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PRINCIPALS, ACCESSORIES AND SENTENCING IN INTERNATIONAL CRIMINAL  
LAW: PERCEPTIONS, CONTRADICTIONS AND THE STATUS QUO

Viviane Arnolds

**Abstract**

Since the emergence of international and hybrid criminal judicial bodies, the attribution of various modes of liability to perpetrators of the most heinous crimes has occupied a central role. However, the impact of modes of liability on the sentence has parted judges in many instances. While some judges regard the differentiation between principal perpetrators and aiders and abettors as immaterial for sentencing purposes, others have naturally referred to the notion that accessories to a crime are entitled to lower sentences. On first sight, in the absence of statutory guidance in this regard, both approaches, which derive from domestic law, seem to have their place and their advocates.

PRINCIPALS, ACCESSORIES AND SENTENCING IN  
INTERNATIONAL CRIMINAL LAW:  
PERCEPTIONS, CONTRADICTIONS AND THE STATUS QUO

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## TABLE OF ABBREVIATIONS

A & A	Aiding and Abetting
ALI	American Law Institute
BiH	Bosnia and Herzegovina
CC	Criminal Code
CaH	Crimes against Humanity
ECCC	Extraordinary Chambers in the Courts of Cambodia
ICC	International Criminal Court
ICL	International Criminal Law
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Yugoslavia
KUHP	Indonesian Criminal Code
PCKK	Provisional Criminal Code of Kosovo
RPE	Rules of Procedure and Evidence
RS	Rome Statute
SFRY	Socialist Federal Republic of Yugoslavia
SICT	Supreme Iraqi Criminal Tribunal
SPSC	Special Panels for Serious Crimes
SR	Superior Responsibility
STL	Special Tribunal for Lebanon
USC	Code of Laws of the United States
WC	War Crimes
WCCBiH	War Crimes Chamber of Bosnia-Herzegovina

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*R v Robert Vincent Giannetto* [1997] 1 Cr. App. R. 1 (UK)

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*R v Kennedy* [2007] UKHL 38 (UK)

*Chan Wing-Siu v The Queen* [1985] AC 168 (UK)

*Attorney General's Reference* (No 1 of 1975) QB 773, 777 (UK)

*R v A* [2011] QB 841 (UK)

*Thatcher v R* (1987) 39 DLR (4<sup>th</sup>) 275 (Canada)

*Maxwell v DDP for Northern Ireland* [1978] 1 WLR 1350 (HL) (UK)

*People v Shafou* 330 NW 2d 647 416 Mich 113 (1982) (USA)

*People v Hoang* 13 P.3d 819 (Colo Ct App 2000) (USA)

*Jamuna Singh v State of Bihar* AIR 1967 SC 553 (India)

*S v Archilla et al.* [2009] SLHC 20 (Sierra Leone)



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Zurich, March 2016

*to my beloved parents*

## CHAPTER 1

### BACKGROUND TO THE RESEARCH

*The Appeals Chamber is of the view that aiding and abetting is a form of responsibility which generally warrants a lower sentence than is appropriate to responsibility as a co-perpetrator.*

***Vasiljević Appeal Judgment, ICTY 2004<sup>1</sup>***

*The Appeals Chamber considers that, in the circumstances of this case, the elevation of Ndahimana's responsibility from that of an aider and abettor to that of a participant in a joint criminal enterprise results in an increase of his overall culpability, which calls for a higher sentence.*

***Ndahimana Appeal Judgment, ICTR 2013<sup>2</sup>***

*The purpose behind the Prosecution's approach appears to be to classify the participant in a joint criminal enterprise who was not the principal offender as a "perpetrator" or a "co-perpetrator", rather than someone who merely aids and abets the principal offender. The significance of the distinction appears to be derived from the civil law, where a person who merely aids and abets the principal offender is subject to a lower maximum sentence. The Trial Chamber does not accept that this distinction is necessary for sentencing in international law, and in particular holds that it is irrelevant to the sentencing practice of this Tribunal. The Appeals Chamber has made it clear that a convicted person must be punished for the seriousness of the acts which he has done, whatever their categorisation.*

***Krnojelac Trial Judgment, ICTY 2002<sup>3</sup>***

#### 1.1 INTRODUCTION

International and hybrid courts and tribunals have become major subjects for the enforcement of international criminal law. However, in comparison to domestic courts, the sentencing process in international judicial institutions is only barely regulated, leaving judges with immense discretionary sentencing powers. This not only impedes predictability, but also endangers consistency in international sentencing practice, which is especially true when it comes to the attribution of individual criminal responsibility to the perpetrator and its actual implications on the sentence. Various modes of liability require different degrees of involvement in the commission of a crime and thus a distinct *mens rea* and *actus reus*. While the criminal conduct of the principal perpetrator constitutes the *actus reus* of an offence in that he directly commits the crime, the criminal conduct of the accessory merely substantially affects the commission of the crime by the principal. Accordingly, one would expect that due to the process of differentiation between the degree of the individual's culpability judges are tasked with, the applicable mode of liability entails a corresponding gradation of

<sup>1</sup> *Prosecutor v Vasiljević* (Appeal Judgment) IT-98-32-A (25 February 2004) para 182.

