Chapter 2
Superior Responsibility for the Rape of Women during Armed Conflicts

‘Power without responsibility: the prerogative of the harlot throughout the ages.’

—Rudyard Kipling.

Introduction

As observed above, the constancy of the evil of sexual violence during armed conflicts is not explained by the uniform failure of international law to proscribe such conducts. For, there is indeed an ‘impressive body of formal prohibition’.¹ The punitive potentials of international law in this respect is, perhaps, best illustrated by the rather unusual case of Pauline Nyiramasuhuko, the Rwandan genocide-era Minister of Family and Women’s Development. She was convicted by an ICTR Trial Chamber, on 24 June 2011, for crimes including rapes of her fellow women. Notably, that conviction hinged upon the theory of superior responsibility in respect of those rapes—committed by her male Interahamwe subordinates.² The problem rather is that compared to the unabated regularity of sexual violence in armed conflicts, there remains a gap between the problem and the norms needed to address it in a manner that could better protect women against the identified vice. In this regard, one area of solutions that requires a second look is the area of superior responsibility for rapes committed by subordinates.

The purpose of this chapter is to consider that question. The discussions here will entail a review of the current state of international law and what more could be done to address the identified problem.

¹ Chinkin, supra. See also Meron, supra. As has already been observed, the proscriptions against rape include: the obligation of special respect and protection for women, especially regarding rape and kindred abuses [art 27 of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War and art 76 of the 1977 Additional Protocol I to the Geneva Conventions]; rape and related offences as forbidden acts and war crimes [art 8(2)(b)(xxii) and art 8(2)(e)(vi) of the International Criminal Court Statute (international armed conflicts), art 4(e) of the ICTR Statute, and art 4(2)(e) of the 1977 Additional Protocol II to the Geneva Convention]; rape and related offences as crimes against humanity, when committed as part of a widespread or systemic attack against a civilian population [art 7(1)(g) of the ICC Statute, art 3(g) of the ICTR Statute, and art 5(g) of the ICTY Statute.]
² Prosecutor v Nyiramasuhuko et al (Judgment and Sentence) delivered on 24 June 2011 [ICTR Trial Chamber].
Chapter 2

The Law as It Should Be

Given the overabundant evidence of the rape of women throughout the history of armed conflicts, there seems little doubt that the following simple proposition must by now be a reasonable one in the mind of the average reasonably informed person: women are always at risk of rape during periods of armed conflicts. If that be the case, that reality ought to follow the law into the mix of what is considered in assessing the responsibility of superiors whose subordinates have committed rape.

In this connection, the motive for such rapes need not derive from the deliberate policy of a party to the conflict in question; although the range of policy theories canvassed in Chapter 1 is wide and varied enough to implicate the average superior in the sexual violence committed by the subordinate. It should be sufficient that there is a general apprehension in the average mind that some arms-bearing men, even purely on a frolic of their own, might exploit the opportunity of war (or other forms of armed conflict) to rape vulnerable women. The test should perhaps be this: would the average person harbour a primal fear for the sexual-oriented safety of a female relative or friend, upon, say, receiving news that she had been confronted by a band of armed men, in an environment of armed conflict?

The historical frequency warranting the reasonableness of this general apprehension makes no distinction as to the reasons for the feared rape. In other words, the historical instances where rapes had been used as a weapon of war do combine with the instances where they had resulted from criminal opportunism, an evolutionary conditioning of men, etc, to raise this general apprehension in the average mind.

The question then arises: what does this mean within the context of the responsibility of a superior for the rapes committed by his men in times of conflict? The answer is this. There should be a resulting legal duty of due diligence on the superior that is more exacting than what currently obtains. This enhanced duty of due diligence will require the superior to take reasonable measures at all times—even before imminent danger of the risk arises—to prevent his armed men from committing acts of sexual violence against women during armed conflicts. It is not enough that the offender is ‘properly hanged’ after the fact, as General Patton would have it. For obvious reasons, it is far better for all that the rapes are prevented in the first place and that the hangings are avoided, than to hang someone after they have already raped.

This standard of protection in international law no doubt finds support in the following clarion call in a resolution of the Parliamentary Assembly of the Council of Europe: ‘[I]n view of the number of rapes in armed conflicts … better legal protection of women is more necessary than ever; … such protection must

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3 United Nations, Basic Security in the Field–Staff Safety, Health, and Welfare: a CD-ROM Course <http://www.christie.ab.ca/htmlsite/webBSITF.htm>. See also United Nations, Security Awareness: An Aide-Mémoire (1995), p 16.
apply in all circumstances.\footnote{Council of Europe (Parliamentary Assembly), Resolution 1212 of 2000, \textit{supra}, para 7.} It is submitted that one way through which such better protection may be achieved would be to consider the responsibility of the superior for failing to take reasonable measures at all times to prevent an obvious danger. That responsibility is sufficiently compelling in view of the theories which would attribute the rampancy of sexual violence during armed conflicts to individualistic opportunism, inevitability or evolution. And the responsibility is even more compelling given theories of policy, including condonation or connivance, as explaining the rampancy of sexual violence during armed conflicts.

**The Law as It Is**

Regrettably, however, international criminal law as it is, does not, as will be seen shortly, require a superior to put in place \textit{at all times} such reasonable measures as will ensure that subordinates do not commit sexual violence against women. The similarly worded Statutes of the International Criminal Tribunals for Rwanda and for the former Yugoslavia, for example, do not permit a superior to escape criminal responsibility for the crimes of a subordinate. But this is the case only if the superior ‘knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.’\footnote{Art 6(3) of the ICTR Statute; art 7(3) of the ICTY Statute.} This provision was undoubtedly inspired by article 86(2) of Protocol Additional to the Geneva Conventions of 12 August 1949 (Protocol I) which provides as follows:

\begin{quote}
The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.
\end{quote}

Article 28 of the Rome Statute introduces new twists to the regime of superior responsibility. To begin with, the article separates superior responsibility into military-type and non-military-type hierarchies. For both types, there is criminal responsibility accruing to the superior who failed to take all necessary and reasonable measures within his or her power to prevent foreseeable crimes of subordinates or repress those in progress. And for both types of superiors, the test of foreseeability is limited by the same undesirable language of immediacy: that the subordinates ‘were committing or about to commit such crimes.’ But the critical twist appears in the different treatment given to the two types of superiors. For the military-type superior, the duty to take all necessary and reasonable measures to prevent or repress arises if (s)he knew or owing to the circumstances prevailing at the time, ought to have known, that the crimes were about to be committed or
were being committed. And for the non-military-type superior, responsibility is
further limited in that the duty to prevent or repress crimes arises if (s)he knew
or consciously disregarded information which clearly indicated that the subordinates
were committing crimes or about to commit them.

It is within statutory frameworks such as these that the responsibility of a
superior for the rapes committed by subordinates is currently assessed. And it is
fairly apparent that, within these statutory frameworks, the criminal responsibility
of the superior for rapes committed by his subordinates does not depend on the
general risk of rape to which women are exposed during armed conflicts. In other
words, there is no general duty upon a superior at all times to prevent his subordi-
nates from committing sexual violence against women.

The language of relevant instruments of international law, as typified by the
ICTR, the ICTY and the ICC Statutes, do clearly indicate that the earliest point
at which the superior’s duty to prevent the sexual violence (hence his criminal
responsibility for failing so to prevent) is engaged only when the subordinate is
‘about to commit’ the act, and extends to when he is ‘committing it’. This requires
an immediate connection between the particular subordinate(s) at the particular
time and the particular rape committed. As an ICTY Trial Chamber noted in the
case of Kordić & Čerkez:

The duty to prevent should be understood as resting on a superior at any stage
before the commission of a subordinate crime if he acquires knowledge that such
a crime is being prepared or planned, or when he has reasonable grounds to suspect sub-
ordinate crimes.6 [Emphases added.]

Prior to the Rome Statute, the clearest legal statement on the point was that con-
tained in Article 6 of the Draft Code of Crimes against the Peace and Security of
Mankind, adopted by the International Law Commission at its forty-eighth ses-
sion. It states as follows:

The fact that a crime against the peace and security of mankind was commit-
ted by a subordinate does not relieve his superiors of criminal responsibility, if
they knew or had reason to know, in the circumstances at the time, that the sub-
ordinate was committing or was going to commit such a crime and if they did not
take all necessary measures within their power to prevent or repress the crime.7
[Emphases added.]

It is thus amply clear that the superior’s responsibility for sexual violence against
women is not engaged until a time immediately before the crime.

6 Prosecutor v Kordić & Čerkez (Judgment) 26 February 2001 [ICTY Trial Chamber],
para 445.

7 Yearbook of the International Law Commission (1996), Vol II, Part Two, Report of the
Commission to the General Assembly on the Work of its Forty-eighth Session (A/51/10), p 25.
The Requirement of Knowledge

It is undoubtedly this requirement of immediate connection between the particular subordinates at the particular time and the particular rape that has generated the extensive jurisprudence at the ad hoc Tribunals on the subject of knowledge—actual or constructive—of the superior and the difficulties regarding its proof. It has also been a central focus of much commentary. According to this line of jurisprudence, the requirement of knowledge is satisfied only 'if information was available to [the superior] which would have put him on notice of offences committed by subordinates.'

8 See Kai Ambos, ‘Superior Responsibility’ in Antonio Cassese et al (eds), The Rome Statute of the International Criminal Court: A Commentary [London: Oxford University Press, 2002] Vol I, 823 at p 834.

9 For instance, see generally, Guénaël Mettraux, The Law of Command Responsibility [Oxford: Oxford University Press, 2009]; Ilias Bantekas, ‘The Contemporary Law of Superior Responsibility’ (1999) 93 American Journal of International Law p 573; Nicole Laviolette, ‘Commanding Rape: Sexual Violence, Command Responsibility, and the Prosecution of Superiors by the International Criminal Tribunals for the Former Yugoslavia and Rwanda’ (1998) 36 Canadian Yearbook of International Law 93; Timothy Wu and Yong-Sung (Johnathan) Kang, ‘Criminal Liability for the Actions of Subordinates—the Doctrine of Command Responsibility and Its Analogues in United States Law’ (1997) 38 Harvard International Law Journal 272; Jia Bing Bing, ‘The Doctrine of Command Responsibility: Current Problems’, (2000) 3 Yearbook of International Humanitarian Law 131; Mirjan Damaška, ‘The Shadow Side of Command Responsibility’ (2001) 49 Am J Comp L 455; William Schabas, ‘Mens Rea and the International Criminal Tribunal for the Former Yugoslavia’, (2003) 37 New England Law Review 1015; Jia Bing Bing, ‘Doctrine of Command Responsibility Revisited’ (2004) 3 Chinese Journal of International Law 1; Arthur O’Reilly, ‘Command Responsibility: A Call to Realign the Doctrine with Principles’ (2004–2005) 20 American University International Law Review 71; Allison Danner and Jenny Martinez, ‘Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law’ (2005) 93 California Law Review 75; Beatrice Bonafé, ‘Finding a Proper Role for Command Responsibility’, (2007) 5 Journal of International Criminal Justice 599; Chantal Meloni, ‘Command Responsibility: Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior?’ (2007) 5 Journal of International Criminal Justice 615; Jenny Martinez, ‘Understanding Mens Rea in Command Responsibility: From Yamashita to Blaškić and Beyond’ (2007) 5 Journal of International Criminal Justice 628; Yaël Ronen, ‘Superior Responsibility of Civilians for International Crimes Committed in Civilian Settings’ (2010) 43 Vanderbilt Journal of Transnational Law 313; and Nicholas Tsagourias, ‘Command Responsibility and the Principle of Individual Criminal Responsibility: a Critical Analysis of International Jurisprudence’ in C Eboe-Osuji, Protecting Humanity [Leyden: Martinus Nijhoff: 2010] 817.

10 See Prosecutor v Delalić (Judgment) 20 February 2001 para 241 [ICTY Appeals
Quite naturally, knowledge, in these circumstances, is an active notion whose ability to assist in the protection of women is relative, largely depending upon the dynamics of the situation at hand. This makes the duty of protection as vulnerable as the inherent limitations of those dynamics. For these reasons, this scheme of legal duty becomes deficient in my view.\textsuperscript{11}

Considering that current authoritative legal statements tend to require this immediate connection between the particular subordinate(s) at the particular time and the particular rape committed, it might seem rather tenuous, at present, to anchor the responsibility of the superior upon the more desirable scheme of a larger theory of foreseeability discussed earlier.\textsuperscript{12}

This apparent deficiency in international law has been brought home in some of the judgments of the ICTR. Although in \textit{Akayesu},\textsuperscript{13} an ICTR Trial Chamber had found the accused guilty of rape of particular Tusti women, it is clear that the conviction was based on the fact that the Accused had been heard clearly encouraging and ordering assailants to rape Tutsi women.\textsuperscript{14} In instances where there had been no clear words from the accused implying a grant to subordinates of the licence to rape, the Chamber had been reluctant to find him criminally responsible for any ensuing rape. The following pronouncement in the \textit{Akayesu} case illustrates this reluctance:

\begin{quotation}
In considering the role of the Accused in the sexual violence which took place and the extent of his direct knowledge of incidents of sexual violence, the Chamber
\end{quotation}

\begin{footnotes}
\footnotetext[11]{Possibly worse still, in regard to rape, is the provision of the ICC Statute with respect to the responsibility of a civilian superior. While the responsibility of a military commander arises where ‘[t]hat military commander or person [effectively acting like a military commander] either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes’, the responsibility of a civilian superior must meet a higher threshold. His criminal responsibility arises only when he ‘either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes.’ Though unlikely, it is not clear that this higher threshold will not avail a civilian superior who is a leader of a band of militia, such as the \textit{Interahamwe} of the Rwandan Genocide fame, who had been actively involved in attacks against civilians, although it is also probable that he would be treated as a ‘person acting effectively in the position of a military commander’. As the ICC Statute now stands, such a leader may only be criminally responsible for rape, only if he knew or deliberately disregarded information clearly showing that a rape was being committed or was about to be committed.}
\footnotetext[12]{See discussion under the subheading ‘The Law as It Should Be.’}
\footnotetext[13]{\textit{Prosecutor v Akayesu}, supra, paras 422, 452, 706 and 731–733.}
\footnotetext[14]{He had been heard saying to the assailants, ‘Never ask me again what a Tutsi woman tastes like,’ and ‘you should first of all make sure that you sleep with this girl’ referring to a Tutsi woman whom he had ordered his subordinates to kill. \textit{Akayesu}, supra, paras 422 and 452.}
\end{footnotes}
has taken into account only evidence which is direct and unequivocal. Witness H testified that the Accused was present during the rape of Tutsi women outside the compound of the bureau communal, but as she could not confirm that he was aware that the rapes were taking place, the Chamber discounts this testimony in its assessment of the evidence. Witness PP recalled the Accused directing the Interahamwe to take Alexia and her two nieces to Kinihira, saying “Don’t you know where killings take place, where the others have been killed?” The three women were raped before they were killed, but the statement of the Accused does not refer to sexual violence and there is no evidence that the Accused was present at Kinihira. For this reason, the Chamber also discounts this testimony in its assessment of the evidence.15 [Emphases added.]

