even though the defendant had reportedly enjoyed his freedom in the DRC and was even promoted in the DRC army despite the standing ICC arrest warrant against him for several years,[1322] when he defected from the Congolese army, Ntaganda lost his political support. Next, the interests of various groups *within* the ICL epistemic community also coincided, namely those who favored the dispassionate implementation of criminal law principles and those who were influenced by moral considerations for the plight of the victims. Because of Ntaganda's position within the UPC/FPLC – high enough in the command chain in order to be held responsible for the conduct of its troops, but not so high that he would be removed from the scene of the crimes – the prosecutor was able to convince the judges in the accused's criminal responsibility. Consequently, Ntaganda's conviction send a message that military commanders did not enjoy impunity, but also presented a methodologically reasoned legal decision.

Therefore, the case is important because, as the next chapter suggests, it may show the way in which the OTP can adapt to the judges' principled approach to criminal responsibility. The state-centered literature has examined how the OTP has 'accommodated' towards the political dynamics of the Court's environment in the selection of cases.[1323] The analysis of the assessment of criminal responsibility at the Court makes the important observation that the prosecutor will also have to adapt to the understanding shared by many ICC judges, such as

[1322] P. Clark 2018:226.
[1323] Bosco 2014:20. Vinjamuri 2018:340.

the *Bemba* AC Majority, the *Gbagbo and Blé Goudé* TC Majority and the *Ntaganda* TC, that the culpability principle should be interpreted and applied narrowly, regardless of the trial outcome.

The *Ntaganda* case also bears implications for the expectations of those members of the ICL community of practice who understand the term 'end impunity' to mean not only fair process, but also punishment of the perpetrators of mass atrocities. The conviction can unrealistically raise the expectations of NGOs and scholars who seek to see the Court deliver substantive justice in the form of convictions. A closer analysis of the judgment reveals that the *Ntaganda* TC did not change its principled approach to the assessment of criminal responsibility in order to render convictions easier. If anything, the *Ntaganda* judgment demonstrates the lowered expectations that human rights should have in relation to seeing convictions delivered at the ICC, lest the prosecutor becomes more efficient in the collection of high-quality evidence. Nevertheless, the small number of judgments at the ICC makes projections difficult, so it remains for future research to examine what the ICC trial record would look like.

8.3. Conclusion

Chapter 6 revealed that the desire to differentiate the ICC from the practices of its predecessors led to a narrow interpretation of the RS' criminal responsibility provisions and a substitution of the pragmatic and flexible JCE with the more theoretically rigid control theory. Chapters 7 and 8 suggested that the ICC judges displayed similar restraint in the application of the modes of principal liability in practice in individual cases. The ICC judges further demonstrated that the modes of accessory liability and command responsibility imposed particular requirements and were not just means for obtaining a conviction where the evidence did not meet the requirements of principal liability under Article 25(3)(a). Furthermore, the judges were unwilling to compromise the quality of proceedings by relying on unsatisfactory evidence with respect to any mode of liability.

Three important observations can be made based on that analysis. Firstly, the restrained application of the modes of liability in practice and the reluctance to ease the burden on the prosecutor, despite the challenges of investigating mass atrocities, often resulted in dismissals

of some (*Ngaïssona*) or all of the charges (*Abu Garda*, *Mbarushimana*), partial acquittals (*Katanga*) or full acquittals (*Ngudjolo*, *Bemba*, *Gbagbo and Blé Goudé*). This is not to say that the ICC judges who wrote those decisions or those legal experts outside the Court who advocated for compliance with the culpability principle, aimed at increasing the rate of acquittals. On the contrary, from the perspective of strict legality the outcome of a given case was not something that the judges should take into consideration when interpreting the law and assessing the evidence. Many ICC judges and some legal experts outside the court shared the understanding that the criminal responsibility laws should be applied in a restrained manner, *regardless* of whether that would produce a conviction or acquittal. So far, this practice has indeed resulted in several high-profile acquittals at the ICC but that need not be the case if, for example, the OTP becomes particularly efficient in discovering incriminating evidence in the future.