<sup>2</sup> *Prosecutor v Ndahimana* (Appeal Judgment) ICTR-01-68-A (16 December 2013) para 252.

<sup>3</sup> *Prosecutor v Krnojelac* (Trial Judgment) IT-97-25-T (15 March 2002) paras 74, 75.

punishment. Following this line of argumentation there would be the presumption that someone who is 'merely' involved as aider and abettor and thus as secondary perpetrator, would be assumed to be less involved in the commission of the crime than a primary perpetrator, directly committing the crime.

However, amongst others, two important considerations are in contradiction with this chain of reasoning. First, neither of the Statutes of the *ad hoc* tribunals, nor the Rome Statute of the ICC, expressly states that different modes of liability attract pertinent corresponding penalties, varying in length. Secondly, considering the fact that the most heinous atrocities are uncommonly committed by high-ranking individuals themselves, as these instead mastermind and concert these plans, a simplified primary and secondary perpetrator distinction seems rather problematic in the context of international criminal justice. Nevertheless, in the past, judges have repeatedly resorted to a principal-accessory distinction for sentencing purposes. As a consequence, the jurisprudence of the *ad hoc* tribunals in respect of modes of liability and their role in the sentencing process seems on first sight rather controversial, and the concept of individual criminal responsibility and the attribution of individual criminal acts to perpetrators of a crime occupy a solid position in international legal scholarship.<sup>4</sup> In the absence of statutory guidance, two distinct camps have evolved. On the one hand there are some judges who take the stance that adherence to the principal-accessory distinction is of importance for sentencing purposes as accessorial liability attracts lower sentences, and on the other hand there are judges emphasising that the categorisation of modes of liability is rather immaterial with respect to its value for sentencing purposes.

The reason for such confusion is based on the domestic nature of attribution concepts, which is manifested in a variety of forms in domestic legal systems. In fact, a principal-accessory distinction is well established in a number of jurisdictions<sup>5</sup> – various domestic systems, belonging to the Romano-Germanic tradition explicitly recognise a principle embedding mandatory mitigation for principals,<sup>6</sup> which is based on the premise that that 'punishment should be inflicted in proportion to the blameworthiness of the conduct of each person involved in the commission of the crime'.<sup>7</sup> Indeed, countries such as Germany and the former Soviet states are 'committed to the proposition that accessories should not be punished as severely as perpetrators'.<sup>8</sup> These countries embrace a so-called

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<sup>4</sup> See for instance J Vogel, 'Individuelle Verantwortlichkeit im Völkerstrafrecht' (2002) 114 *Zeitschrift für die gesamte Strafrechtswissenschaft* 403; G Werle, 'Individual Criminal Responsibility in Article 25 ICC Statute' (2007) 5 *Journal of International Criminal Justice* 953; H Olásolo, *Responsibility of Senior Political and Military Leaders as Principals to International Crimes, Studies in International and Comparative Criminal Law* (Hart 2010); C Damgaard, *Individual Criminal Responsibility for Core International Crimes: Selected Pertinent Issues* (Springer 2010); E van Sliedregt, *Individual Criminal Responsibility in International Law* (OUP 2012) 65; H Vest, 'Problems of Participation — Unitarian, Differentiated Approach, or Something Else?' (2014) 12 *Journal of International Criminal Justice*, 295.

<sup>5</sup> See *inter alia* Germany, Spain and several Latin American countries.

<sup>6</sup> Olásolo, *Responsibility of Senior Political and Military Leaders* (n 4) 17.

<sup>7</sup> G Fletcher, *Rethinking Criminal Law* (OUP 2000) 650.

<sup>8</sup> *Ibid.*

“differentiated” approach. In contrast, Anglo-American countries, but also *inter alia*, Denmark, Italy or France, are committed to the proposition that an accessory to a crime can be punished as severely as the principal perpetrator, although in sentencing practice the individual’s role in the commission of the offence will frequently be considered at the sentencing stage.<sup>9</sup> A detriment of such a unitary model is that a person who is less culpable, because he does not share the same intent as the principal perpetrator (the intent to commit the offence in question), may be punished as severely as a person who causes much greater harm – subject to judicial discretion – due to a significantly higher intentional involvement in the commission. This proposition is based on the so-called unitary theory. Strictly speaking, the unitary theory can be divided into ‘pure unitary systems’ and ‘functional unitary systems’.<sup>10</sup> While the former systems, which include for instance Italy and Denmark, do not distinguish between principal perpetrators and accessories, the latter, such as Austria and Poland, differentiate between principal and accessorial liability, but do not recognise the derivative nature of accessorial liability, despite such distinction.<sup>11</sup> As Fletcher notes, the reason why Romano-Germanic countries have intensively engaged with the law on accessorial liability, at least compared to England, is the ‘greater importance they ascribe’ to it and obviously the legal consequences resulting therefrom.<sup>12</sup> So why do the *ad hoc* tribunals devote so much time to the distinction between principals and accessories? One could be inclined to assume that the categorisation of modes of liability in international law and the attention devoted thereto, at least by the *ad hoc* tribunals, draws on a seemingly established principle that the labelling process occupies a central role in the sentencing process and indicates the level of culpability. The latter was clearly supported by the Trial Chamber in the *Krnojelac* Trial Judgment, where it held that the distinction between the ‘principal offender, as a perpetrator or a co-perpetrator’, from someone who ‘merely aids and abets’, was irrelevant for sentencing purposes.<sup>13</sup>