Similarly, in Kajelijeli, another Trial Chamber found that the accused had ordered assailants to exterminate Tutsis,16 but declined to find the accused guilty of the rapes of Tutsi women committed as part of that order to exterminate. This was because the accused had not ordered the assailants to commit the collateral crime of rape. As the Chamber put it:

[...] After careful consideration of the evidence presented at trial the Chamber is convinced that Witness GDT was raped by members of the Interahamwe on 7 April 1994 in Susa secteur, Kinigi Commune. It is not in contention that the Accused was not present at the scene of the rape of GDT. The Chamber finds, by a majority, Judge Ramaroson dissenting, that the Prosecution did not prove that the Accused issued a specific order to rape or sexually assault Tutsi women in Susa secteur, Kinigi Commune on that day.17

Had international law required the superior to put in place at all times reasonable measures to prevent subordinates from raping women, the issue in Akayesu and Kajelijeli would have been whether the Accused had put those measures in place when they ordered the killing of Tutsis in an armed conflagration of the type in which assailants are known typically to commit rape. That they did not actually order or instigate the rapes would have been immaterial to their criminal responsibility.

Routes around the Difficulties of the Lex Lata

Problematic though it is, the deficiency in the law noted here18 is not altogether an impossible obstacle to overcome, especially at the ad hoc Tribunals. One pos-

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15 Akayesu, supra, para 451.
16 Prosecutor v Kajelijeli, supra, para 907; see also paras 823, 825, 833, 836, 842, 856, 897, 899, 904, 905.
17 Ibid, para 681. See also paras 682, 683, 920, 923, 924, 936–938.
18 Specifically, the deficiency resulting from the ‘committing or about to commit’ requirement.
sible route around the problem will be to follow the jurisprudence of the ad hoc Tribunals in their interpretation and application of article 6(i) of the ICTR Statute and article 7(i) of the ICTY Statute. In this connection, a close look needs to be taken at the case law relating to joint criminal enterprise and ordering which are modes of responsibility covered within those provisions. Whether the law develops similarly in the relatively uncharted terrains of ‘instigating’ and ‘aiding and abetting’ remains to be seen.

Before we examine these concepts, it must be noted, however, that the assistance they offer are not perfect; for they depend on the imagination of counsel (on both sides) and the judges, as well as on the prevailing wind of jurisprudence at any particular time.

**Joint Criminal Enterprise**

The most obvious mode of criminal responsibility is *commission*, as provided for under article 6(i) of the ICTR Statute and article 7(i) of the ICTY Statute. But that concept has been expansively construed at the ad hoc Tribunals, to hold accused persons criminally responsible in ways not appearing so obvious at first. This is notably so under the doctrine of joint or common criminal enterprise. The doctrine has been pronounced upon in a number of cases reaching the Appeals Chamber of the ICTY. The notion was originally discussed by that Chamber in *Prosecutor v Tadić (Judgment)*. For present purposes, the gist of the discussion, aptly captured by Judge Hunt in a subsequent case, is as follows:

6. The Appeals Chamber held that the notion of a joint criminal enterprise “as a form of accomplice liability” was firmly established in customary international law, and that it was available (“albeit implicitly”) under the Tribunal’s Statute. The Appeals Chamber identified three “distinct categories of collective criminality” as being encompassed within the concept of joint criminal enterprise, although it subsequently suggested that the second category was in many respects similar to the first, and that it was really a variant of the first category. The three categories were as follows:

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19 See *Prosecutor v Tadić (Judgment)* 15 July 1999 [ICTY Appeals Chamber], para 185 et seq; *Prosecutor v Furundžija (Judgment)* 21 July 2000 [ICTY Appeals Chamber], paras 115–120; *Prosecutor v Delalić & Ors, supra*, [ICTY Appeals Chamber], paras 343, 365–366; and *Prosecutor v Milutinović, Šainović & Ojdanić (Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction–Joint Criminal Enterprise)* 21 May 2003 [ICTY Appeals Chamber].

20 *Prosecutor v Tadić (Judgment)* dated 15 July 1999 [ICTY Appeals Chamber]. See also Kai Ambos, ‘Joint Criminal Enterprise and Command Responsibility’ (2007) 5 *Journal of International Criminal Justice* 159.

21 See Separate Opinion of Judge David Hunt in *Prosecutor v Milutinović, Šainović & Ojdanić (Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction–Joint Criminal Enterprise)* 21 May 2003 [ICTY Appeals Chamber].
Category 1: All of the participants in the joint criminal enterprise, acting pursuant to a common design, possessed the same criminal intention. The example is given of a plan formulated by the participants in the joint criminal enterprise to kill where, although each of the participants in the plan may carry out a different role, each of them has an intent to kill.

Category 2: All of the participants in the joint criminal enterprise were members of military or administrative groups acting pursuant to a concerted plan, where the person charged held a position of authority within the hierarchy; although he did not physically execute any of the crimes charged, he actively participated in enforcing the plan by aiding and abetting the other participants in the joint criminal enterprise who did execute them. The example given is of a concentration camp, in which the prisoners are killed or otherwise mistreated pursuant to the joint criminal enterprise.

Category 3: All of the participants were parties to a common design to pursue one course of conduct, where one of the persons carrying out the agreed object of that design also commits a crime which, whilst outside the “common design”, was nevertheless a natural and foreseeable consequence of executing “that common purpose”. The example is given of a common (shared) intention on the part of a group to remove forcibly members of one ethnicity from their town, village or region (labelled “ethnic cleansing”), with the consequence that, in the course of doing so, one or more of the victims is shot and killed.

Although described in an earlier decision as a form of ‘accomplice liability’, the ICTY Appeals Chamber has subsequently clarified that joint criminal enterprise is a form of ‘commission’ pursuant to article 7(1) of the ICTY Statute, and not a matter of aiding and abetting. Clearly, all these categories are relevant to the

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22 At paragraph 220 of the Tadić judgment, the ICTY Appeals Chamber put the point as follows: 'In sum, the Appeals Chamber holds the view that the notion of common design as a form of accomplice liability is firmly established in customary international law and in addition is upheld, albeit implicitly, in the Statute of the International Tribunal.' [Emphasis added.] See also paragraph 223 where the Appeals Chamber concluded that ‘the mode of accomplice liability under discussion is well-established in international law and is distinct from aiding and abetting.’

23 See Prosecutor v Milutinović, Šainović & Ojdanić (Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction–Joint Criminal Enterprise), supra, [ICTY Appeals Chamber], paras 19 and 20. See also Prosecutor v Stakić (Judgment) 31 July 2003 (ICTY Trial Chamber II), para 432. This clarification is entirely consistent with the statements of the Appeals Chamber even in paragraphs 192 and 229 of their Tadić judgment. At paragraph 192, the Appeals Chamber said as follows: Under these circumstances, to hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators of all those who in some way made it possible for the perpetrator physically to carry out that criminal act. At the same time, depending upon the circumstances, to hold the latter liable only as aiders and abettors might underrate the degree of their criminal responsibility.
notion of criminal responsibility for an accused in the position of a superior. In other words, if the superior is linked to his subordinates in a transactional relationship that qualifies as a joint criminal enterprise, he runs a high risk of criminal responsibility for the rapes committed by the subordinates. In view of this relationship between the notions of joint criminal enterprise and superior responsibility, Kai Ambos, aiming to avoid confusion, usefully discusses the need to keep in mind the distinct elements of the two concepts whenever they operate to govern the conduct of the same accused in relation to the same situation. In particular, he points out that the notion of joint criminal enterprise requires some form of contribution to the criminal enterprise by persons ‘normally belong[ing] to the same hierarchical level and operate[ing] in a coordinated, horizontal way’; while the notion of superior responsibility hinges adequately upon the fault of criminal omission as the culpable conduct in a vertical hierarchical relationship of superior and subordinate. Some care is needed in the appreciation of Ambos’s point, particularly as regards the factor of relationship in the respective constructs of joint criminal enterprise and superior responsibility. His thesis does not negate for all purposes the presence of a hierarchical relationship in a joint criminal enterprise. Nor does he, for all purposes, insist upon the existence of a coordinate or horizontal relationship in a joint criminal enterprise. His point is best understood as emphasising what is a compulsory element in the notion of superior responsibility such as necessarily sets it apart from joint criminal enterprise. Thus, the absence of a superior-subordinate hierarchy will negate a finding of superior responsibil-

And at paragraph 229, the Appeals Chamber said as follows:

In light of the preceding propositions it is now appropriate to distinguish between acting in pursuance of a common purpose or design to commit a crime, and aiding and abetting.

(i) The aider and abettor is always an accessory to a crime perpetrated by another person, the principal.

(ii) In the case of aiding and abetting no proof is required of the existence of a common concerted plan, let alone the pre-existence of such a plan. No plan or agreement is required: indeed, the principal may not even know about the accomplice’s contribution.

(iii) The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. By contrast, in the case of acting in pursuance of a common purpose or design, it is sufficient for the participant to perform acts that in some way are directed to the furthering of the common plan or purpose.

(iv) In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal. By contrast, in the case of common purpose or design more is required (i.e., either intent to perpetrate the crime or intent to pursue the common criminal design plus foresight that those crimes outside the criminal common purpose were likely to be committed), as stated above.

Ambos, ‘Joint Criminal Enterprise and Command Responsibility’, supra, generally, especially at pp 180.
ity: the presence of such a relationship, on the other hand, is unnecessary in a joint criminal enterprise—but does not negate it. An accused, in a superior position, who makes a positive contribution in a joint criminal enterprise that includes his own subordinates will thus become a co-perpetrator to the crime,\textsuperscript{25} with an enhanced moral fault, rather than someone guilty merely in virtue of omission.

Category 3 or the extended form of joint criminal enterprise is of special relevance in this discussion. No doubt, in determining whether the rape committed by the subordinate was a ‘natural and foreseeable consequence’ of executing another crime which was the object of the common enterprise, such that the superior will be held criminally responsible, the judge in the case will take into account the generalised risk of rape which the context of armed conflicts presents. It is, however, for the prosecutor to make that case.

While the ICTR and ICTY Statutes are silent on the concept of joint criminal enterprise, the ICC Statute does provide for it. Where the silence of the ICTR and ICTY Statutes on the subject had enabled the judges to construe its existence and scope within the notion of ‘commit’, the ICC Statute goes some way in prescribing the boundaries of the concept, thus limiting judicial ability to extend its reach by way of interpretation. In these regards, article 25(3) of the ICC Statute provides as follows:

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

[…]

\textsuperscript{25} Ibid, 180–181.
While Categories 1 and 2 of the concept of joint criminal enterprise at the *ad hoc* Tribunals adequately fit within the general scheme of article 25(3)(d) of the ICC Statute, Category 3 appears a more difficult proposition. This is for the simple reason that while the essence of Category 3 is that the resulting crime was a ‘natural and foreseeable consequence’ of executing the group’s common purpose, article 25(3)(d) of the ICC Statute appears on its face to require a settled *intention* to make some contribution to the *resulting crime*—and not just to the common purpose of the group. This makes it more difficult to impute to the accused a crime to which he had not intended to contribute, though the crime be a natural and foreseeable consequence of a joint criminal enterprise.

Conversely, however, it is possible to interpret article 25(3)(d) to the same effect as Category 3. This might be achieved by decoupling the *mens rea* of the ‘contribution’ from the *mens rea* of the actual perpetrators of the resulting criminal activity. In this connection, an analogy may be drawn from the jurisprudence relating to the *mens rea* of an accomplice, in which it is settled that the *mens rea* of the accomplice need only be to do the actual thing that amounted to assistance; he need not have wished the crime *per se*. The analogy then is to the effect that the intention to do that which is seen as contribution to the crime [under article 25(3)(d) of the Rome Statute] may be treated in the same way, for purposes of *mens rea*, as the intention to do that which is seen as the assistance to the crime [under the jurisprudence of the ad hoc Tribunals].

From this springboard, it becomes easy to achieve a Category 3-type joint criminal enterprise, especially if it is appreciated, first, that it is sufficient that the contribution ‘be made in the knowledge of the intention of the group to commit the crime’; and secondly, that the ICC Statute has left open the content of what may constitute ‘contribution’, hence, planning, conspiring, giving moral support, etc, are all candidates to what may constitute ‘contribution’.

Alternatively, the same result may be achieved, perhaps with greater difficulty, by proceeding in the following cumulative way. By undertaking the same decoupling exercise indicated above. By stressing that the contribution need only satisfy the alternatives of furthering either the ‘criminal activity’ or the ‘criminal purpose of the group’. By stressing that the fault element in the contribution is that ‘such activity or purpose’ involves the commission of a crime’ within the jurisdic-

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26 Although not specifically addressing the different types of joint criminal enterprise developed by the ICTY and ICTR judges, Schabas considers it ‘plausible’ that the ICC judges will be strongly influenced by the jurisprudence of the *ad hoc* Tribunals on the subject: William Schabas, *Introduction to the International Criminal Court*, 2nd edn [Cambridge, Cambridge University Press, 2004] at p 104.

27 Which is, in any event, very directly relevant to the concept of joint criminal enterprise, since a confederate in crime is an accomplice: see Schabas, supra, pp 103 and 104.

28 See Chile Eboe-Osuji, “Complicity in Genocide” versus “Aiding and Abetting Genocide: Construing the Difference in the Statutes of the ICTY and ICTR” (2005) 3 *Journal of International Criminal Justice* 56 at 63.
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tion of the ICC. Here, the construction will turn on the significance of the word ‘involves’, with the following two possible jurisprudential results, inasmuch as it relates to the common purpose: (A) It is possible to take the view that ‘involves’, in this context, calls for no more than a subjective appraisal of the properties of the common purpose. For example, where the common purpose was to kill members of an ethnic group, men and women, the plan to kill does not involve rape of the women, if no one said anything about raping the women of the group as part of the business of killing them; and, (B) The alternative view is that the term ‘involves’ calls for an objective evaluation of the common purpose, including taking into account any foreseeable risk of the resulting crime, in the process of executing the common purpose. Thus, in the preceding example, one might reasonably (fore)see how it is that rape of the women might result, since the chances are great that a genocidal thug might see no objection to raping a woman who, at any rate, was to be extra-judicially killed. Clearly, the latter approach, a perfectly reasonable one to follow, will include within the scope of article 25(3)(d) of the ICC Statute the same results as seen in Category 3 of the concept of joint criminal enterprise as developed by the judges of ICTY and ICTR.