In fact, it seems reasonable to suggest that those judges and academic commentators accept acquittals as an unproblematic outcome in the *short-term* because they believe that the strict application of the rule of law would help to establish a stable system of international criminal justice that ultimately ends impunity in the *long-term*. Engaging in the ICL field of practice requires commitment to both the 'legalism' norm and the 'anti-impunity' norm.[1324] Just as the proponents of substantive justice do not negate the importance of legality and do not advocate for summary executions, so the advocates of high-quality process do not lose sight of the ultimate goal of ICL – to prevent the perpetrators of mass atrocities from escaping justice. The difference between the two visions of ICL is *how* to accomplish that goal – by balancing process with outcome considerations, or by applying the principles of criminal law in a technical and predictable fashion, hoping to build a successful system of criminal justice in the future. The latter view is entirely consistent with the legalist faith in progress, according to which international law would increasingly gain strength vis-à-vis state politics.[1325]

Secondly, the overview of ICC cases suggests that the confirmation of charges and convictions decisions followed the *same line of legal reasoning* as those decisions that acquitted the accused. Possibly with the exception of *Lubanga*, where the judgment paid significant attention to the UPC's military and political goals and to the accused's position of

[1324] Chapter 3, section 3.2.
[1325] Chapter 2, section 2.2.1.2.

authority in the organization, the ICC chambers generally applied the concepts of 'common plan', 'control', 'indirect co-perpetration' and 'knowledge' that the crime 'will occur in the ordinary course of events' in a restrained manner. Consequently, the ICC judges do not appear to lower the burden on the prosecutor for the purpose of delivering a conviction. Rather, in some cases, such as *Ntaganda* where the accused had been actively involved in the criminal conduct, the prosecutor was more successful in convincing the judges that the facts met their strict requirements.

Finally, the overview of ICC cases demonstrated that the analysis of the normative dynamics within the ICL field complements the insights from the existing literature on the functioning of the ICC in the international political arena. State politics could affect the proceedings, for instance by creating obstacles to the collection of evidence as in the Kenyan trials. The findings of this thesis revealed that the assessment of the defendants' guilt or innocence is also guided by a distinguishable line of legal reasoning, namely, one that understood the criminal responsibility laws in a strict and narrow manner. The legal norms that guide the ICC judges' reasoning are 'political' in the sense that they present a variety of intersubjectively held beliefs about the meaning and purpose of the law that are being promoted by different subgroups of the ICL community of practice. But these are the internal 'politics' of the *legal field* where every idea about the law needs to be justified with respect to pre-existing sets of shared understandings. In the context of the ICC, the advocates of strict compliance with the criminal law, both within and outside the Court, proved particularly influential. Given the challenges of obtaining reliable evidence in relation to mass atrocities, this trend has rendered the window of opportunity of finding an accused guilty of mass atrocities at the ICC even *narrower* than considered by the critical literature. The empirical analysis of ICC cases reveals that in order to end up in a conviction a case needs to both obtain the political support of states *and* meet the high standards of imposing criminal responsibility, that were promoted by some members of the ICL epistemic community within and outside the ICC.

This finding problematizes both the critical and the liberal ICL scholarship. Firstly, it demonstrates the limitations of state-centred critical accounts, which illuminate some power relations affecting specific aspects of ICL, such as the jurisdictional reach of the Court, the handling of self-referrals and the selection of individual suspects. The critical analysis of these aspects reveals the power imbalance between the Global North and the Global South that

continues to dominate international trials. But the critical literature fails to examine the power struggles taking place within the legal field – the struggle over competing visions of justice. As chapters 7 and 8 demonstrated, *that* power struggle is crucial for understanding the outcomes of ICC trials and, as the next chapter discusses, it provides insights into the future development of the discipline. Indeed, a critic might object by saying that the internal political struggles of the legal field are not really 'political' in the sense that the ICL community shares an overall political belief in Western legalism. But internal debates within the ICL field still display a variety of political ideas, in this case, between a minimalist contractualist idea of the international society and a more communitarian vision that seeks to establish strong moral bonds between members of the international community of mankind.

Secondly, the analysis problematizes the common perception within the liberal-legalist literature that the ICL field juxtaposes self-interested states who seek to limit the reach of the law versus idealistic lawyers who aim to expand its scope. Neither do states have monolithic interests with respect to the scope of the law, as demonstrated by their utilization of 'self-referrals' and the voluntary cooperation with the ICC in cases involving opposition leaders, nor do lawyers, NGOs and academics hold a unanimous understanding on that question. The concluding chapter examines the question whether the understanding shared by many within and outside the ICC of the importance of high-quality process is sustainable in the long-term in the ICL field and whether we can draw lessons from the analysis of the assessment of criminal responsibility in order to study the internal ideological battles taking place with respect to other aspects of ICL.