A similar view was taken in the separate opinion by Judge Hunt in *Ojdanić*, who states that it was ‘unwise for this Tribunal [ICTY] to attempt to categorize different types of offenders in this way when it is unnecessary to do so for sentencing purposes’.<sup>14</sup> Likewise, Judge Fulford emphasised in relation to the ICC in his Separate Opinion in the *Lubanga* Judgment that there was ‘no proper basis for concluding that ordering, soliciting or inducing a crime (Article 25(3)(b)) is a less serious form of commission than committing it “through another person” (Article 25(3)(a)), and these two concepts self-evidently overlap’.<sup>15</sup> He further contended that the creation of a ‘hierarchy of seriousness’ which

<sup>9</sup> A Cassese and others, *International Criminal Law: Cases and Commentary* (OUP 2011) 323.

<sup>10</sup> Olásolo, *Responsibility of Senior Political and Military Leaders* (n 4), fn 37.

<sup>11</sup> *Ibid.*

<sup>12</sup> Fletcher, *Rethinking Criminal Law* (n 7) 637, fn 4.

<sup>13</sup> *Krnojelac* Trial Judgment (n 3) paras 74, 75.

<sup>14</sup> *Prosecutor v Milutinović et al.* (Separate Opinion of Judge David Hunt on Challenge by Dragoljub Ojdanić to Jurisdiction – Joint Criminal Enterprise) IT-99-37-AR72 (21 May 2003) para 31.

<sup>15</sup> *Prosecutor v Lubanga* (Separate Opinion of Judge Adrian Fulford) ICC-01/04-01/06-2842 (14 March 2012) para 8.

is 'dependent on different modes of liability within Article 25(3) of the Statute' could only be of assistance if 'sentencing was strictly determined by the specific provision on which an individual's conviction is based' and clarified that at the ICC 'considerations of this kind do not apply'.<sup>16</sup>

Likewise, Judge Van den Wyngaert rejects the idea that aiding and abetting 'may be treated as less serious than committing' under Article 25(3)(c) of the Rome Statute.<sup>17</sup> According to Judge Van den Wyngaert, the blameworthiness of a perpetrator is based and therefore dependent upon the 'factual circumstances' as opposed to the particular mode of liability.<sup>18</sup> These statements corroborate the position that, in international criminal law, no mandatory increased sentence or mitigation is attached to a particular mode of liability, which leads to the rationale that different contributions to a crime are equal<sup>19</sup> and that the seriousness of the conduct is assessed irrespective of the classification as either principal or secondary offender.

While previous studies have confirmed that modes of liability are indeed sentencing predictors, it has also been pointed out that their impact on the sentence must not be overestimated and more specifically that 'complicity by no means warrants a lesser sentence in international criminal law'.<sup>20</sup> Nevertheless, the approach of a 'clear-cut' distinction between principal and accessorial liability has been expressed in several judgments, leading to the impression that some judges do in fact consider several modes of liability as determinants when assessing culpability and deciding on the appropriate sentence.<sup>21</sup> Respectively, there appears to be a broad consensus that aiding and abetting leads to more lenient sanctions as opposed to participation in a JCE, which has been designed by the ICTY to hold all persons liable who act together to pursue a common plan. According to JCE in its basic form (JCE I), (i) a group of persons (ii) must act with a common plan (iii) and the accused must have voluntarily contributed within the framework of this common plan.<sup>22</sup> There is a consensus that JCE is viewed as a form of commission liability;<sup>23</sup> however, the participation of the member of the JCE 'need not involve commission of a specific crime under one of those provisions (...), but may take the form of assistance

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<sup>16</sup> Ibid para 9.

<sup>17</sup> *Prosecutor v Ngudjolo Chui* (Concurring Opinion of Judge Christine Van den Wyngaert) ICC-01/04-02/12-4, (18 December 2012) para 24.

<sup>18</sup> Ibid.

<sup>19</sup> van Sliedregt, *Individual Criminal Responsibility* (n 4) 70.

<sup>20</sup> M Aksenova, *Complicity in International Criminal Law* (PhD Thesis, European University Institute 2014) 197.

<sup>21</sup> *Prosecutor v Furundžija* (Trial Judgment) IT-95-17/1-T (10 December 1998) para 235.