The problem with these constructions is that they rely on an analogy drawn to the jurisprudence of the ad hoc Tribunals. Objection might be taken against them for this reason, based on the fact that the ICC Statute might be taken as eschewing criminal liability by analogy. However, the aversion towards analogy might be correctly taken as relating only to ‘definition’ of substantive crimes and not to modes of attribution. Still, it could be argued that any mode of attribution that results in the imposition of a criminal liability that might not otherwise have resulted is equivalent to imposing liability for a substantive crime deduced only from a definition of a crime that has been extended by analogy. On the other hand, the sin of creation of a crime by analogy is that the deduced crime was hitherto unknown to law, while the analogy to existing jurisprudence does not suffer from the same legal flaw.

Much Ado About Joint Criminal Enterprise

The doctrine of joint criminal enterprise has not been free from controversy. The version of the doctrine attracting the most vigorous criticism is the extended form.

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29 Specifically, article 22(2) provides: 'The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.'

30 See, for instance, Danner and Martinez, supra; Jens Ohlin, ‘Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise’ (2007) 5 Journal of International Criminal Justice 69; Mark Osiel, ‘The Banality of Good: Aligning Incentives against Mass Atrocity’, (2005) 105 Columbia Law Review 1751; Harmen van der Wilt, ‘Joint Criminal Enterprise: Possibilities and Limitations’ (2007) 5 Journal of International Criminal Justice 91; Harmen van der Wilt, ‘The Continuous Quest for
Allison Danner and Jenny Martinez have described it as the ‘most far-reaching aspect’ of a ‘wide-ranging form of liability,’ lending support to the indignant declarations of other critics such as that ‘[s]uccessive rulings of the ICTY Appeals Chamber have allowed this doctrine to get wildly out of hand.’ I shall next discuss these criticisms.

The usual form of complaint is that the extended form of the doctrine unduly leans toward culpability built upon the sentiment of ‘guilt by association’. The basis of this assessment is the doctrine’s mainstay of aggregate or collective criminal responsibility rather than individual criminal responsibility. A particularly dramatic form of these criticisms appears in the extremely tough essay by Danner and Martinez tellingly entitled ‘Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law.’ In that piece, the following ominous warning was sounded:

> Joint criminal enterprise provides an example of an international criminal doctrine where certain aspects of the human rights and transitional justice influences in international criminal law are in danger of overpowering the restraining force of the criminal law tradition. As currently formulated, the doctrine has the potential to stretch criminal liability to a point where the legitimacy of international criminal law will be threatened—thereby undermining not only the criminal law aims, but also the human rights and transitional justice goals of international criminal law.

Actually invoking ‘doom’ in this connection, they went on to pronounce as follows: ‘Over-expansive doctrines, unbridled prosecutorial discretion, and unpersuasive judicial decision-making may still doom international criminal adjudication.’

But it may well be, upon close examination, that such levels of hyperbole really do overstated the merits of the criticism. This is especially so when the complaints are said to have been inspired by ‘the criminal law tradition’. In this regard, it must be said that although the idea of joint criminal enterprise is, as much else, a new concept in the administration of international criminal justice, given its ori-
gins in the 1999 judgement of the ICTY Appeals Chamber in *Prosecutor v Tadić*, the doctrine itself is a very familiar one to criminal lawyers from the common law tradition. In *R v Powell*, Lord Hutton observed that there is ‘a strong line of authority that participation in a joint criminal enterprise with foresight or contemplation of an act as a possible incident of that enterprise is sufficient to impose criminal liability for that act carried out by another participant in the enterprise.’ [Emphasis added.] Notably, in *R v Rahman*, Lord Rodger of Earlsferry starkly illustrated the relevant common law principle in the following way: ‘Suppose that, knowing what A is like and that he tends to carry a gun, B contemplates that A may take a gun and use it in the course of the attack on the victim. Then, even if B is vehemently opposed to the use of a gun and tries to dissuade A from carrying one, nevertheless, if, being aware of the risk, B takes part in the joint assault, he will be guilty of murder if A shoots the victim.’ And in *Clayton v R*, the High Court of Australia explained the relevant principle of culpability in this way: ‘[T]he criminal culpability lies in the continued participation in the joint enterprise with the necessary foresight …. That the participant does not wish or intend that the victim be killed is of no greater significance than the observation that the person committing the assault need not wish or intend that result, yet be guilty of the crime of murder.’ [Emphasis received.]

Clearly, the principle being discussed by the House of Lords in *Powell and Rahman*, and the High Court of Australia in *Clayton*, is not at all different from the formulation of the extended form of joint criminal enterprise in international criminal law. In the Privy Council case of *Chan Wing-Siu v R*, Sir Robin Cooke had referred to it as the ‘wider principle’ of joint criminal enterprise, in contrast to the version of the doctrine described by Lord Hoffmann, in *Brown & Isaac v The

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37 See *Prosecutor v Tadić (Judgment)* 15 July 1999 [ICTY Appeals Chamber], para 185 et seq.
38 See *Johns v R* (1980) 143 CLR 108 [High Court of Australia]; *Chan Wing-Siu v R* [1985] AC 168 [Privy Council]; *Hui Chi-Ming v R* [1992] 94 Cr App R 236 [Privy Council]; *McAuliffe v R* [1995] 130 ALR 26 [High Court of Australia]; *R v Powell and English* [1999] AC 1, [1998] 1 Cr App R 261 [House of Lords]; *R v Rahman and Ori* [2008] UKHL 45 [House of Lords]; *Clayton v R* [2006] HCA 58 [High Court of Australia]; *Gillard v R* (2003) 219 CLR 1 [High Court of Australia]; *R v Tomkins* [1985] 2 NZLR 253 [New Zealand Court of Appeal]; *R v Hyde* [1991] 1 QB 134 [Court of Appeal of England and Wales]; *R v Uddin* [1999] 1 Cr App Rep 319 [Court of Appeal of England and Wales]. See also Alan Reed, ‘Joint Participation in Criminal Activity’ (1996) 60 Journal of Criminal Law 310; and A P Simister, ‘The Mental Element in Complicity’, (2006) 122 Law Quarterly Review 578.
39 *R v Powell*, supra, p 21.
40 *R v Rahman*, supra, para 36.
41 *Clayton v R*, supra, para 17. See also *Chan Wing-Siu v R*, supra, at 175, where Sir Robin Cooke indicated that the ‘criminal culpability lies in participating in the venture with that foresight’.
42 Ibid.
State, at the Privy Council, as the ‘plain vanilla version’\(^{43}\) or the ‘paradigm case’\(^{44}\) of the doctrine. The ‘plain vanilla’ version is equivalent to the version described in Tadić as Category 1 of joint criminal enterprise.

In *R v Powell*, Lord Hutton indicated that under the wider or extended principle of joint criminal enterprise, ‘the scope of the common purpose is to be determined by what was contemplated by the parties sharing that purpose.’ In context, the term ‘contemplated’ is synonymous with ‘realised’ or ‘foresaw’.\(^{45}\) The accused is spared from liability only if the secondary crime committed by another member of the joint criminal enterprise is ‘fundamentally different’, in the sense of not being reasonably foreseen.\(^{46}\) The secondary crime would thus be seen as outside the scope of the joint criminal enterprise and the accused would not be guilty of the secondary crime.

Another critic, Jens Ohlin, more moderately accepts that the problems he perceives with joint criminal enterprise in international criminal law ‘do not implicate the essential core of the doctrine.’\(^{47}\) But, he proposes a programme of reform—preferably by way of amendment to article 25 of the Rome Statute—with the view to ensuring that intentionality, foreseeability and culpability, as essential factors in the administration of criminal justice, are sufficiently reflected in the analysis and application of the doctrine of joint criminal enterprise. In that regard, the reform efforts he proposes will respectively correct the following deficiencies that he had identified as dangers in the current application of the doctrine: (a) the mistaken attribution of criminal liability to members of the joint criminal enterprise who might have made unintentional contribution towards the criminal purpose of the enterprise or those whose moral burden went no further than mere awareness of the criminal purpose, (2) the imposition of criminal liability for the foreseeable acts of one’s co-conspirators, without differentiation between the penalisation of the primary perpetrator and the participant who merely ought to have foreseen the criminal act of the primary perpetrator; and (3) the ‘mistaken claim that all members of a joint enterprise are equally culpable for the actions of its members.’\(^{48}\)

It is submitted that while the concerns triggered by the extended form of joint criminal enterprise in both its doctrinal formulation and application are well intended and healthy efforts in improving international criminal justice as a relatively new human endeavour, there is no grave danger that the doctrine will turn

\(^{43}\) Brown & Isaac *v The State* [2003] UKPC 10 [Privy Council], para 13. See also *R v Rahman*, supra, paras 9, 33 and 52.

\(^{44}\) *Brown & Isaac v The State*, supra, para 8.

\(^{45}\) *R v Rahman*, supra, para 11.

\(^{46}\) *R v Powell*, supra, paras 17 and 28. See also *R v Rahman*, supra, generally; and Steve Forster, ‘Joint Enterprise Liability’, *Criminal Law and Justice Weekly* (8 August 2009) available at <www.criminallawandjustice.co.uk/index.php?/Analysis/joint-enterprise-liability.html>

\(^{47}\) Ohlin, supra, p 89.

\(^{48}\) *Ibid*, pp 89–90.
into the Frankenstein’s monster that some critics, such as Danner and Martinez, postulate as possessing nearby potential to eventually destroy the very essence of justice and the cause of human rights and the general legitimacy of international criminal law. It is notable, in this regard, that the Clayton litigation at the Australian High Court engaged efforts of domestic critics of the doctrine of joint criminal enterprise urging the Court to reconsider the doctrine. But the Court flatly declined the urge. The Court stated the primary reason for declining in the following way: ‘contrary to the applicants’ central submission, it is not demonstrated that the application of the principles [of joint criminal enterprise] has led to any miscarriage of justice in this case or, more generally, has occasioned injustice in the application of the law of homicide. The applicants pointed to no decided case said to reveal the alleged injustice. Rather, for the most part, the argument was advanced in a wholly abstract form.’ The same is true of critics of the doctrine of joint criminal enterprise in international law.

In particular, experience would suggest that international judges have been very responsible in the way they have applied the doctrine. In contrast to Danner and Martinez, Harmen van der Wilt identifies on the part of ICTY judges, a ‘restrictive approach’ towards the doctrine. A development that he ‘considered an honourable effort to save the ICTY from relapsing into the earlier errors of the Nuremberg Tribunal.’ The ICTR judges, for their part, rarely base convictions on the doctrine, even when the Prosecution had pleaded it. Hence, actual experience does not bear out the fear that international judges perceive ‘all members of a joint enterprise [as] equally culpable for the actions of its members.’ The reality rather is that international judges have, for the most part, tended to approach their tasks with a heightened sense of consciousness of the degrees of culpability appropriate in the assessment of the individual criminal responsibility of persons prosecuted before them. It is that consciousness in the gradation of culpability that explains,

49 Ibid, para 15.

50 Van der Wilt, supra, p 100. Contrast this with the assessment of Danner and Martinez that ‘when faced with decisions about how to limit the potential scope of JCE, international judges have almost invariably elected the most expansive interpretation of the doctrine’: Danner and Martinez, supra, p 142.

51 In Prosecutor v Zigiranyirazo, for example, the Trial Chamber founded a conviction on a theory of joint criminal enterprise, among other things: Prosecutor v Zigiranyirazo (Judgment) dated 18 December 2008 [ICTR Trial Chamber]. But on appeal, the Appeals Chamber reversed the conviction and acquitted him altogether: Zigiranyirazo v Prosecutor (Judgment) dated 16 November 2009 [ICTR Appeals Chamber].

52 Ohlin, supra, pp 89–90.

53 As someone who has both prosecuted cases as senior trial counsel and senior appellate counsel respectively at the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone, as well as assisted judges in a different senior advisory capacity in the drafting of judgments in both the Trial Chambers and the Appeals Chamber at the ICTR, this author is in a position to observe how keenly aware judges are—sometimes frustratingly so—of their responsibility to ensure that an accused person receives a sentence that is appropriate to his grade of culpability.
at least in part, the phenomenon of sentencing trend that Mark Harmon and Fergal Gaynor lament as ‘ordinary sentences for extraordinary crimes’. They noted how light the sentences handed down at the ICTY appear in comparison to those handed down at the ICTR, for instance. According to the comparative statistical snapshot they provided:

At the International Criminal Tribunal for Rwanda (ICTR), 37% of those convicted have received a life sentence. At the ICTY, just one person (1.8% of those convicted) has received a life sentence.

A closer look at the sentencing practices of the ICTY and the ICTR reveals a considerable discrepancy in the length of sentences meted out. Of the 57 persons convicted at the ICTY, 20 persons (35%) have received sentences of less than 10 years. 28 persons (49%) have received sentences of 10-20 years. Only nine persons (16%) have received sentences above 20 years, of whom just one, as mentioned, received a life sentence. Of the 27 persons convicted at the ICTR, three persons (11%) have received sentences of less than 10 years. Five persons (19%) have received sentences of 10-20 years. 19 persons (70%) have received sentences above 20 years, of whom 10 received life sentences.

Against that comparative background, they posed the question: ‘Why are persons convicted of extraordinary crimes at the ICTY sentenced to such ordinary sentences? Why are many ICTY sentences, whether following a trial or a guilty plea, so much lower than those at Nuremberg, Tokyo and Arusha? ... How appallingly awful must a campaign of murder, rape and expulsion be to merit life sentences?’ Harmon and Gaynor partly answered their own questions when they acknowledged that there is ‘no doubt that the other courts each dealt with a graver set of crimes than the ICTY: the number of victims, of all ethnicities, murdered or criminally mistreated in Yugoslavia in the 1990s was of a much lesser magnitude than those in the Nazi- or Japanese-occupied zones in the Second World War, or in Rwanda in 1994.’ But they remain unconvinced that such difference in the magnitude of the crimes should be more than ‘of limited relevance to sentencing.’

A further answer, perhaps, is possible. The disparate trend of sentencing that they identified may have, it is submitted, a direct correlation with the higher frequency of use of the doctrine of joint criminal enterprise in prosecutions at the

54 Mark Harmon and Fergal Gaynor, ‘Ordinary Sentences for Extraordinary Crimes’ (2007) 5 Journal of International Criminal Justice 683.
55 Ibid, pp 684–686.
56 Ibid, pp 684–685.
57 Ibid, pp 685–686.
58 Ibid, p 686.
59 Ibid.
ICTY than is the case at the ICTR. At the ICTR, the sentences are heavier because there is heavier reliance on evidence of direct involvement of the accused persons in the commission of the offences, thus making joint criminal enterprise less necessary for convictions. In the result, the judges at ICTR have been more confident in imposing heavier sentences, reflecting that direct involvement of the accused in the commission of the offences. Notably, Harmon and Gaylor acknowledged in a footnote that reliance on joint criminal enterprise is one of the factors that could affect sentencing. What was missing in their analysis was the significance of that reality in explaining the disparity of sentences between the ICTR and the ICTY.