9. CONCLUSION

The empirical analysis of this thesis revealed the importance of understanding the dynamics taking place within the ICL field, namely the intersubjective legal norms that regulate the assessment of criminal responsibility, for analysing trial outcomes at the Court. The claim that 'law matters' has often been uttered with respect to international criminal justice, but it generally rested on a bifurcated view of law and politics as two separate realms. By contrast, this thesis examined the internal politics of the legal field, and more specifically the constant struggle for the promotion of different visions about what that laws on criminal responsibility should require. While all those visions demonstrate commitment to Western legalism, they display significant variation in terms of the perceived role of ICL in international society – from building a stable and predictable international legal order, to binding the moral community of mankind. Nevertheless, the political struggle over the meaning of the criminal responsibility laws is unique to the legal field in that the politics of ICL are both constrained and enabled by the intersubjective rules of practice that govern that field.

The concluding chapter discusses two future-oriented questions that follow from the findings of this thesis. Firstly, whether the commitment to the restrained interpretation and application of the criminal responsibility laws would continue to dominate the ICC. Secondly, whether the analysis of the criminal responsibility norms can provide insights into the study of other ICL aspects.

9.1. The variety of legalist ideologies and the future of ICL

In the aftermath of the Nuremberg and Tokyo trials, Judith Shklar observed that 'legalism' was an ideology, a belief that a certain course of conduct, namely the adjudication of criminal responsibility in a courtroom setting, was the appropriate response to mass atrocities.[1326] Several decades later, the practice of the UN tribunals and the ICC revealed the existence of a variety of 'sub-ideologies' *within* legalism, that ultimately rest on different visions of international society. One of those visions favours the communitarian idea that ICL should reflect an emerging global morality that binds together the international community of mankind. The other vision follows a minimalistic idea of the international society, where the

[1326] Shklar 1964.

rule of law serves to institute stable order with clearly defined rules, and not to deliver specific substantive justice outcomes in the short-term.

Different ideas about the meaning of the criminal responsibility laws grew in popularity in different spatial and temporal contexts. The devastation caused by the Second World War and the widespread publicization of the atrocities committed in the Former Yugoslavia and in Rwanda, fuelled the moral impulse to prevent the perpetrators of those crimes to escape justice either because of the lack of applicable codified law or because those persons had been removed from the scene of the crimes. By contrast to these *ad hoc* institutions, the ICC was the product of a long process of deliberation among experts from around the world. The idea that the ICC was a fundamentally different creation from its predecessors created the perception among many members of the ICL epistemic community, both within and outside the court, that the practices with respect to the assessment of criminal responsibility, which were employed elsewhere, were no longer appropriate at the permanent ICC.

But whether the restrained and 'dispassionate' assessment of criminal responsibility would continue to dominate the ICC in the future is less clear. It is possible that the cautiousness of many ICC judges, displayed at the *Bemba* AC Majority and the *Gbagbo and Blé Goudé* TC Majority, not to over-stretch the notion of personal culpability could create a backlash within the ICL epistemic community in favour of a more balanced approach of the assessment of criminal responsibility. The cold rational language of those ICC judgments stood in stark contrast with the emotionally charged discourse that generally surrounds international trials. For decades that discourse has been the driving force behind the creation of international tribunals. From the UN Security Council being 'shamed' into taking action to address the atrocities in the Former Yugoslavia and Rwanda, to the advocacy of human rights advocates and NGOs for the establishment of the ICC, the institutionalization of ICL has been accompanied with references to the plight of the victims and the moral consciousness of humankind.

In fact, this backlash is already observable. While many members of the ICL epistemic community became increasingly concerned that the practices of the UN tribunals came dangerously close to the attribution of guilt by association, the restrained approach of the ICC judges began to trigger the opposite reaction. NGOs criticised the ICC judges for applying

'overly strictly' the culpability principle.[1327] Similarly, some scholars who had been advocating for greater compliance with the criminal responsibility principles in ICL,[1328] became concerned that the ICC had 'over-corrected' the practices of the UN tribunals.[1329] Notably, some ICC judges, who shared a humanitarian concern for expanding the protection of civilians during conflict, departed from the approach to criminal responsibility taken by the majority of their colleagues, as illustrated by the dissenting opinion of Judge Herrera-Carbuccia at the *Gbagbo and Blé Goudé* TC. The humanitarian perspective may still constitute the minority position at the ICC, but if the backlash intensifies, that could change.