<sup>22</sup> *Prosecutor v Kvočka et al.* (Trial Judgment) IT-98-30/1-T (2 November 2001) para 266; This refers to JCE in its basic form - JCE II and JCE III will be considered later in more detail.

<sup>23</sup> See below (n 165) and additionally *inter alia* *Krnjelac* Trial Judgment (n 3) para 73; *Prosecutor v Simić et al.* (Trial Judgment) IT-95-9-T (17 October 2003) para 138; *Prosecutor v Stakić* (Trial Judgment) IT-97-24-T (31 July 2003) para 432. To the contrary, for a categorisation as accomplice liability, see *inter alia* *Prosecutor v Tadić* (Appeal Judgment) IT-94-1-A (15 July 1999) para 220. It has also been stated that JCE: *Kvočka et al.* Trial Judgment (n 22) para 249. For a detailed discussion see also Damgaard (n 4) 198 seq; A Cassese and others, *Oxford Companion to International Criminal Justice* (OUP 2009) 395.

in, or contribution to, the execution of the common plan or purpose'.<sup>24</sup> The *actus reus* of an aider and abettor requires him to provide 'practical assistance, encouragement, or moral support, which has substantial effect on the perpetration of the crime' but, contrary to a member of JCE an aider and abettor 'does not need to share either at the outset or later, the criminal intent of the perpetrator; he only intends to assist the perpetrator in the commission of a crime'.<sup>25</sup> Thus, a fundamental difference is that 'although he is cognizant that the perpetrator intends to commit the crime, he does not share the *mens rea*'.<sup>26</sup> According to Cassese, '[t]his is why, in principle, the criminal liability of the aider and abettor is more tenuous (or less weighty) than that of the participant in a common criminal enterprise'.<sup>27</sup>

A landmark decision in the context of the principal-accessory distinction at the ICTY was the *Vasiljević* Appeal Judgment, where the Appeals Chamber reduced the sentence imposed by the Trial Chamber from 20 to 15 years, based exclusively on the finding that the convicted person was not a participant in a JCE but instead aided and abetted.<sup>28</sup> In a similar manner, such differentiation based on the proposition that accessories are less culpable and entitled to lower sentences, was also confirmed in a number of cases, namely amongst others, *Krstić*,<sup>29</sup> *Mrkšić and Šljivančanin*,<sup>30</sup> *Kajelijeli*<sup>31</sup> and only recently the ICTR Appeals Chamber confirmed in *Ndahimana* that aiders and abettors have a lower culpability.<sup>32</sup> Accordingly, it seems reasonable to conclude that, with regard to the sentencing practice of the ICTY and ICTR, aiding and abetting as a form of secondary perpetration attracts a lower sentence. Notwithstanding that, empirical research in respect to the ICTY's sentencing practice revealed that, after appeal, those perpetrators who were responsible as participants in a JCE were punished less severely than aiders and abettors.<sup>33</sup>

<sup>24</sup> *Tadić* Appeal Judgment (n 23) para 227.

<sup>25</sup> A Cassese, 'The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise' (2007) *Journal of International Criminal Justice* 5, 109, 116.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

<sup>28</sup> *Vasiljević Appeal* Judgment (n 1) para 181; 'the Appeals Chamber is of the view that the sentence needs to be adjusted due to the Appeals Chamber's finding that the Appellant was responsible as an aider and abettor (...) instead of being responsible as a co-perpetrator as was found by the Trial Chamber'; *Prosecutor v Krstić* (Appeal Judgment) IT-98-33-A (19 April 2004) para 268.

<sup>29</sup> *Krstić* Appeal Judgment (n 28) para 266, 268, the Appeals Chamber found that the sentence had to be adjusted based on its finding that Krstić was responsible as an aider and abettor to genocide and not as co-perpetrator as found by the Trial Chamber.

<sup>30</sup> *Prosecutor v Mrkšić and Šljivančanin* (Appeal Judgment) IT-95-13/1-A (5 May 2009) para 407, the Appeals Chamber expressly held that: 'the fact that an accused did not physically commit a crime' was in fact 'relevant to the determination of the appropriate sentence' and that 'the practice of the International Tribunal clearly indicate[d] that aiding and abetting' was 'a lower form of liability than ordering, committing or participating in a joint criminal enterprise and may as such attract a lesser sentence'.

<sup>31</sup> *Prosecutor v Kajelijeli* (Judgment and Sentence) ICTR-98-44A-T (1 December 2003) para 963, the ICTR Trial Chamber stated *inter alia* in *Kajelijeli* in the context of sentencing practice of the ICTY and ICTR that indirect forms of participation would generally result in lower sentences.

<sup>32</sup> *Ndahimana* Appeal Judgment (n 2) para 642.

<sup>33</sup> B Holá and others, 'Is ICTY Sentencing Predictable? An Empirical Analysis of ICTY Sentencing Practice' (2009) 22 *Leiden Journal of International Law* 79, 92.