The point therefore is that it is an exaggerated criticism to suggest that the doctrine of joint criminal enterprise poses a grave risk of misleading judges of international courts into a ‘mistaken claim that all members of a joint enterprise are equally culpable for the actions of its members.’ The reality lies more likely in the opposite direction.

Regarding the charge that the doctrine of joint criminal enterprise entails ‘guilt by association’, it needs to be boldly said at once that there is nothing essentially wrong with the idea of ‘guilt by association’. What is wrong rather is guilt by association alone. But the doctrine of joint criminal enterprise, properly understood, does not entail guilt by association alone. I shall discuss such proper understanding next.

In this connection, it is possible to observe that so much of the criticism alleging ‘guilt by association’ reveals a tendency either to miss the significance of the adjective criminal in ‘joint criminal enterprise’ or to project a dangerously relaxed view of the role of criminal law in the ordering of society, by adopting a tunnel vision of the notion of individual culpability. Ohlin errs on the first count—when he illustrates his motivating worry by the fear that ‘merchants providing mere background services should not be charged with the crimes of their customers.’ [Emphasis added.] And Danner and Martinez are guilty of the latter error in their

60 See Allison Danner, ‘Joint Criminal Enterprise’ in Cherif Bassiouni, *International Criminal Law* 3rd edn [Leyden: Martinus Nijhoff, 2008] vol III, p 483. The experience of the present author is a case in point. In the prosecution of the Semanza case, in which this author appeared as senior prosecution counsel, joint criminal enterprise was pleaded in the indictment, as a mode of liability. However, in light of the ample evidence of the direct involvement of the accused in the crimes—including direct evidence of genocidal intent on his part—it was deemed unnecessary to emphasise joint criminal enterprise as a mode of responsibility in the case.

61 In Rwamakuba, for instance, the Prosecution withdrew their case of joint criminal enterprise and relied instead on a direct responsibility of André Rwamakuba: *Prosecutor v Rwamakuba (Judgment)* 20 September 2006 [ICTR Trial Chamber] paras 21–23.

62 Harmon and Gaylor, *supra*, footnote 117.

63 Ohlin, *supra*, pp 89–90.

64 Ohlin, *supra*, p 89.
conceptualization of the notion of individual culpability, as bearing a near exclusive ‘focus on individual wrongdoing as a necessary prerequisite to the imposition of criminal punishment.’\[^{65}\] But such a view of the notion of individual culpability strangely ignores the gaseous effects of particular wrongdoings beyond their own immediate compartments. In this connection, one must note Van der Wilt’s wholly useful caution against ‘a one-sided emphasis on personal guilt’ such as ‘may obscure the collective dimension of system criminality.’\[^{66}\] Van der Wilt’s caution is consistent with the following explanation of joint criminal explanation offered by Lord Bingham of Connhill in *Rahman*: ‘In the ordinary way a defendant is criminally liable for offences which he personally is shown to have committed. But, even leaving aside crimes such as riot, violent disorder or conspiracy where the involvement of multiple actors is an ingredient of the offence, it is notorious that many, perhaps most, crimes are not committed single-handed. Others may be involved, directly or indirectly, in the commission of a crime although they are not the primary offenders. *Any coherent criminal law must develop a theory of accessory liability which will embrace those whose responsibility merits conviction and punishment even though they are not the primary offenders.*’\[^{67}\] [Emphasis added.]

In my view, a correct understanding of the doctrine of joint criminal enterprise lies in a distinct appreciation that there is jural significance in the idea of a difference between a joint enterprise that is *criminal* by definition, and a joint venture that is perfectly legitimate. That is to say, a distinction needs to be made between a legitimate purpose in which a partner commits a crime, and a criminal purpose in which a confederate commits a different crime. A and B are not in the same league of social conduct if A is accused of rape—on a theory of joint criminal enterprise—on grounds that he had embarked upon robbery of an undergraduate female hostel in the middle of the night, with a gang including young men he knew to be rape ex-convicts, one of whom ended up raping one of the victims. B, for his part, is a kitchen utensils dealer in the business of selling extremely sharp *Wüsthof* meat-cleavers, one of which was used by his mentally unstable partner to murder a customer. A clearly had embarked upon a joint *criminal* enterprise (the midnight robbery) and B had been involved in a *purely legitimate business* enterprise (selling kitchenware, including extremely sharp meat-cleavers). The assessment of the liabilities of A and B for the foreseeable conducts of their partners will take off from different places on the scale of social acceptability of the underlying

\[^{65}\] Danner and Martinez, *supra*, p 82.

\[^{66}\] Van der Wilt, *supra*, p 108. He also usefully reminds us that ‘criminal law derives its existence from the legal and moral authority of states to protect society and its members against anti-social and disruptive behaviour, and it focuses on individual responsibility and guilt’: *ibid*, p 91. Connecting these two observations from Van der Wilt, a third proposition becomes that the protective work of criminal law could not be done effectively by way of strict compartmentalisation that prevents it from permitting or giving penal significance to the existence of the jural link of foreseeability between two crimes.

\[^{67}\] *Rahman*, *supra*, para 7.
activities, in the sense that A had been involved in a criminal undertaking to begin with, and B had not been.

The principle of public policy reflected in the mental element requirement of the extended form of joint criminal enterprise is equally reflected in the mental element requirement of culpable homicide. In murder, the mental element ranges from premeditation, at the higher end, down to ‘wicked and corrupt disregard of the lives and safety of others.’\textsuperscript{68} Particularly notable is the tainting role of illegality in characterising a conduct as criminal. Notably, a person is guilty of murder, ‘if death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such nature as to be likely to endanger human life; ... In [that] case it is immaterial that the offender did not intend to hurt any person.’\textsuperscript{69} [Emphasis added.] It is no doubt the prevalence of principles of criminal law like these that led Gerhard Werle and Florian Jessberger correctly to observe that in the realms of domestic and international law, ‘under the concepts of recklessness or \textit{dolus eventualis}, the perpetrator’s awareness merely of the risk that a particular consequence may occur is generally sufficient to establish criminal responsibility.’\textsuperscript{70}

Approached differently, it may be possible to understand the issues better if they are viewed from the perspective of a certain tension between two interests: the interest of a subject in pursuing a primary purpose versus the interest of the policy maker in stopping him. In the ordering of society, using the criminal law,\textsuperscript{71} policy makers have a proper function in aiming to discourage unlawful undertakings or participation in primary criminal enterprises that entail the foreseeable risk of certain secondary crimes. The subject, on the other hand, has no right to engage in such unlawful undertakings or primary criminal enterprises. Hence, the dictates of morality, public policy and criminal law do combine to require the subject to abandon such unlawful undertakings or primary criminal enterprises. In persisting, he assumes the risk of the foreseeable secondary crime. The resulting legal order is appreciably different from a situation in which the subject has the right to engage in the pursuit of a purely legitimate enterprise by way of a joint venture, though there is a foreseeable risk that an associate in the undertaking may engage in a secondary activity that is criminal. As the subject has a perfectly legitimate interest or right in pursuing the joint venture, there is no requirement on him to abandon it on account of the risk of an associate’s foreseeable secondary activity that is criminal. The attendant concern of morality, public policy and criminal law, in the second scenario, becomes the question of the subject’s contribution to the secondary activity that is a crime—assessed at the level of that activity—or his duty (to the extent that it exists) to prevent or punish its occurrence.

\textsuperscript{68} See \textit{Prosecutor v Delalić & Ors (Judgment)} 16 November 1998 [Trial Chamber] para 434.

\textsuperscript{69} See Section 316 of the Nigerian Criminal Code and s 302 of the Criminal Code of Queensland, Australia (1899). See also s 229(c) of the Canadian Criminal Code, and §210.2(i)(b) of the US Model Penal Code.

\textsuperscript{70} Gerhard Werle and Florian Jessberger, \textit{Principles of International Criminal Law} [The Hague: T M C Asser Press, 2005], para 307.

\textsuperscript{71} See Van der Wilt, \textit{supra}, p 91.
Ohlin recommends a reform of the law of joint criminal enterprise in the terms of requiring a ‘substantial and indispensable’ contribution to the criminal enterprise. Danner and Martinez, for their part, insist that the continuing legitimacy of the doctrine of joint criminal enterprise depends upon a reform of the law in a manner that requires ‘substantial contribution.’

It is important to observe that the ICTY Appeals Chamber has clearly rejected the idea of requiring substantial contribution as an element of joint criminal enterprise. Given the suggestion that the doctrine entails guilt by association alone, the remaining question becomes whether there is a need to reform the doctrine in order to emphasise positive contribution, hence addressing the criticism of guilt by association alone? I see no need for any such reform. For a correct understanding of the doctrine reveals—as already existing in it—the element of positive contribution, at the levels necessary for the philosophical or public policy rationale of the doctrine. That rationale has already been explained above, as a proper function of public policy. And the element of positive contribution already exists, if the public policy objective of the doctrine is deterrence against the commission of crimes—reasonably foreseen—from the springboard of a different crime. Since the secondary crime is necessarily connected to the springboard crime by the jural link of foreseeability, it becomes legitimate to gauge the accused’s contribution not only at the level of the secondary crime, but also at the level of the springboard crime. Such contributions would include material assistance provided to the primary perpetrator in the commission of the springboard crime, as well as psychic boost or fortification for the springboard crime from which platform the primary perpetrator achieved impetus to commit the secondary crime. Recognition of psychic boost as positive contribution to crimes is a legal tradition that calls for no extended discourse here. Given, therefore, that the secondary crime is con-

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72 Ohlin, supra, p 89.
73 Danner and Martinez, supra, pp 150–151.
74 Prosecutor v Kvočka and Ors (Judgment) 28 February 2005 [ICTY Appeals Chamber] para 97 and 104.
75 In this regard, one must note Van der Wilt’s correct observation that ‘[g]roup crimes are committed by virtue of a common effort in which each and every contribution counts, as each member is fortified and feels comforted by the presence of the others’: Van der Wilt, supra, p 107. But I disagree with his assessment that ‘[w]e are largely left in the dark as to the requisite mens rea and actus reus standards’ (p 100); and with his claim that the ‘basic problem’ with the doctrine of joint criminal enterprise is that ‘mens rea and actus reus attach to the common purpose instead of the crimes themselves’ (p 101). To the extent that there exists a jural link of foreseeability that connects the secondary crime to the springboard crime, one may not easily say that the mens rea and actus reus attaches only to the common purpose (read the springboard crime). Nor do I agree with his suggestion that the doctrine of joint criminal enterprise is necessarily ‘predicated on at least a silent understanding’ among or between ‘partners in crime’ (pp 92 and 102). As regards the extended form of joint criminal enterprise, which is the most controversial form, the doctrine is not so much predicated on a silent understanding of partners in crime, as it is on the mental fault of assumption.
connected to the springboard crime by the jural link of foreseeability; and, where the accused positively contributed to the springboard crime; it becomes irrelevant, for purposes of his culpability in the secondary crime, that he had even discouraged it while still contributing to the springboard crime. That is the essence of the observation of Lord Rodger of Earlsferry discussed above, when he wrote that where the secondary crime was foreseeable to the accused as possibly incidental to the springboard crime forming the common purpose, the responsibility of the accused for the secondary crime is engaged even if he was ‘vehemently opposed’ to it, as long as he had persisted in pursuing the springboard crime. Lord Lane CJ had made a similar observation in *R v Hyde*. In that case, he explained the principle in terms of the psychic boost that the accused, with foresight of the secondary crime, gave the primary perpetrator in the commission of the springboard crime. According to Lord Lane:

If B realises (without agreeing to such conduct being used) that A may kill or intentionally inflict serious injury, but nevertheless continues to participate with A in the venture, that will amount to a sufficient mental element for B to be guilty of murder if A, with the requisite intent, kills in the course of the venture. As Professor Smith points out, B has in those circumstances lent himself to the enterprise and by so doing he has given assistance and encouragement to A in carrying out an enterprise which B realises may involve murder.76

The extended or wider version of the joint criminal enterprise is thus a principle of public policy. It entails the moral or legal fault of criminal recklessness in the dogged pursuit of a criminal activity that the accused had no right to pursue. It is an entirely sound principle. In the circumstances, it is incorrect to suggest that the doctrine of joint criminal enterprise entails imposing punishment ‘where the

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76 *R v Hyde*, supra, p 139. See also *R v Powell*, supra, pp 25–26, par Lord Hutton; *McAuliffe v R*, supra, 30.
person is not blameworthy’ or ‘basing guilt on association alone.’ The better view is that once the moral and public policy premises of the doctrine of joint criminal enterprise are correctly understood, it will become clear that there is nothing wrong at all in punishing the sort of ‘guilty associations’ that the doctrine implicates. Quite the contrary, it is the proper function of criminal law to do that.

All this is not, of course, to dismiss entirely the call for reform. Law reforms are a necessary part of the life of the law in any jurisdiction. Even in common law jurisdictions, with a longer experience in the use of the doctrine of joint criminal enterprise, there is continuing pressure for a reform of the doctrine. While incremental reform is made, it is important not to overhype the criticisms about the danger inherent in the doctrine. The matter of greater importance lies, it is submitted, in the need always to keep in mind that the doctrine of joint criminal enterprise serves an essential purpose in the administration of international criminal justice. That essential purpose is what Cassese and his associates have correctly described as ‘ensuring that individual culpability is not obscured in the fog of collective criminality’ thus resulting in the ‘evasion of accountability.’ Hence, joint criminal enterprise remains a useful tool through which a superior, in appropriate cases, could be held responsible for rapes committed by his subordinates.

The difference between an enterprise that is criminal in its purpose (in the pursuit of which a foreseeable secondary crime is committed) and an undertaking that is purely legitimate (but in pursuit of which a foreseeable crime is committed) brings us to the judgment of the Appeals Chamber of the Special Court for Sierra Leone in the RUF case. The SCSL Appeals Chamber found that the doctrine of joint criminal enterprise applied to that case. That joint criminal enterprise was anchored by the necessary common criminal purpose. And the common criminal purpose consisted of (a) the objective of gaining and exercising political power and control over the territory of Sierra Leone, especially the diamond mining areas; and (b) a programme of criminal conducts as the means of achieving that objective.