Nevertheless, two factors need to be considered that may halt, or at least slow down this process. Firstly, because of the intersubjective nature of international legal norms, the change of the dominant set of shared understandings at an institution takes time and, in fact, it may prove particularly challenging at the ICC. The practices of the UN tribunals regarding the assessment of criminal responsibility did change over time, but a radical departure from those practices only took place at the ICC. The dispassionate approach to delivering international judgments may prove unsustainable in the long run, but at the moment it holds a firm grip on the ICC.

Secondly, the ICC prosecutor may adjust to the strict criminal responsibility requirements, enforced by the majority of the ICC judges, and present at the Court only those cases that are supported by solid evidence, thus, increasing the chances of conviction. In fact, most cases in which the charges were confirmed in the past few years, including *Ongwen*, *Al-Mahdi*, *Al-Hassan*, and *Yekatom*, involve allegations of the accused's direct participation in the criminal conduct, which renders the link between the accused and crimes easier to establish. As demonstrated by the reactions to the *Ntaganda* judgment, those cases that involve abundant evidence of the accused's personal role in the crimes strike a balance between the different visions of legalism – the one driven by the moral impulse to punish the perpetrators of mass atrocities and the one emphasising high-quality process. While the accused in all of the aforementioned cases constitute mid-level insurgent commanders, this could change in the future, if the prosecutor manages to collect abundant and high-quality evidence against a leadership figure. The prosecutor has already taken steps in that regard by proposing in the

[1327] Women's Initiatives for Gender Justice 2018:147.
[1328] See Robinson 2008.
[1329] See Robinson 2013a.

OTP's official strategy to target mid-level perpetrators as means to eventually link their commanders to the crimes.[1330] Given the pace of ICC proceedings, inevitably slowed down by the challenges of international investigations, it might take years before a senior official is convicted at the court.[1331] Therefore, it is up to future research to examine whether the prosecutor's strategy has been successful.

9.2. Towards future research agendas

The findings of this thesis can be used in future research on other aspects of the ICC's judicial decisions. The main insights gained from this thesis with respect to the future research of other ICL norms, concern the findings about the important role of the ICL community of practice in enforcing, firstly, a set of ground rules that enable communication within the legal field, and secondly, a variety of shared understandings that enable the continuous practices of contestation and justification of legal norms.

However, the content of the relevant shared understandings that influence the determination of the meaning of the law needs to be examined in relation to each particular aspect of ICL. It should be stressed that the aim of the thesis was to provide a very detailed analysis of a narrowly defined phenomenon – the assessment of criminal responsibility, and more specifically the decisions concerning the RS modes of liability. The more contextually specific the finding, the less generalizable it is. Therefore, while the ICC judges have strongly dissociated the court from some of the practices of the UN tribunals in relation to *the assessment of criminal responsibility*, such as the use of JCE and the lack of a causality requirement in relation to command responsibility, that might not be the case in relation to other legal norms. Nor do the findings of this thesis suggest that the ICC will employ a restrained interpretation of *all* RS provisions.

A relevant example of that is the observation that the conclusions of ICC judges have appeared more humanitarian-oriented when their deliberations did not directly involve the modes of liability. For example, the court recognized for the first time in ICL the criminality of gender-based violence that was committed *within* an armed group and not just by the

[1330] ICC, Office of the Prosecutor 2013:14.
[1331] Interview with Kevin Heller.

opposing warring party.[1332] The ICC judges considered that 'in the absence of any general rule' that excluded members of armed forces from protection against violations by members of the same armed force, within-group rapes and sexual enslavement were included in the ambit of the war crimes codified in Article 8 (2)(b)(xxii) and (2)(e)(vi) RS, respectively.[1333] That interpretation of the law was rather bold because international humanitarian law generally protects from within-group violence only those persons who are defenseless due to, *inter alia* wounds or sickness, but not the active combatants.[1334] Yet, the novel interpretation of the law on gender-based war crimes was supported by ICC judges at the TC[1335] and the AC,[1336] even though those judges otherwise adopted a restrained approach towards the criminal responsibility laws. Notably, among the judges who concurred with the findings on within-group gender-based violence was Judge Van den Wyngaert – a longstanding defender of the narrow interpretation of legality and culpability at the ICC.