While the practice of some hybrid tribunals, such as the Special Tribunal for Lebanon (STL), the Supreme Iraqi Criminal Tribunal (SICT) and the Extraordinary Chambers in the Courts of Cambodia (ECCC) has not been greatly affected by this debate, as they seem to have rather paid less attention to these issues, the SCSL can be observed to have formerly prevalingly followed the differentiated approach favoured by the *ad hoc* tribunals, while lately expressing preference for the unitary approach, akin to the ICC.

## 1.2 RESEARCH QUESTION

By assessing the relationship between modes of liability and sentence severity, this dissertation intends to provide a new outlook on the role of modes of liability within international sentencing practice in that it not only examines methodologically the jurisprudence of international and hybrid judicial bodies within the timeframe of their emergence up to now, but also identifies and analyses possible reasons for the pertinent practice. In line with this, the primary purpose of this dissertation is to shed some light on the legal weight ascribed to principal and accessorial liability respectively in relation to the punishment. It will be seen that, against the backdrop of statements made by judges, the entire picture is far more contradictory than it seems at first glance.

Therefore, potential reasons for such conflicting approaches will be explored. The central research question reads as follows:

*Is the distinction between the principal perpetrator and the aider and abettor merely a matter of terminology and/or a lens through which the nature of the criminal liability of an offender under substantive international criminal law is established, or does it also have an impact on the severity of the sanction imposed on them in the case of a conviction?*

Does the legal relevance ascribed to modes of liability only affect the attribution stage, or does it also influence the sentencing stage? Is there a correlation between the mode of liability and the sentence severity? Do different modes of liability reflect several degrees of participation and more specifically, are accessories perceived to be less blameworthy? On the one hand, assuming that this is the case, the degree of culpability would be dependent on the respective mode of liability for which a perpetrator is convicted, which should then be reflected in the sentence imposed. When transferring the considerations of the domestically originated unitary and differentiated theories respectively to the system of international criminal law, a particular concern is the unique nature of international crimes in that large-scale international crimes are usually committed on a macro level by a plurality of persons acting within a hierarchical structure. Thus, the individuals most responsible and culpable do not normally carry out the physical element of the offence. In considering an appropriate theory, be it unitary or differentiated, this consideration is of high significance and, in the light of the unique nature

of international crimes, a simple “installation” of a domestic doctrine into international criminal justice has to be placed under close scrutiny and may ultimately be rendered inadequate. On the other hand, if modes of liability shall only describe the specific criminal conduct without implying a degree of blameworthiness, then the question is whether one could perceive a mode of liability as a requirement, which can simply be ticked in order to establish liability and then ignore the particular label in the sentencing process? According to criminal law theory, the main objectives of punishment are primarily retribution and deterrence.<sup>34</sup> It could be argued that labelling serves this purpose. Do modes of liability make sense if the particular label does not affect the sentence? If this is the case then all different labels seem rather superfluous. Nevertheless, it ought to be stressed that the sentencing process will neither be predictable, nor relatively uniform as long as these different interpretations of the classification of modes of liability and their impact on the sentencing process lead to opposed applications in practice.

### 1.2.1 LEGITIMACY TO EMBRACE A DIFFERENTIATED APPROACH

When considering the different concepts of individual criminal responsibility the initial question is whence the legitimacy to rely on one or the other is derived. Both Statutes of the *ad hoc* tribunals are silent on the sources of international criminal law. Therefore, it has been clarified by the ICTY that it has to rely on the sources of general international law as set out in Article 38(1) ICJ Statute,<sup>35</sup> as these are regarded as the most authoritative codified instrument on the sources of international law. However, the list provided by Article 38(1) is neither exhaustive,<sup>36</sup> nor does it provide for a hierarchy.<sup>37</sup> Nevertheless, a clear distinction must be drawn between the application of the sources listed in Article 38(1), which work in the international legal context of sovereign states based on consent,<sup>38</sup> and the application of sources in international criminal law, which concerns a relationship between the individual and the judiciary. While the ICJ applies, in order to avoid *non liquet*, all available sources of Article 38(1) and even draws on analogies, the latter is strictly forbidden in

<sup>34</sup> W Schabas, *The UN International Criminal Tribunals, The Former Yugoslavia, Rwanda and Sierra Leone* (CUP 2006) 554; see also *Mrkšić and Šljivančanin*, Appeal Judgment (n 30) paras 414-416.

<sup>35</sup> *Prosecutor v Kupreškić et al.* (Trial Judgment) IT-95-16-T (14 January 2000) para 540.

<sup>36</sup> It can be argued that that the list provided by Article 38(1) (a)-(d) ICJ Statute is not exhaustive as the ICJ has itself applied ‘the concept of general international law without reference to customary international law’. Hence, this would support the assumption that certain norms, which are not expressly listed in Art 38(1) could be considered sources of public international law: O Yasuaki, ‘The ICJ: An Emperor without Clothes? International Conflict Resolution, Article 38 of the ICJ Statute and the Sources of International Law’ in N Ando and others (eds), *Liber Amicorum Judge Shigeru Oda*, Volume 1 (Brill Nijhoff 2002), 208 fn 42. It has further been argued that there is ‘ample evidence’ that Article 38 is not exhaustive, because the ICJ additionally recognises *ius cogens*, unilateral declarations (which do not lead to the formation of international customary law) and binding decisions of international organisations; K Zemanek, ‘Is the Term “Soft Law” Convenient?’ in A Rest and others (eds), *Liber Amicorum Professor Ignaz Seidl-Hohenveldern: In Honour of his 80<sup>th</sup> Birthday* (Brill Nijhoff 1998) 844; van Sliedregt *Individual Criminal Responsibility* (n 4), 12.