Notably, the Appeals Chamber employed a progressive sequence of legal analysis to arrive at this conclusion. That analysis began with considering the objective of gaining power and exercising control over the territory of Sierra Leone, particularly the diamond mining areas. The Appeals Chamber concurred with the Trial Chamber in finding that objective as non-criminal. But that non-criminal

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77 Danner and Martinez, supra, p 83.
78 Ibid, p 85.
79 See, for instance, Clayton v R, supra.
80 Antonio Cassese and the Board of Editors of the Journal of International Criminal Justice, Amicus Curiae Brief filed before the Extraordinary Chamber in the Courts of Cambodia in Case No 001/18-07-2007-ECCC/OCIJ (PTC 02) dated 27 October 2008, para 20.
81 Prosecutor v Sesay, Kallon and Gbao (Judgment) 26 October 2009 [SCSL Appeals Chamber].
82 Ibid, para 305.
objective transformed into a criminal purpose once the commission of crimes became the intended means for the achievement of the objective. At that level of abstraction, it is hard to argue with that legal proposition—i.e. what may be a perfectly legitimate objective will become a criminal activity once it is corrupted by criminal means. But the analysis becomes more interesting when one considers what the Appeals Chamber considered to be the criminal means that corrupted the objective in the RUF Case. Those crimes were acts of violence against the civilian population, with the aim of spreading extreme fear in the civilian population, with the view to dominating and controlling them—essentially through acts and conducts intended to terrorise the civilian population into submission.

This is certainly an important dimension in the law of joint criminal enterprise. In the era of protection of human rights, the future application of the underlying principle will certainly not be limited to the facts of the RUF Case, which involved seizure of political power by way of a military coup and the violent conduct of the military junta to subjugate the population. It should not take a quantum leap to apply the principle, thus enunciated, to the conduct of even initially duly elected politicians who would seek to perpetuate themselves in political office, by using violence and terror to suppress opposition or the population seeking a change of regime.

In the RUF Case, however, it might also have been possible—even quicker—to resolve the character of the objective as a common criminal purpose by limiting or focusing the analysis on the actual military coup per se. In the scenarios of violent change of power through violent military coups, it is possible to use the analogy of burglary and robbery (the classic cases involving the doctrine of joint criminal enterprise in national jurisdictions). That is to say, violent military coups involve the pursuit of political power just like burglary or robbery typically involves the quest for property acquisition. Yet, robbery or burglary has been viewed by the Courts as the primary criminal enterprise that afforded the springboard for the secondary crime. It is possible also to view military coups as criminal enterprises. The criminal character of violent military coups would derive severally from the domestic laws of every State, as violent military coups are proscribed by the criminal laws of States. The combined effect of those several domestic criminal laws would arguably anchor a norm of international law, by virtue of general principles of law recognised by modern States.

Ordering

Another way in which the case law has made it possible for a superior to be held criminally responsible for rapes committed by his subordinates is by extending the

83 Ibid, para 300.
84 Ibid, paras 301–302.
85 See Chile Eboe-Osuji and Angela Nworgu, ‘Nigeria’s Jurisdiction to Prosecute Johnny Paul Koroma for War Crimes Committed in Sierra Leone’ in C Eboe-Osuji, Protecting Humanity [Leyden: Martinus Nijhoff: 2010] 839 at p 843.
criminal consequences of ‘ordering’, as was done by the ICTY Appeals Chamber in *Prosecutor v Blaškić*:

The Appeals Chamber … holds that a person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite mens rea for establishing liability under Article 7(1) pursuant to ordering. Ordering with such awareness has to be regarded as accepting that crime.86 [Emphases added.]

Of note in *Blaškić* is the significance of the Appeals Chamber’s pronouncements as to when ‘mere possibility’, as opposed to ‘substantial likelihood’, of the collateral crime may attract criminal responsibility upon a superior. Having stated, as noted above, that there will be criminal responsibility on him that orders something to be done with awareness of a substantial likelihood of a crime being committed in the execution of the order, the Appeals Chamber reiterated the existing jurisprudence in which mere possibility, and not substantial likelihood, of a collateral crime is seen as sufficient to attract criminal responsibility for the crime on the part of a member of a joint criminal enterprise. Recalling its reasoning in an earlier judgment,87 the Appeals Chamber said as follows:

In relation to the responsibility for a crime other than that which was part of the common design, the lower standard of foreseeability—that is, an awareness that such a crime was a possible consequence of the execution of the enterprise—was applied by the Appeals Chamber. However, the extended form of joint criminal enterprise is a situation where the actor already possesses the intent to participate and further the common criminal purpose of a group. Hence, criminal responsibility may be imposed upon an actor for a crime falling outside the originally contemplated enterprise, even where he only knew that the perpetration of such a crime was merely a possible consequence, rather than substantially likely to occur, and nevertheless participated in the enterprise.88

It follows then that a superior ordering his subordinates to commit a crime, as opposed to a legitimate deed, will bear criminal responsibility for any collateral crime which was a possible consequence of the crime ordered. This conclusion flows from the stated doctrine of common enterprise. Hence, where a superior orders one or more to commit a crime, that crime becomes a joint criminal enterprise which the superior shares with the subordinates who would execute the criminal order. Although it is typically not stated in this way, it is still obvious that if criminal responsibility for a collateral crime will ordinarily be visited upon

86 *Prosecutor v Blaškić (Judgment)*, supra, [ICTY Appeals Chamber] para 42.
87 *Prosecutor v Vasiljević (Judgment)* 25 February 2004 [ICTY Appeals Chamber] para 101, quoting *Prosecutor v Tadić (Judgment)* 15 July 1999 [ICTY Appeals Judgment] para 228.
88 *Blaškić, supra*, para 33.
a member of a common criminal enterprise (with an awareness of the mere possibility that such a crime may be committed in the course of carrying out the joint criminal purpose), it must follow that a superior who ordered a crime will equally be liable for the commission of a collateral crime, where there was a mere possibility that the collateral crime may be committed.

The extension of the criminal consequences of ‘ordering’, as was done in Blaškić, is a perfectly sensible result as far as it goes. And the significance of this legal development to the responsibility of a superior for rapes committed by subordinates is all too apparent. But it only goes as far as visiting such criminal responsibility on a superior for positively stimulating a crime. It is submitted that the same legal template will not fit considerations of responsibility for omission (without more) to prevent the crime. In the latter scenario, the responsibility needs to arise where the mere possibility is reasonably foreseeable, but the superior failed to take preventive measures proportionate to the foreseeable risk. And, as will be shown below, this is aptly considered as part of ‘aiding and abetting’. Of course, the degree of culpability will be reflected in the sentencing of the superior upon conviction.

Unlike joint criminal enterprise, no attempt was made in the ICC Statute to circumscribe the conceptual boundaries of ‘ordering’. Hence, there are no apparent limitations on the possibility that future ICC jurisprudence may extend the consequences of ‘ordering’ along the Blaškić lines noted above.

Before moving on, it might be necessary to consider the value of article 30 of the ICC Statute to the development of the law according to the Blaškić jurisprudence thus far reviewed. The jurisprudence according to the ICTY Appeals Chamber in Blaškić, as it permits criminal liability upon a member of a joint criminal enterprise, on grounds of mere possibility of risk, requires a careful look at article 30 of the ICC Statute, which articulates a certain view of mens rea. Article 30 of the ICC Statute provides as follows:

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
   (a) In relation to conduct, that person means to engage in the conduct;
   (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, “knowledge” means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. “Know” and “knowingly” shall be construed accordingly.

As Werle and Jessberger rightly observed, article 30 ‘establishes a standard of mens rea that is apparently stricter than the one applied by both domestic and international courts. There, under the concepts of recklessness or dolus eventualis, the perpetrator’s awareness merely of the risk that a particular consequence may occur
is generally sufficient to establish criminal responsibility. A question thus arises as to this provision’s provenance and rationale. Werle and Jessberger raised this query appropriately in the following way: ‘[W]hy should the standard of mens rea under the ICC Statute be stricter than the standard applied by the Yugoslavia or the Rwanda Tribunals or national courts in prosecuting crimes under international law?’

In pondering an appropriate answer to this question, it is important to consider that, in view of its legislative history, it would be a mistake to exaggerate the value of this provision as either a product or a reflection of rational legislative drafting inspired by accurate distillation of either customary international law or general principles of criminal law accepted in modern states. To put it plainly, this provision appears mostly to be a product of diplomatic compromise, the culmination of a very intense and sustained disagreement (over earlier drafts of the article) during the negotiations of the draft ICC Statute in Rome. As Professor Roger Clark observed, significantly in a commentary on the drafting of article 30, ‘[d]rafting by consensus, the norm in both exercises, the Statute and the Elements, leads sometimes to awkward compromises. An adamant minority can carry the day.’ Notably, article 30 reportedly came from a proposal suggested by the Canadian delegation. This is certainly interesting, given that mens rea in Canadian criminal law is not, even for crimes against humanity, so easily reduced to such simple formulae as (a) ‘a person shall be criminally responsible and liable for punishment for [genocide, crimes against humanity and war crimes] only if the material elements are committed with intent and knowledge’ and (b) ‘knowledge means awareness that a circumstance exists or a consequence will occur in the ordinary course of events’. Noting also that this apparently might not accu-

89 Werle and Jessberger, supra, para 307.
90 Ibid.
91 Roger S Clark, ‘The Mental Element in International Criminal Law: the Rome Statute of the International Criminal Court and the Elements of Offences,’ (2001) 12 Criminal Law Forum 291 at p 295. The attendant compromises include the feature ‘that assorted “theoretical” issues, the resolution of which some of the players see as a matter of life and death, will simply be finessed. Another feature is that some issues, intractable during the negotiations, will ultimately be postponed for another day, either by silence or by creative obfuscation’: ibid, p 317.
92 Per Saland, in Roy S Lee (ed), The International Criminal Court, The Making of the Rome Statute [The Hague: Kluwer Law International, 1999], p 189 at 205. See also Werle and Jessberger, supra, footnote 70 to para 301.
93 In R v Finta, for instance, the Supreme Court of Canada held that although awareness of circumstances of criminality of his actions is required to be established on the part of a person accused of war crimes and crimes against humanity, such awareness will be sufficiently proved by way of wilful blindness on the part of the accused: ‘The mental element required to be proven to constitute a crime against humanity is that the accused was aware of or wilfully blind to facts or circumstances which would bring his or her acts within the definition of a crime against humanity. However it would not be necessary to establish that the accused knew that his
rately reflect the understanding of *mens rea* in the continental European legal system, one then wonders what study and experience would have prompted the Canadian delegation to come up with this proposal during the heat of such an intense and sustained disagreement?

How this provision is eventually interpreted and applied at the ICC remains to be seen. Happily, however, there is an escape route from the strictures of the provision. This is chiefly afforded by an appropriate construction of the prefatory proviso: ‘unless otherwise provided’. In this connection, Werle and Jessberger are correct in observing that not only does this proviso permit a way out of the apparent strict requirements of article 30, but it also permits reliance upon doctrines of *mens rea* developed under customary international law (such as in the jurisprudence of the ICTR and ICTY), as well as upon the *mens rea* doctrines comprised in the general principles of law recognized by modern nations. This solution could reconcile article 30 of the ICC Statute with the *mens rea* elements found within the doctrine of joint criminal enterprise. Thus, the *Blaškić* jurisprudence, which permits criminal liability upon a member of a joint criminal enterprise, on grounds of mere possibility of risk, may not, after all, be that inconsistent with article 30 of the ICC Statute.

**Planning and Instigating**

Having discussed ‘ordering’ as it did in the *Blaškić* case, the Appeals Chamber declined to discuss ‘planning’ and ‘instigating’ as modes of criminal responsibility, since those modes of responsibility were not subject of the appeal under consideration in that case. It is submitted, however, that there is no reason to expect that any analysis of ‘planning’ and ‘instigating’ will produce a legal result that is markedly different from those of ‘ordering’, and of ‘joint criminal enterprise’ as a mode of ‘committing.’

Besides, noting that ‘planning’ a crime which would be committed by others very much involves a conspiracy (of the planner and the perpetrators) to commit

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or her actions were inhumane. For example, if the jury was satisfied that Finta was aware of the conditions within the boxcars, that would be sufficient to convict him of crimes against humanity even though he did not know that his actions in loading the people into those boxcars were inhumane. Similarly for war crimes the Crown would have to establish that the accused knew or was aware of facts that brought his or her action within the definition of war crimes, or was wilfully blind to those facts. It would not be necessary to prove that the accused actually knew that his or her acts constituted war crimes. Those then are the requisite elements of the offence and the mental element required to establish it: *R v Finta* [1994] 1 SCR 701 at 821.

94 See generally Werle and Jessberger, supra, especially para 307.
95 *Ibid*, para 303.
96 *Ibid*, para 314.
97 Cf. Clark, supra, at p 301.
the crime, there may be no denying a place here for the principle of law according to which declarations and acts of one member of a conspiracy, made in pursuance of the object of the conspiracy, before the consummation of the object of the conspiracy, is attributed to all the members of the conspiracy. The rationale for this rule derives from the doctrine of agency which underlies the idea of people combining in pursuit of a common enterprise. According to this doctrine, the actions and declarations of one member bind all, as they are agents of one another. This is especially so if it is reasonably foreseeable that the collateral crime, such as rape, may be committed in the course of committing the one planned or instigated. Hence, the superior who plans or instigates a crime will most likely be liable for both the crime expressly intended and any rape which was reasonably foreseeable in the circumstances.

In the ICC Statute, neither ‘planning’ nor ‘instigating’ appears as part of the language of the provisions on criminal responsibility. Nevertheless, the same import as instigating clearly is present in the language of article 25(3) in general, with particular regard to the notion of inducing a crime. And there is nothing in that language which limits the possibility of the future case law of the Court extending the consequences of inducing a crime.

The notion of planning a crime is also clearly envisaged within the notion of joint criminal enterprise appearing, as discussed above, in article 25(3)(a) and (d). To that extent, the apparent limitations already noted as regards joint criminal enterprise within the ICC Statute will, accordingly, encumber the extension of responsibility for planning.

**Aiding and Abetting**

Apart from the types of positive acts described above, a superior may also incur criminal responsibility under article 6(1) of the ICTR Statute by the not-so-obvious route of dereliction of duty. This will come under the rubric of aiding and abetting in the planning, preparation or execution of the crime(s). It is notable in this

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98 Phipson on Evidence [London: Sweet & Maxwell, 1990] pp 659–660; Richard May, Criminal Evidence, 3rd edn [London: Sweet & Maxwell, 1995] p 216; Roger Salhany, The Practical Guide to Evidence in Criminal Cases, 5th edn [Toronto: Carswell, 1997] pp 276–277; Don Stuart, Canadian Criminal Law, 3rd edn [Toronto: Carswell, 1995] p 628.