The judges' interpretation of the law on gender-based war crimes may appear surprising considering the findings of this thesis, but a closer look at the normative environment surrounding the decision demonstrates that the interpretation of Article 8 (2)(b)(xxii) and (2)(e)(vi) RS was not an idiosyncratic idea of the judges, but resonated with sets of shared understandings that were held within the ICL community of practice concerning those specific legal norms. Article 8 (2)(b)(xxii) and (2)(e)(vi) are codified in the part of the RS that lists the types of offences and not of the General Part codifying the criminal law principles. A very different set of shared understandings dominated the ICL community with respect to questions of the scope of the legal norms that criminalized gender-based crimes compared to the criminal responsibility laws. Unlike the drafting of the General Part, which was a novel endeavour in comparative criminal law that was delegated to legal experts, the drafting of the RS list of offences involved the active participation of human rights organizations, including the Women's Caucus, which lobbied for the codification of a comprehensive set of provisions that would offer maximum humanitarian protection. Especially with respect to gender-based crimes, the NGOs' efforts were remarkable, which raised the expectations within the ICL field that the ICC would finally recognize the severity of gender-based crimes in international

[1332] Women's Initiatives for Gender Justice 2018:139-142.
[1333] *Ntaganda, Appeals Judgment on the Defence's Challenge on Jurisdiction*: 65.
[1334] Heller 2017.
[1335] *Ntaganda, Trial Chamber's Decision on the Defence's Challenge on Jurisdiction*.
[1336] *Ntaganda, Appeals Judgment on the Defence's Challenge on Jurisdiction*.

law.[1337] In fact, after the Rome Conference the Women's Caucus transformed into the Women's Initiatives for Gender Justice, an NGO that closely monitors the work of the ICC with respect to the prosecution of gender-based crimes.[1338] Consequently, the finding that sexual violence committed within armed groups was criminalized appeared 'rather convincing' to many members of the ICL epistemic community.[1339]

Crucially, the readiness of ICC judges to expand wartime protection to the victims of rapes and sexual slavery does not contradict their restrained approach to matters of criminal responsibility, which bears implications for the outcomes of proceedings. For instance, the *Mbarushimana* case included a broad range of gender-based crimes charges, but all of those charges were dismissed because the PTC concluded that Mbarushimana's alleged contribution to the FDLR's conduct did not meet the 'significant' contribution level threshold, a requirement that was imposed by the judges despite its absence from the language of Article 25(3)(d). Similar outcomes occurred in *Katanga*, where the TC's reluctance to infer Katanga's knowledge that the group of combatants he had aided were about to commit rapes and sexual slavery resulted in the accused's acquittal of those charges. Even though command responsibility under Article 28 imposed lower mental element requirements compared to Article 25(3), which led some commentators to suggest that it would be a potent tool for enabling convictions for gender-based crimes,[1340] that mode of liability also proved too restrictive, as interpreted and applied by view of the ICC judges' shared understandings about the criminal responsibility laws. Bemba was the first accused who was convicted for rape, but the narrow interpretation of command responsibility by the AC reversed that outcome. Until September 2020 Ntaganda remains the only person with a standing conviction for gender-based crimes at the ICC, pending appeal. As discussed, unlike previous cases, there was available evidence that Ntaganda had sexually abused girls within his armed group, which enabled the judges to establish a solid link between the accused and the crimes.

This brief discussion suggests that the ICC judges may approach RS provisions in a different manner, depending on the sets of shared understandings that are specific to distinctive

[1337] Bedont and Hall-Martinez 1999:65–85.
[1338] Chappelle 2014b:580.
[1339] McDermott 2017b. See also Women's Initiatives for Gender Justice 2018:139-142. For a critique of the decision see Heller 2017.
[1340] Kortfält 2015:554. Giamanco 2011:218.

aspects of ICL practice. This study provided insights into the mechanisms through which legal norms influence ICC decisions, namely, the competition between different visions of the scope and meaning of a particular law. Future research can employ those insights to examine the internal debates associated with other aspects of ICL practice, apart from criminal responsibility, and their implications with respect to the type of 'justice' delivered through international trials.

Unlike rationalistic international relations theories of judicial independence that seek generalizable results over a large set of samples, the aim of this thesis was to contribute to the gradual process of building a body of interdisciplinary literature that examines in detail a variety of aspects of ICL practice. This 'bottom-up' approach presents a long-needed transformation of the study of the ICC and enables better integration between political science and international law for the purpose of enabling true interdisciplinary research on international criminal justice.

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