<sup>37</sup> Notwithstanding the absence of a prescribed hierarchy, the principles *lex posterior priori derogate* and *specialia generalibus derogant* could ultimately indicate a specific order.

<sup>38</sup> V Degan ‘On the Sources in International Criminal Law’ (2005) 4 Chinese Journal of International Law 45, 50.

international criminal law in relation to ‘incrimination of human behaviour’.<sup>39</sup> Therefore a distinction between international law and international criminal law for the purpose of the applicable law has to be drawn.

The application of customary international law, which plays an essential role in dynamic law-making, has been criticised on the basis that the identification of *opinio iuris* and state practice, and the respective weight attached to each, is difficult.<sup>40</sup> It could then be argued that this ambiguity leads inevitably to the question whether a conflict with *nullum crime sine lege* arises as a result thereof.<sup>41</sup> Following this line of argumentation it appears that although judicial law-making has played an important role in the development of international criminal law and particularly the modes of liability, a requirement of foreseeability and thus predictability as to what constitutes criminal conduct is vital. Only an exhaustive list enables stability, which is particularly essential in the context of international criminal justice.

Article 21 of the Rome Statute of the ICC contains a specific provision on sources and therefore lacunae are not likely to arise as easily. This is an innovation in international criminal law, as it is the first codification of international criminal law sources. Unlike Article 38(1), this provision sets out ‘the applicable law’ in a hierarchical order. Although Article 21 does not mention customary international law expressly, its application may be based on Article 21(1)(b), namely rules of international law.<sup>42</sup>

Notwithstanding the above, ‘judicial law-making’ occupies an essential role in the development in international criminal law, and has contributed to the elaboration of concepts of individual criminal responsibility.<sup>43</sup> This is clearly demonstrated in the case law of the *ad hoc* tribunals: the ICTY has developed the notion of JCE<sup>44</sup> in order to establish the individual criminal responsibility of high-level leaders, who are rather remote from the actual crime scene. Yet the ICC has largely rejected the JCE doctrine and resorted instead to a complex notion based on the concepts of indirect perpetration and co-perpetration.<sup>45</sup> The two latter concepts are based on the notion of ‘control over the crime’ (‘the control theory’), which is rooted in German doctrine and has been developed by the German scholar Claus Roxin.<sup>46</sup> Based on Articles 6(1) and 7(1) of the ICTR and ICTY Statutes respectively, the *ad*

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<sup>39</sup> Ibid 51, 53.

<sup>40</sup> van Sliedregt, *Individual Criminal Responsibility* (n 4) 14.

<sup>41</sup> Ibid.

<sup>42</sup> W Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2010) 391.

<sup>43</sup> van Sliedregt, *Individual Criminal Responsibility* (n 4) 14.

<sup>44</sup> See for instance *Tadić* Appeal Judgment (n 23); *Krstić* Appeal Judgment (n 28); *The Prosecutor v Obrenović* (Sentencing Judgment) IT-02-60/2-S (10 December 2003).

<sup>45</sup> A Herzig, ‘Die Tatherrschaftslehre in der Rechtsprechung des Internationalen Strafgerichtshofs’ (2013) 4 *Zeitschrift für Internationale Strafrechtsdogmatik*, 189.

<sup>46</sup> See for instance *Prosecutor v Lubanga* (Decision on the Confirmation of Charges) ICC-01/04-01/06 (29 January 2007) para 330, where it was held that perpetrators are those who ‘physically carry out the objective elements of the offence, but also include those who, in spite of being removed from the scene of the crimes, control or mastermind its commission because they decide whether and how the offence will be committed’.

*hoc* tribunals differentiate between committing, planning, ordering, instigating and, finally, aiding and abetting. Each of these distinct modes entails different *actus reus* and *mens rea* requirements.