99 R v Carter (1982), 1982 CarswellNB 13 para 8; [1982] 1 SCR 938, 31 CR (3d) 97, 67 CCC (2d) 568, 137 DLR (3d) 387 [Supreme Court of Canada]; Stuart, supra, p 628.

100 See article 25(3)(b).

101 In this connection, it is submitted that Judge Güney’s analysis of superior responsibility as part of the analysis under art 6(1) of the ICTR Statute is truer to the general structure of the statute than is the prevailing view of separating superior responsibility from art 6(1) analysis. See Separate and Dissenting Opinion of Judge Güney in Prosecutor v Bagilishema (Judgment), supra, para 5 et seq [ICTR Trial Chamber]. See also Mettraux, Law of Command Responsibility, supra, p 40; Bantekas, supra, pp 585–586; Wu and Kang, supra, 272, 276 and 286.
regard that some domestic criminal legislation have clearly situated the superior’s duty to prevent crimes within the conception of accomplice liability— the functional equivalent of ‘aiding and abetting’ under article 6(1) of the ICTR Statute. In this connection, there is great merit in Ilias Bantekas’s articulation of the juristic rationale for the doctrine of superior responsibility in international criminal law. As he very sensibly put it, superior responsibility is ‘a form of complicity through omission. Since accomplices and principals are held equally liable, failure of commanders to discharge their binding obligation entails their responsibility for the underlying crimes committed by their subordinates.’

In international law, the extent of the superior’s duty to prevent the commission of a crime, however, will depend on whether the accused was a superior in a military-type versus a non-military-type hierarchy. As is evident from the relevant provisions of the Statute of Rome, different considerations do apply to these two types of leadership structures, for purposes of criminal responsibility for the crimes actually committed by the subordinates.

For the military-type hierarchy, different considerations apply, obviously as a result of occupational hazards of soldiery. It is notable in this regard that the circumstances in which the superiors and subordinates are brought together are such that put the subordinate in a position of ability or privilege to ‘commit’ the crime. A soldier is trained to inflict injury and damage and armed to do so, and perhaps deployed to a given place, by a State (or a rebel movement) for purposes of doing so. There are at least two theories of hazard here, either or both of which should trigger criminal responsibility. First, the fact of this training and provision (and deployment) would constitute the assistance to the subordinate which enabled him to commit the crime in question. These potentially meet the positive requirements of aiding and abetting, as that would clearly be the case where such training, provision or deployment was done for criminal purposes and not for the legitimate purposes of an armed conflict. What separates soldiery from banditry is the ethos of discipline and control or restraint, in conformity with the law. Absent this ethos, a soldier becomes a rogue, and his derivative conduct becomes potentially criminal. And, secondly, if one believed the situational theorists of evil seen in Chapter 1 above, these circumstances of training, provision for or deployment

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102 One such legislation is the Model Penal Code of the United States which provides as follows in §2.06(3)(a)(iii):

A person is an accomplice of another person in the commission of an offense if:

(a) with the purpose of promoting or facilitating the commission of the offense,

he

(i) solicits such other person to commit it, or

(ii) aids or agrees or attempts to aid such other person in planning or committing it, or

(iii) having a legal duty to prevent the commission of the offense, fails to make proper effort so to do;...

103 Bantekas, supra, 577.

104 See article 28.
of soldiers will constitute an alteration\textsuperscript{105} to the natural, social order in a manner that is potentially dangerous, if not properly controlled. The reasoning here is not entirely different from that which holds owners and handlers of naturally dangerous animals strictly liable for any harm done to others by such dangerous animals. It is for these reasons that one is compelled to disagree with Bantekas when he observes that the ‘crux of the issue is that because of their aura of authority, military and civilian superiors are entrusted with far-reaching duties and must especially ensure their troops’ compliance with the laws of war.’\textsuperscript{106} The individual criminal responsibility of a superior rests more reliably upon a firmament of facilitation or causation as reasoned above. The superior’s ‘aura of authority’ offers a rather weak support for criminal responsibility.

Undoubtedly, the analogy to strict liability in respect of owners of dangerous animals is bound to attract the traditional concerns that the aversion to strict liability has attracted to the doctrine of superior responsibility.\textsuperscript{107} But, the reasoning espoused here with respect to superior responsibility in armed conflicts does not even go as far as to advocate strict liability similar to that governing the liability of owners of dangerous animals. This is because belligerents in an armed conflict are not animals, let alone naturally dangerous ones. Subordinate soldiers are human beings with the distinguishing faculties of intellect and moral empathy.

These faculties of human intellect and empathy that subordinates possess will necessarily bind with credible, purposive measures that superiors put in place at all times and maintain regularly, with the effect that women are afforded the desired better protection from sexual violence during armed conflicts. The fault on the part of the superiors therefore becomes the failure to put those credible measures in place \textit{at all times} or to maintain them regularly. Their fault is not that they were merely superiors, perhaps with ‘aura of authority’, over errant subordinates. Understood from this perspective, it becomes clear that the legal regime here advocated is something distinctly removed from a regime of strict liability. It is a regime of due diligence, made necessary by the historical prevalence of sexual violence against women during armed conflicts. In the circumstances, Justice Murphy’s worries, expressed in \textit{Yamashita},\textsuperscript{108} are laid to rest. That is to say, no future US President or his chiefs of staff or military advisers, as Justice Murphy had feared,\textsuperscript{109} would be held individually criminally responsible for the sexual violence by rogue troops in the field, where there is evidence that those superiors had put in place and regularly maintained credible measures to ensure that military

\textsuperscript{105} See Dyer, \textit{supra}, pp 31 to 62; Marshall, \textit{supra}, pp 56–57 and 79; Grossman, \textit{supra}, pp 10–11, 18–28 and 178–179; and Watson, \textit{supra}, p 45.

\textsuperscript{106} Bantekas, \textit{supra}, 576–577.

\textsuperscript{107} Strict liability has been a constant source of worry for some judges and commentators, as regards the doctrine of superior responsibility. See, for instance, Danner and Martinez, \textit{supra}, 124, 125, 127, 128, 139, 147; Wu and Kang, \textit{supra}, 279 \textit{et seq}, Bantekas, \textit{supra}, 577 and 586.

\textsuperscript{108} \textit{In re Yamashita} 327 US 1 (1946).

\textsuperscript{109} See \textit{Yamashita}, \textit{supra}, p 28.
personnel under their command do not commit sexual violence against women during armed conflicts.

Still, there is a need for proper control and discipline, despite these faculties of intellect and empathy possessed by subordinates. For, human experience has shown that there will always be instances of anti-social behaviours among human beings. And, soldiers have particularly been known to rape women during armed conflicts. In this connection, the theory of inevitability of sexual violence during armed conflicts ought to increase, rather than diminish, the criminal responsibility of superiors, by requiring them to take reasonable steps to control those whom they train, arm and deploy in a manner that results inevitably in sexual violence to women. The case for greater control, tending towards the regime of strict liability, much like that warranted by *ferae naturae*, also becomes tempting if Alford’s theory of universal human trait towards sadism is allowed pride of place.

On either theory—i.e. strict liability or not—the resulting conditions are such that if the soldiers are not properly controlled, it is reasonable to foresee that they may cause harm beyond what is warranted by military necessity. They may rape women—and they do. It becomes necessary then to impose on those who command such subordinates a duty to exercise such control so as to prevent the subordinates from abusing this position of ability or privilege (to inflict harm and destruction) into which they have been placed. The liability, however, is not strict since it can be avoided where the conditions are such as to show that the commander took reasonable steps in the circumstances to prevent the crime or punish the culprits, as is, for instance provided for under article 6(3) of the ICTR Statute.

These considerations did clearly actuate the *Yamashita* judgment. General Tomoyuki Yamashita was both the commander of the 14th Division of the Japanese Imperial Army as well as the Governor of the Philippines during World War II. Towards the end of the war, troops under his command committed numerous atrocities against the civilian population of the Philippines. Following the unconditional surrender of Japan to the United States, General Yamashita surrendered to the US forces in the Philippines. He was indicted before a US military commission for war crimes, upon the allegation that troops under his command had deliberately planned to massacre and exterminate a large portion of the civilian population of Batangas Province which resulted in the killing and/or mistreatment of over 25,000 civilians. As his defence, he argued that he did not personally commit the crimes. He was convicted by the US Military Commission. The Supreme Court of the Commonwealth of the Philippines denied his writ of habeas corpus. He appealed to the US Supreme Court. Responding to his defence of non-perpetration of the crimes in question, the majority of Supreme Court reasoned that the defence overlooked the fact that the ‘gist of the charge is an unlawful breach of duty by the petitioner as an army commander to control the operations of the members of his command by “permitting them to commit” the extensive and widespread atrocities specified’ in the indictment. In the view of the Supreme Court, the ‘question then is whether the Law of War imposes on an army commander a duty to take such appropriate measures as are within his powers to control the troops under his command for the prevention of the speci-
fied acts which are violations of the Law of War and which are likely to attend the occupation of hostile territory by uncontrolled soldiery, and whether he may be charged with personal responsibility for his failure to take such measures when violations result.’ Having reviewed a range of international instruments applicable at the time, the majority of the Supreme Court held as follows:

> It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the Law of War to prevent. Its purpose to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection. Hence the Law of War presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.

According to the Supreme Court, the duty imposed by international law in the circumstances was ‘an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population.’

The commander’s failure in this duty to control his troops will no doubt justify the characterisation made in Yamashita that the commander had in a sense ‘permitted’ his troops to commit the crimes. This characterisation is made more compelling by two sets of factors at least; first, if one considers, as I have suggested earlier, the elements of training, arming and deploying the troops, thereby assisting them into the position that enabled them to commit the crime. And, secondly, if one considers the policy theories reviewed in Chapter 1 as explaining the prevalence of sexual violence during war. This includes especially, but is not limited to, the theory of systematic condonation or connivance and their motivations.

From the day it was delivered by the US Supreme Court, the Yamashita judgment promptly acquired the status of an obligatory punching bag on the thoroughfare of spirited criticism. The milder forms of these criticisms are couched in terms such as that Yamashita’s conviction was ‘based on negligence or, per-

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110 These include the Annex to the Fourth Hague Convention of 1907, respecting the laws and customs of war on land (article I); the Tenth Hague Convention, relating to bombardment by naval vessels (article 19), which provides that commanders-in-chief of the belligerent vessels ‘must see that the above Articles are properly carried out’; the Geneva Red Cross Convention of 1929 for the amelioration of the condition of the wounded and sick in armies in the field (article 26), makes it ‘the duty of the commanders-in-chief of the belligerent armies to provide for the details of execution of the foregoing articles, (of the Convention) as well as for unforeseen cases’; and, the Annex of the Fourth Hague Convention (article 43).

111 Yamashita, supra, p 15.

112 Ibid, p 16.
haps, even strict liability. But the criticism is equally susceptible of more colourfully rendition. One of those was understandably deployed by Yamashita’s defence counsel when he submitted at first instance that his client was ‘charged not with having done something or having failed to do something, but solely having been someone. For the gravamen of the charge is that the Accused was the commander of the Japanese forces, and by virtue of that fact alone, is guilty of every crime committed by every soldier assigned to his command.’ More remarkably, this criticism found sympathy in the dissenting opinion of US Supreme Court Justice Murphy. For, in his own view, General Yamashita ‘was not charged with personally participating in the acts of atrocity or with ordering or condoning their commission. Not even knowledge of these crimes was attributed to him. ... No one in a position of command in an army, from sergeant to general, can escape those implications. Indeed, the fate of some future President of the United States and his chiefs of staff and military advisers may well have been sealed by this decision.’

Many legal academic commentators have also not viewed Yamashita with great favour. These criticisms are not without merit, in light of the particular fact pattern in the Yamashita case. Particularly noteworthy in this regard is the fact that his control over his troops had been disrupted by the military efficiency of the US offensive against his troops. He had been forced to order an evacuation. He then split his troops into three divisions. He ceded command over two of those divisions and retained command over only one. His evacuation order was not carried out. He was left isolated in a remote mountainous region; unable to communicate with his headquarters and the other two commanders. Notwithstanding this loss of actual and effective control, he was convicted upon the theory that he could not avoid criminal responsibility by delegating his command. In these circumstances, one is sympathetic to complaints such as that ‘[i]t strains the mind to consider the possibility of upholding criminal responsibility in cases where both de facto control is missing and de jure command was already ceded for military purposes and not for the purpose of escaping criminal responsibility.’

Particularly worrying was the refusal of the Majority of the Supreme Court to appraise the facts at play in the case. As the Majority expressed itself: ‘We do not here appraise the evidence on which petitioner was convicted. We do not consider

113 See Martinez, supra, p 641.
114 See Wu and Kang, supra, footnote 17.
115 Yamashita, supra, p 28. See also Wu and Kang, ibid, footnote 17.
116 See Danner and Martinez, supra, p 124; Damaška, supra, at p 48; Cherif Bassiouni, ‘From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court,’ (1997) 10 Harvard Human Rights Journal 11, at pp 36–37. A more sympathetic treatment of the case is seen in William Parks, ‘Command Responsibility for War Crimes’ (1973) 62 Military Law Review 1, at pp 22 et seq.
117 Bantekas, supra, p 585. See also Laurie Barber, ‘Yamashita Trial Revisited’ (1998) 1 WaiMilHist (available at www.waikato.ac.nz/wfass/subjects/history/waimilhist/1998/yamashita.htm)
what measures, if any, petitioner took to prevent the commission, by the troops under his command, of the plain violations of the law of war detailed in the bill of particulars, or whether such measures as he may have taken were appropriate and sufficient to discharge the duty imposed upon him. These are questions within the peculiar competence of the military officers composing the commission and were for it to decide.” 118 The majority of the Supreme Court was quite happy to defer all those considerations to the senior soldiers who composed the military commission that tried Yamashita at first instance. According to the Supreme Court: ‘It is plain that the charge on which petitioner was tried charged him with a breach of his duty to control the operations of the members of his command, by permitting them to commit the specified atrocities. This was enough to require the commission to hear evidence tending to establish the culpable failure of petitioner to perform the duty imposed on him by the law of war and to pass upon its sufficiency to establish guilt.’ 119

This is surely a most peculiar application of the all too familiar doctrine of judicial deference in appellate adjudication. It is one thing for an appellate court to decline to appraise the forensic strength of evidence tendered before the trial court, in terms of the credibility—especially when founded on demeanour—of witnesses whom the appellate court did not observe testify. This handicap usually compels appellate courts to defer to the trial judges on questions of appraisal of credibility of witnesses. There is therefore nothing strange about the Supreme Court declining to ‘appraise the evidence on which petitioner was convicted’, if they meant that they had declined to consider the testimonial credibility of the evidence in the case. But it is a different matter altogether for an appellate court to decline to assess whether the established presence or absence of facts in a case is sufficient for purposes of answering the central legal question engaged in the case. In Yamashita, that central question was whether General Yamashita had breached the duty on him to prevent the atrocities committed by his troops. It was therefore very strange that the Supreme Court refused to ‘consider what measures, if any, petitioner took to prevent the commission, by the troops under his command, of the plain violations of the law of war detailed in the bill of particulars, or whether such measures as he may have taken were appropriate and sufficient to discharge the duty imposed upon him.’ For, those considerations engage—what is necessarily a mixed question of law and fact—the central question in the case. In Yamashita, that question was whether Yamashita breached the duty on him to prevent the atrocities committed by troops under his command. That the Majority of the Supreme Court had avoided that question fully justifies the scepticism with which their judgment continues to be greeted in the Yamashita case.