Article 25(3)(a)-(d) of the ICC Statute distinguishes in detail different modes of individual criminal responsibility, thereby supplementing them. There is a position that Article 25(3)(a)-(d) provides a hierarchy in that it categorises systematically the modes of liability<sup>47</sup> starting with commission liability, which entails the highest degree of individual criminal responsibility. Thus, Article 25 (a) stipulates that individual criminal responsibility arises if a person '[c]ommits such a crime, whether as an individual, jointly with another or through another person'. Article 25 then goes on to list various forms of instigation and ordering in the second category. The third group contains the modes of aiding and abetting and otherwise assisting in the commission or the attempted commission. Finally the fourth category refers to the contribution 'to the commission or attempted commission of such a crime by a group of persons acting with a common purpose'.<sup>48</sup> Article 25(3)(a) (Second Alternative) contains two distinct elements, namely 'committing' and 'jointly with another'. Therefore, one can infer from the latter concept, also referred to as co-perpetration, that it entails the objective element, namely the physical commission, and the subjective element consisting of the common plan.<sup>49</sup> On first sight, this concept may seem to be similar or even identical to the JCE doctrine developed by the ICTY. However, notwithstanding the fact that the JCE doctrine played a significant role in the definition of the concept of joint commission under the ICC Statute, it is a different concept. In addition to the basic form of JCE, there are two further forms of the JCE doctrine, namely JCE II and III, which share the same *actus reus* that is required for basic JCE (JCE I), but differ in relation to the *mens rea* requirements.<sup>50</sup> Accordingly, it becomes clear that JCE (I and II), as particularly developed by the ICTY, is not expressly included in the Statute, but has rather been developed as a form of commission<sup>51</sup> liability, established in customary international law.<sup>52</sup> JCE II pertains to the so-called 'concentration camp cases'. In these types of cases, the alleged perpetrators are 'military administrative units' acting according to a 'concerted plan'.<sup>53</sup> JCE II is very similar to JCE I in that the requirements are the same, but in JCE II personal knowledge of the system of ill-treatment is additionally required.<sup>54</sup> JCE III is the most far-reaching category. In addition to the basic requirement of JCE I, individual criminal responsibility is already incurred if a crime, which was committed

<sup>47</sup> Werle, 'Individual Criminal Responsibility' (n 4) 956, 957; Werle distinguishes between four categories of modes of liability, each reflecting a different degree of culpability.

<sup>48</sup> Article 25(3)(d) ICC Statute.

<sup>49</sup> Werle, Individual Criminal Responsibility in Article 25 ICC Statute (n 4) 958.

<sup>50</sup> *Tadić* Appeal Judgment (n 23) para 228.

<sup>51</sup> This categorisation of JCE as either a form of principal liability under 'commission' or accomplice liability under 'aiding and abetting' has led to discussions before the ICTY Trial and Appeals Chamber. For further discussion see Damgaard (n 4), 193-211.

<sup>52</sup> G Werle, *Völkerstrafrecht* (3<sup>rd</sup> edn, Mohr Siebeck 2012) 219; However, the legal value of the extended form of JCE, namely JCE III, has been subject to immense criticism, see *Co-Prosecutor v Nuon Chea, Ieng Sary, Ieng Thirith, Khieu Samphan* (Decision on the Applicability of Joint Criminal Enterprise) Case File/Dossier No. 002/19-09-2007(ECCC/TC (12 September 2011) para 27.

<sup>53</sup> Eg running concentration camps, see Damgaard (n 4) 141.

<sup>54</sup> *Ibid* 145.

outside the common plan, was a foreseeable possibility caused by the execution of the common plan, and the accused was aware of this possible consequence.<sup>55</sup> Nonetheless, the concept of co-perpetration must be distinguished from JCE I, II and III. While the *actus reus* under Article 25(3)(a) requires an ‘essential’ contribution to the realisation of the common plan, which is necessary for the commission of the offence, the ICTY has taken the stand that any contribution can be sufficient if it is carried out within the common plan.<sup>56</sup> Accordingly, it becomes clear that the high threshold of the *actus reus* of the former might be the most striking feature of distinction. It is argued that this requirement is based on the interpretation in line with the ‘differentiated participation model’, according to which co-perpetration as form of commission entails the highest degree of liability.<sup>57</sup> This approach supports the presumption that various modes of liability are mutually exclusive. Accordingly the principal-accessory ‘clear cut’ distinction would entail an indication as to the seriousness of the individual’s contribution to the crime, which lies in the centre of numerous debates in international criminal law.

### 1.3 OBJECTIVES OF THIS STUDY

This study seeks to investigate whether the distinction between primary and secondary perpetration, and more specifically aiding and abetting, in international criminal law is merely terminological or whether it is linked to specific penological consequences and to provide a coherent account of the current status. The general understanding of the term “accessorial liability” in the international context appears to be that it comprises also order-givers and those who incite/solicit. However, each mode of liability stands by itself, as each possesses different *mens rea* and *actus reus* requirements. The focus of this dissertation will lie on aiding and abetting, as it is argued that this is the only mode in the practice of the *ad hoc* tribunals, which is in fact treated as inferior to other modes at the sentencing stages. Moreover, as will be seen throughout this work, several criminal codes, such as those of Croatia, Serbia and BiH, only consider the aider and abettor to be an ‘accessory’.

In order to understand the prevalence of a respective approach, be it unitary or differentiated, it is vital to investigate which justifications have been put forward by judges for embracing either a ‘differentiated’ or a ‘unitary’ approach in relation to sentencing. Thus, the objectives of this study are:

- To identify the position of modes of individual criminal responsibility (with emphasis on aiding and abetting) within the framework of international sentencing.<sup>58</sup>

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<sup>55</sup> S Wirth, ‘Committing Liability in International Criminal Law’ in C Stahn and G Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill 2009) 334.