But these shortcomings in the Yamashita case do not diminish the notion of duty articulated in the judgment, as the foundation of the doctrine of superior responsibility. For, as even Justice Murphy conceded, ‘No one denies that inaction

118 Yamashita, supra, p 17.
119 Ibid.
or negligence may give rise to liability, civil or criminal. He also pointed out that his criticism of the majority judgment ‘is not to say that enemy commanders may escape punishment for clear and unlawful failures to prevent atrocities.’ Hence, the Yamashita criticisms are predominantly directed at the application of the duty to prevent atrocities in the particular context of that case.

While the full extent of the criminal responsibility of civilian leaders is not as clear in international law outside of the ICC Statute, there is some clarity as regards the criminal responsibility of civilian leaders who direct and control the functions of government. This view emerges from an examination of the judgment of the International Military Tribunal for the Far East in the Tokyo case. Though speaking in relation to duties owed to prisoners of war and the civilian population, the pronouncement should be of some value in the assessment of the extent of criminal responsibility of both military and civilian leaders in other contexts as well. According to the Tribunal:

Prisoners taken in war and civilian internees are in the power of the Government which captures them. This was not always the case. For the last two centuries, however, this position has been recognised and the customary law to this effect was formally embodied in the Hague Convention No IV in 1907 and repeated in the Geneva Prisoner of War Convention of 1929. Responsibility for the care of prisoners of war and of civilian internees (all of whom we will refer to as ‘prisoners’) rests therefore with the Government having them in possession. This responsibility is not limited to the duty of mere maintenance but extends to the

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120 Yamashita, supra, p 39.
121 Ibid, p 40. A repeated gravamen of Justice Murphy’s criticism was his perception of the absence of lack of precedent in international law for the charge against General Yamashita. Notably, his view that Yamashita’s conviction violated the rule requiring that ‘punishment should be based upon charges fairly drawn in light of established rules of international law and recognized concepts of justice: ibid, p 40. He had earlier lamented: ‘Nothing in all history or in international law, at least as far as I am aware, justifies such a charge against a fallen commander of a defeated force. To use the very inefficiency and disorganization created by the victorious forces as the primary basis for condemning officers of the defeated armies bears no resemblance to justice or to military reality: ibid, p 35. Leslie Green is not at all persuaded that Justice Murphy’s historical knowledge of international law was encyclopaedic enough to warrant such a pronouncement. As Green put it: ‘While there may be something to be said for Murphy’s comments on the effectiveness of the American campaigns and their consequent disruption of Yamashita’s lines of communication, it is submitted that his knowledge of the history of command responsibility is not as complete as he implied’: Leslie Green, ‘War Crimes, Crimes against Humanity and Command Responsibility’ (1997) 50 Naval War College Review 26, at p 35.
122 Parks, supra, at p 35–36. See also Green, ‘War Crimes, Crimes against Humanity and Command Responsibility’, supra, p 33.
123 Prosecutor v Delalić, supra, para 240 [ICTY Appeals Chamber].
124 See article 28(b).
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prevention of mistreatment. In particular, acts of inhumanity to prisoners which are forbidden by the customary law of nations as well as by conventions are to be prevented by the Government having responsibility for the prisoners.

In the discharge of these duties to prisoners Governments must have resort to persons. Indeed the Governments responsible, in this sense, are those persons who direct and control functions of Government. In this case and in the above regard we are concerned with the members of the Japanese Cabinet. The duty to prisoners is not a meaningless obligation cast upon a political abstraction. It is a specific duty to be performed in the first case by those who constitute the Government. In the multitude of duties and tasks involved in modern government there is of necessity an elaborate system of sub-division and delegation of duties. In the case of the duty of Governments to prisoners held by them in time of war those persons who constitute the Government have the principal and continuing responsibility for their prisoners, even though they delegate the duties of maintenance and protection to others.125

Given that civilian leaders who control the functions of Government are as responsible as military commanders, if not more so in democratic States, for enlisting, training, arming and deploying soldiers, it is right to make them share with military commanders the same responsibility, all reasonable qualifications made, that arises from the occupational hazards of soldiery discussed earlier.

The duty of the superior is further delineated with greater clarity in the judgment in the Tokyo case. Using the ratio of the system of humane treatment of prisoners of war, the IMT held that the duty comprised not only the establishment of a system of protection for protected persons, but also the ensuring of its continued and efficient operation: ‘It is the duty of all those on whom responsibility rests to secure proper treatment of prisoners and to prevent their ill-treatment by establishing and securing the continuous and efficient working of a system appropriate for these purposes.’ Those upon whom the duty rests would be in breach of it if ‘they fail to establish such a system of protection; or having established it, ‘they fail to secure its continued and efficient working.’ The duty to establish and secure continued operation of the system of protection comprises within it a duty of constant vigilance to ensure that the system is continually affording the desired level of protection. As the Tribunal put it, every obligor ‘has a duty to ascertain that the system is working and if he neglects to do so he is responsible’. The obligor ‘does not discharge his duty by merely instituting an appropriate system and thereafter neglecting to learn of its application. An Army Commander or a Minister of War, for example, must be at the same pains to ensure obedience to his orders in

125 Bernard V A Röling and C F Rüter (eds), The Tokyo Judgment [Amsterdam: APA-University Press Amsterdam BV, 1977] p 29. See also Gabrielle Kirk McDonald and Olivia Swaak-Goldman (eds), Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts, vol II part 2 [The Hague: Kluwer, 2000] p 768.
this respect as he would in respect of other orders he has issued on matters of the first importance.’

Even where the proper system is put in place and efficient monitoring of continued operation is met, the obligor may still be criminally responsible for violations committed within the system if the superior bearing the duty (i) had knowledge that such crimes were being committed, and having such knowledge he failed to take such steps as were within his power to prevent the commission of such crimes in the future, or (ii) was at fault in having failed to acquire knowledge that the crimes were being committed within the system of protection. According to the Tribunal:

If such a person had, or should, but for negligence or supineness, have had such knowledge he is not excused for inaction if his Office required or permitted him to take any action to prevent such crimes. On the other hand it is not enough for the exculpation of a person, otherwise responsible, for him to show that he accepted assurances from others more directly associated with the control of the prisoners if having regard to the position of those others, to the frequency of reports of such crimes, or to any other circumstances he should have been put upon further enquiry as to whether those assurances were true or untrue. That crimes are notorious, numerous and widespread as to time and place are matters to be considered in imputing knowledge.

A civilian or military member of cabinet that is collectively responsible for the system of protection will be individually responsible and does not escape responsibility, if he continues to stay in that government, after gaining knowledge of the violations, he omitted or failed to secure corrective measures. In the words of the Tribunal:

A member of a Cabinet which collectively, as one of the principal organs of the Government, is responsible for the care of prisoners is not absolved from responsibility if, having knowledge of the commission of the crimes in the sense already discussed, and omitting or failing to secure the taking of measures to prevent the commission of such crimes in the future, he elects to continue as a member of the Cabinet. This is the position even though the Department of which he has the charge is not directly concerned with the care of prisoners. A Cabinet member may resign. If he has knowledge of ill-treatment of prisoners, is powerless to prevent future ill-treatment, but elects to remain in the Cabinet thereby continuing to participate in its collective responsibility for protection of prisoners he willingly assumes responsibility for any ill-treatment in the future.

The Tribunal recognised that military or civilian members of a military hierarchy, in the personage of military commanders and civilian ministers of defence can, by order, secure proper treatment and prevent ill-treatment of prisoners. And if crimes are committed against prisoners under their control, of the likely occurrence of which they had, or should have had knowledge in advance, they
are responsible for those crimes. If, for example, it be shown that within the units under his command conventional war crimes have been committed of which he knew or should have known, a commander who takes no adequate steps to prevent the occurrence of such crimes in the future will be responsible for such future crimes.’

Beyond these higher-level officials, the duty to resign does not extend to civil servants. Nevertheless, where their duties include administration of the system of protection, they have a duty to take steps within their powers to prevent or correct abuses, if they have knowledge of the occurrence of such abuses. ‘Departmental Officials having knowledge of ill-treatment of prisoners are not responsible by reason of their failure to resign; but if their functions included the administration of the system of protection of prisoners and if they had or should have had knowledge of crimes and did nothing effective, to the extent of their powers, to prevent their occurrence in the future then they are responsible for such future crimes.’

Now, insofar as the point of the Yamashita and Tokyo judgments on this matter is that there exists in the superior an affirmative duty to take such measures as are within his power and appropriate in the circumstances to protect those at their mercy, it becomes clear that this duty envisages that the superior must always have in place reasonable measures to prevent his subordinates from committing sexual violence. This is because such crimes have traditionally been committed by arms bearing men during armed conflicts. In this regard, it should be no defence that there was no contemporaneous evidence seen by the superior foreboding that the subordinates were ‘about to commit’ or ‘committing’ rape.

But for one obstacle, the foregoing analysis should work as well within the construct of ‘aids, abets, or otherwise assist’ in the commission or attempted commission of an offence, as provided for in article 25(c) of the ICC Statute. The obstacle in question is that article 25(c) requires that the assistance of the aider and abettor must have been rendered for the ‘purpose of facilitating the commission of such a crime’.

Arguable Limits of Routes around the Difficulties of the Lex Lata

Apart from those already indicated in the foregoing review, there are other possible limitations to the routes around the difficulties created for a better protection of women from rape, in virtue of the requirement of ‘committing or about to commit.’

For one thing, the doctrine of joint criminal enterprise discussed above, the extension of ‘ordering’ as done in Blaškic, as well as any eventual development of the concepts of planning, instigating and aiding and abetting as explained above, are arguably judge-made. Hence, they may not override the express language of ‘committing or about to commit.’ In other words, the judicial interpretation of ordering, for instance, to include ‘substantial likelihood’ of a collateral crime in the theory of

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126 Röling, supra, pp 29–31; McDonald, supra, p 769.
criminal responsibility, being judge-made law, ought not negate the defence which the legislator has expressly afforded a superior to the effect that he is criminally responsible for the crimes of the subordinate only when he knew or ought to have known that the subordinate was ‘committing’ a crime or was ‘about to commit a crime.’ There is apparent force in this argument especially given the jurisprudence of the ICTY Appeals Chamber which has stated in clear terms that liability under article 7(1) of the ICTY Statute is distinct and separate from liability under article 7(3).

On deeper reflection, however, it is possible to overcome this argument. In this connection, there is a need to focus on the *actus reus* of the superior in the relevant analysis. When this is done, it becomes clear that the modes of responsibility, such as in article 6(1) of the ICTR Statute, which have ensnared the superior, involve some positive stimulus from the superior in question. This is clear from joint criminal enterprise, ordering, planning and instigating. While this is not always as clear from ‘aiding and abetting’, the story is still the same: there is some positive stimulus which raises his conduct from that of a mere bystander to that of a participant in crime. As shown earlier, he has done something jointly or severally to put the subordinate in the position to commit the crime—i.e. enlist, train, equip and mobilise—thence arises his duty to control their actions. In contrast, the ‘committing or about to commit’ defence remains a valid defence for those superiors who could not be said to have provided such a positive stimulus in any way. They may then not be held responsible, in the current state of international law, for failing to take measures at large to prevent rapes given the general knowledge that women are always at risk of rape during armed conflict.

**Superior Responsibility and the Duty to Punish**

The foregoing discussion has a special significance to a superior’s duty to prevent the commission of a crime. A related duty is the duty to punish a subordinate who committed a crime that was not—or could not be—prevented.

In many instruments of international law, the two duties are often stated together in the same clause. Yet, the duty to punish is different from the duty to prevent. The duty to punish does not supplant the duty to prevent. That is to say, even where it is amply discharged, the duty to punish would not absolve from responsibility the superior who had failed in his duty to prevent the commission of....

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127 For instance, article 6(3) of the ICTR Statute provides as follows: “The fact that any of the acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.” [Emphasis added.] Article 7(3) of the ICTY Statute contains a similar provision.
of the crime which the superior knew or ought to have known was being committed or about to be committed.\textsuperscript{128}

The duty to punish, in a sense, underscores the character of superior responsibility as a jural concept in the nature of dereliction of duty. In \textit{Hadžihasanović}, both the Trial Chamber\textsuperscript{129} and the Appeals Chamber\textsuperscript{130} of the ICTY made it plain that the superior’s responsibility is something \textit{sui generis}. It arises from responsibility for a certain omission on the part of the superior. According to this line of jurisprudence, superior responsibility is not equivalent to vicarious responsibility, in virtue of which the superior is subrogated in punishment for the subordinate’s criminal conduct.

Although it is my view, as a matter of \textit{lex ferenda}, that the doctrine of superior responsibility should attract direct criminal responsibility upon the superior who failed to control rogue subordinates, given the superior’s implication in training, arming, and deploying the subordinates, it is possible to note, first, that this theory of responsibility would obviously not encumber a superior who was never in a position to control the subordinate at the time of the offence, such as a superior who had not been put into command at the time of the crime. Secondly, the \textit{lex ferenda} view under consideration remains just that in the meantime. The \textit{lex lata}, according to the jurisprudence of the ICTY Appeals Chamber, is that superior responsibility is something \textit{sui generis}.

Interestingly, the full import of this line of jurisprudence was thrown into a state of flux in virtue of a division of opinion among the five ICTY appellate judges who decided an interlocutory appeal in \textit{Hadžihasanović}. The debate concerned whether there is a duty upon a superior to punish a subordinate for a crime committed prior to the superior’s assumption of command.

In a very narrow split (3:2) the ICTY Appeals Chamber judges disagreed. In the ensuing debate, Judge Shahabuddeen and Judge Hunt, writing separately, articulated the minority view; while the majority opinion was written by Judge Meron (also representing the views of Judge Pocar and Judge Güney).

The majority held that a superior is under no duty to punish a subordinate who committed a crime prior to the superior’s assumption of command. The majority opinion is essentially based upon the reasoning that there is no evidence of prac-

\textsuperscript{128} \textit{Prosecutor v Aleksovski (Judgment)} dated 24 March 2000 [ICTY Appeals Chamber] paras 72 and 76; \textit{Prosecutor v Delalić et al (Judgment)} dated 20 February 2001 [ICTY Appeals Chamber] paras 192, 193, and 198; \textit{Prosecutor v Blaškić (Judgment)} dated 3 March 2000 [ICTY Trial Chamber] para 336; \textit{Prosecutor v Kordić & Čerkez (Judgment)} dated 26 February 2001 [ICTY Trial Chamber] paras 444–446.

\textsuperscript{129} See \textit{Prosecutor v Hadžihasanović (Judgment)} dated 15 March 2006 [ICTY Trial Chamber] paras 73–75.

\textsuperscript{130} See \textit{Prosecutor v Hadžihasanović (Judgment)} dated 28 April 2008 [ICTY Appeals Chamber] para 39. See also \textit{Prosecutor v Krnojelac (Judgment)} dated 17 September 2003 [ICTY Appeals Chamber] para 171; and \textit{Prosecutor v Halilović (Judgment)} dated 16 November 2005 [ICTY Trial Chamber] para 78.
tice coupled by *opinio juris* supporting such a duty in a superior.\(^{131}\) According to them, criminal responsibility can be imposed only if the crime charged was clearly established under customary law at the time the events in issue occurred. Any doubt in this regard would, they contended, negate the imposition of criminal responsibility, out of ‘full respect for the principle of legality’.\(^{132}\)

The minority disagreed. To them, the correct approach is not to look for evidence of practice coupled with *opinio juris*, to the effect that a superior has a duty to punish a subordinate who committed a crime prior to the superior’s assumption of command. The better approach rather is to identify the existence of a principle of customary international law, and then seek to interpret that principle in terms of its applicability to the factual question at hand. And this task must be undertaken with the *object and purpose* of the particular principle always kept in view. Applying this method, the established principle of customary international law is that a superior operates under a duty to punish a subordinate for a consummated crime; and the factual question is whether this duty also encumbers a superior who came into command after the commission of the crime.

The minority were of the view that this factual question must be answered in the affirmative. As already indicated, the essence of their position is generally anchored upon the canon of interpretation that requires to be taken into account the object and purpose of the relevant rule or provision, as dictated by the Vienna Convention on the Law of Treaties of 1969.\(^ {133}\) According to Judge Shahabuddeen, ‘the object and purpose of the provisions [relating to the duty to punish] would include the avoidance of future crimes by the subordinates of a new commander arising from seeming encouragement through inaction by him over crimes committed by the same subordinates before he assumed duty but of which he knows or had reason to know.’\(^ {134}\) The aim is to make certain that ‘there is always someone who will have responsibility for ensuring that the commission of war crimes by a subordinate will not go unpunished’; considering that reports of ‘the commission of the crime might never have reached the previous commander and he might therefore have never been in a position to exercise power to punish the subordinate for it; the reports might only be received by the new commander. Responsible command, from which flows the concept of command responsibility, vests the new commander

\(^{131}\) *Prosecutor v Hadžihasanović (Decision on the Interlocutory Appeal Challenging Jurisdiction in relation to Command Responsibility)* dated 16 July 2003 [ICTY Appeals Chamber] paras 45 and 53.

\(^{132}\) *Ibid*, para 51.

\(^{133}\) *Prosecutor v Hadžihasanović (Decision on the Interlocutory Appeal Challenging Jurisdiction in relation to Command Responsibility)*, supra, [ICTY Appeals Chamber, Partial Dissenting of Judge Shahabuddeen] paras 11 et seq. See also the Separate and Partially Dissenting Opinion of Judge Hunt, paras 22–26.

\(^{134}\) *Hadžihasanović (Decision on the Interlocutory Appeal Challenging Jurisdiction in relation to Command Responsibility)*, supra, Partial Dissenting of Judge Shahabuddeen, para 12.
with power to punish the subordinate for the crime so disclosed. Judge Hunt was generally of a similar view, although he had expressed himself differently.

It appears that the concerns underlying the majority view stems from their being viscerally haunted by the lurking ghost of vicarious liability, which imputes unto someone else the jural consequences of the act of another. Seen in this way, a commander becomes liable for, say, the war crime of torture, committed by a subordinate. Notably, this appears to be the view of superior responsibility that the drafters of the Statute of the International Criminal Court had taken of superior responsibility. For according to them, where the prescribed conditions are met, the superior ‘shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces’. It is, perhaps, telling that the majority in the Hadžihasanović interlocutory appeal cited article 28 of the ICC Statute as their first example of statement of norms tending to negate the imposition on a superior a duty to punish a subordinate who committed an offence prior to the assumption of command.

If, as the majority in the Hadžihasanović interlocutory appeal did, superior responsibility is always to be viewed from the prism of article 28 of the ICC Statute—i.e. as imposing a form of vicarious criminal responsibility upon a superior for the acts of his subordinate—the concerns of the majority in the Hadžihasanović interlocutory appeal would be fully justified. For it would offend elementary principles of criminal justice to impute onto someone responsibility for a crime committed when he was not in a position of the relevant relationship with the actual perpetrator.

However, those concerns evaporate if, as is indicated in the jurisprudence of ICTY, the nature of superior responsibility is viewed within a *sui generis* framework, entailing a type of assessorial responsibility in the nature of dereliction of duty. That duty entails a failure on the part of the superior to do something else

135 *Ibid*, para 24.
136 See the Separate and Partially Dissenting Opinion of Judge Hunt, paras 22–26.
137 For instance, ‘where: (i) that military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and (ii) that military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.’ See article 28(a) of the ICC Statute. See also article 28(b) where a differently worded provision is made regarding the responsibility of a superior other than a military commander.
138 See article 28 of the ICC Statute.
139 See *Prosecutor v Hadžihasanović (Judgment)*, supra, [ICTY Trial Chamber] paras 73–75; *Prosecutor v Hadžihasanović (Judgment)*, supra, [ICTY Appeals Chamber] para 39; *Prosecutor v Krnojelac (Judgment)*, supra, [ICTY Appeals Chamber] para 171; and *Prosecutor v Halilović (Judgment)*, supra, [ICTY Trial Chamber] para 78.
entailing a renunciation of the crime, so that it is either not committed (the duty to prevent) or, once committed, the perpetrator does not enjoy impunity (the duty to punish).

If it is accepted that the duty to punish is about the prevention of impunity, as opposed to vicarious criminal responsibility derived from a subordinate’s criminal conduct, why should it then matter that the superior had not yet assumed the command position when the crime was committed?

Recalling a point of jurisprudence noted at the beginning of this section, it would seem that the answer to this question would expose a scenario in which the superior in command at the time of the offence would be burdened by two types of duty (to prevent an imminent or immediate crime or both, and to punish consummated crimes); while his successor would bear the burden of only one duty (to punish consummated crimes). There is therefore no injustice done to the latter kind of superior, as there is a distinction made between him and his predecessor. There is, on the other hand, injustice done to victims and to society if there were no obligation on a succeeding superior to prevent impunity, by requiring him to punish a consummated crime whenever the crime or its perpetrator is discovered.

The reasoning of the minority in the Hadžibasanović interlocutory appeal is therefore more appealing than that of majority. On the whole, it is difficult to resist a view of the position of the majority as curiously mechanical. This is particularly so for a number of reasons. The first thing one notices in this regard is the failure of the majority to invite—and their refusal to accept at the urging of the minority—the ‘object and purpose’ canon in their analysis. That is to say, not once in their reasoning did the majority make reference to this canon. What is more, they categorically rejected the reasoning of the minority, as it is generally anchored on that canon.

Indeed, the improbability of the position of the majority appears in relief in the realms of impunity for sexual crimes against women committed during armed conflicts. This is the case, given the theory (already explored) that it might be in the interest of some armed forces to condone or cover-up crimes of sexual violence that their members commit against women. Clearly, this concern is not assisted by the fact that a superior enjoys a licence to ignore the fact that one or more members of his troops had committed sexual violence against women, prior to his assumption of command.

In this regard, one notes that in the judgment on the merits in Hadžibasanović—i.e. the final appeal—the Appeals Chamber stressed that ‘a superior’s failure to punish a crime of which he has actual knowledge is likely to be understood by his subordinates at least as acceptance, if not encouragement, of such conduct with the effect of increasing the risk of new crimes being committed.’140 If the object of the dictum is that a superior’s permission of impunity in respect of a consummated crime has a minimum value of likely appearance to subordinates as condonation of the given crime, thus increasing the risk of future crimes of that nature,

140 See Prosecutor v Hadžibasanović (Judgment), supra, [ICTY Appeals Chamber] para 30.
then there is no reason why this should be a matter of concern only in respect of a superior under whose command the crime was committed. This message of condonation, as a result of failure to punish, is no less a concern in respect of a superior who came into command only after the crime had been committed.

It must of course be noted that the employment of the phrase ‘actual knowledge’ by the Appeals Chamber is something of moment. It is not clear whether by employing that phrase the Appeals Chamber meant to limit the contemplated knowledge to that which the superior gained in consequence of his own direct observation of the underlying facts—as opposed to knowledge that the superior had gained by way of received credible evidence. It is submitted that any such limitation of the idea of knowledge will, as a matter of principle, be wholly unrealistic, even for purposes of assessing whether a message of condonation of the crime had been sent by the superior. It will impermissibly exclude from desirable blame the upper military hierarchy, who are rarely in the theatre of actual military operations so as to observe a crime being committed. As a practical matter, it might, in view of the majority in the Hadžihasanović interlocutory appeal, also exclude from blame a superior who subsequently came into his command, following his own direct observation of the crime when he had not yet come into command.

Another reason that the position of the majority comes across as curiously mechanical is the rather low obligation which the duty to punish may really entail. The superior’s imposition of disciplinary measures may, given the circumstances, be sufficient to satisfy the duty. So, too, may the reporting of the matter to appropriate investigative or prosecutorial authorities be sufficient to discharge the duty to punish. It is therefore surprising that the majority in the Hadžihasanović interlocutory appeal appear to be suggesting that a superior has no duty to undertake even these minimal actions in respect of crimes committed prior to his assumption of command. Finally, time may not be of the essence in relation to the superior’s duty to punish the rogue subordinate for the subsequently discovered crime, such as makes the duty to punish an unjust imposition on the current superior. That is to say, given that no statute of limitation applies to war crimes, the current superior may generally be able to take his time in punishing the subordinate for the past crime. What is unjust to victims and society is that he does not punish at all.

Still, the division of opinion in the Hadžihasanović interlocutory appeal has a minimum value of identifying an area in which international criminal law is in need of improvement for purposes of affording women better protection during armed conflicts. In this connection, it is important for the loophole identified in virtue of the position of the majority to be closed—through appropriate legislation or by way of jurisprudence—so that it is beyond question that a superior is clearly placed under an obligation to punish a subordinate who had committed sexual violence against women, prior to the assumption of a superior’s command.

141 See Prosecutor v Hadžihasanović (Judgment), supra, [ICTY Appeals Chamber] para 33.

142 See Prosecutor v Hadžihasanović (Judgment), supra, [ICTY Trial Chamber] para 173.
Conclusion

In its bid to protect women from rapes during armed conflicts, international law leans on both subordinates and their superiors. While the proscription against rape is more definite in relation to the subordinate with a tendency to rape, there remains an undesirable gap on the superior’s flank. That gap mostly results from the legal duty which requires the superior to prevent rapes only when the subordinate is about to commit it or is actually doing so. This leaves the superior the defence that he did not know nor ought he have known, given the circumstances then prevailing, that the rapist subordinate was ‘committing’ or ‘about to commit’ rape.

In view of the frequency of rape as a constant occurrence in armed conflicts throughout history, it is submitted that it is reasonable to impose upon superiors a duty to take all reasonable measures to prevent rapes, notwithstanding that there might not yet be an immediate danger of rape in the particular circumstances. But the present state of international law does not impose such a duty beyond the immediate timing of the crime.

Although it may still be possible in some cases to limit the effects of this deficiency in the law, the present solutions remain unsatisfactory, since they largely depend on judicial interpretations which may vary from judge to judge and from time to time. Furthermore, even this ability to cover the gap by way of judicial interpretation is more difficult with the ICC Statute where the provisions have gone into such details as do not always leave the judges much room to manoeuvre.

Ultimately, what is required to permit the foreseeability of sexual violence in armed conflicts as a factor in the assessment of criminal responsibility of the superior is to recognise the limitations which the existing texts of relevant instruments of international law pose. These limitations necessarily call for normative correction of international law, with the view to covering the legal lacuna under consideration here. One method of achieving this is by fostering a regime of due diligence that enhances the duty on superiors to put measures in place at all times, and maintain them regularly, with the view to preventing subordinates from committing sexual violence against women during armed conflicts.

The question does naturally arise as to whether the regime of due diligence advocated here is also not applicable and relevant to all or other types of violations during armed conflict. The answer is that they may be so to varying degrees, depending on the violation contemplated. However, the regime is particularly suited and uniquely necessary to sexual violence against women during armed conflict. This is for the simple reason of obvious foreseeability of that particular brand of violations during armed conflict. Few other types of violations during armed conflict share the same attraction and frequency of occurrence during armed conflicts. As has been noted earlier, the phenomenon was serviceably described as military ‘rape differential,’\(^{143}\) by Madeline Morris in her study that compared the rates of sexual violence between military men and civilian men during periods

\(^{143}\) Morris, ‘By Force of Arms: Rape, War, and Military Culture’, \textit{supra}, p 653.
of peace and of armed conflicts. As discussed, she found in particular that the peacetime rates of rape by American military personnel are actually lower than civilian rates, taking age and gender into account. Her study also suggested that that peacetime military rape rates are diminished from civilian rates far less than are military rates of other violent crime. In the contrasting context of armed conflicts, her study suggested that military rape rates climbed to several times civilian rates, while military rates of other violent crime were roughly equivalent to civilian rates. Morris's study thus provides specific confirmation of what has become general knowledge, or assumed as a matter of common sense, in great abundance of literature on the subject. It thus sets sexual violence against women during armed conflicts as a crime that is unique in comparison to other crimes that are committed during armed conflicts. That uniqueness supplies ample justification for singling out sexual violence against women for the special regime of due diligence in which superiors are required to put in place at all times measures aimed at preventing their troops from committing such crimes—and to maintain such measures regularly to ensure their continuing effectiveness. A related consideration is the fact of specific foreseeability of the crime. The frequency of sexual violence against women during armed conflicts makes it so specifically foreseeable that it can be easily singled out and be more manageably subjected to the special measures which superiors are required to put in place at all times and maintain regularly.

In the next chapter, we will examine legal developments in the area of definition of rape, from the perspective of containment of the evil that is sexual violence during armed conflicts.