<sup>56</sup> *Tadić* Appeal Judgment (n 23) para 229 (3); *Kvočka et al.* Trial Judgment (n 22) para 274: According to the Appeals Chamber, ‘it is sufficient for the participant to perform acts that in some way are directed to the furthering of the common plan or purpose’.

<sup>57</sup> Werle, Individual Criminal Responsibility in Article 25 ICC Statute (n 4) 961.

<sup>58</sup> The primary objective of this thesis is to examine the relationship between aiding and abetting and sentence severity against the backdrop of commission liability and sentencing. However, for the sake of good order, all other modes are included but their impact on the sentence is only examined to a very limited extent.

- To identify the origins of individual criminal responsibility linked to selected domestic jurisdictions.
- To examine the relationship between modes of liability and sentence severity in international criminal law.
- To identify and evaluate how much weight judges have attached to different modes of liability in the sentencing process, and more specifically whether a differentiated or unitary approach is prevalently embraced. Thus the jurisprudence of the following tribunals<sup>59</sup> will be analysed by placing the justification of a specific approach taken by judges (be it unitary or differentiated) under close scrutiny: ICTY, ICTR, the Special Court for Sierra Leone (SCSL), the Regulation 64 Panels in Kosovo (Kosovo Panels), the War Crimes Chambers for Bosnia and Herzegovina (WCCBiH), the Special Tribunal for Lebanon (STL), the Special Panels for Serious Crimes in Dili District Court (SPSC), the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the Supreme Iraqi Criminal Tribunal (SICT).<sup>60</sup> Particularly with reference to the *ad hoc* tribunals it is not attempted to analyse the ways in which different modes of liability have been interpreted and analysed by international, hybrid and domestic courts *per se* in depth as this has already been done thoroughly in other works,<sup>61</sup> although these processes may be elaborated on, on a contextual basis where appropriate.
- To compare how international and hybrid courts and tribunals have applied modes of liability, in order to identify which impact the respective sentencing practice of the purely international tribunals and the ICC has had on hybrid tribunals.
- To identify cases where principal or accessorial liability has had a significant impact on the sentence length.
- To analyse empirically whether the findings of the foregoing jurisprudential analysis can be verified by means of quantitative analyses. This part for statistical reasons restricted to the *ad hoc* tribunals, the WCCBiH and the SPSC.

<sup>59</sup> As will be seen throughout this work, the practice of some hybrid tribunals has not been analysed as thoroughly as the approaches embraced by the *ad hoc* tribunals, for two main reasons: (i) in some instances the accessibility of the judgments was very limited (ie the Kosovo Panels, or in relation to the SPSC no appeal judgments), (ii) the number of judgments rendered was too low (ECCC, SCSL) or no judgments were rendered by the tribunals at the time of writing (STL) or (iii) the issue relating to the question whether accessories are less culpable has not been addressed sufficiently or at all and did thus not allow for inferences. The second consideration also applies to the ICC although, despite the limited judgments rendered to date, clear opinions have been voiced by judges in relation to the issues in question.

<sup>60</sup> Although the SICT is strictly speaking not an internationalised tribunal, as it is integrated into the domestic system,<sup>60</sup> Article 24 (e) of its Statute requires that the sentencing practice created by 'relevant international precedents' is taken into account; see Cryer and others, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press 2010) 194 and S Williams, *Hybrid and Internationalised Criminal Tribunals* (Hart 2012) 117. Similarly the ECCC is, strictly speaking, a domestic court. Due to special characteristics (it consists of Cambodian and international Judges, applies Cambodian and international law) it is referred to as hybrid/internationalised tribunal.

<sup>61</sup> See *inter alia* publications enumerated (n 4).

- To explore the reasons why judges use contradictory approaches and why a respective theory is more or less frequently used.<sup>62</sup>

#### 1.4 METHODOLOGY

This study draws on descriptive, comparative and empirical research and finally includes interdisciplinary inquiries. Following a doctrinal and jurisprudential examination, a quantitative analysis of the sentencing practice of the *ad hoc* tribunals, the WCCBiH and the SPSC are introduced. Moreover partial comparative components are in place when exploring the domestic concepts of individual criminal responsibility. It is not attempted to include considerations regarding modes of liability from a criminal law theory angle, as this has been done extensively elsewhere.<sup>63</sup> Accordingly, it can be said that this dissertation seeks to achieve its objectives by engaging jurisprudential, empirical and partly interdisciplinary examination.

#### 1.5 TERMINOLOGY

For the purpose of this study it is necessary to clarify the use of the term ‘accessory’ as the ambit of it may differ depending on the jurisdictional context. In British and American English the term accessory denotes both an “abettor” and “a thing of minor importance”.<sup>64</sup> The term ‘accessory’ has been used in a variety of ways. According to Garner’s Dictionary of Legal Usage, ‘American writers tend to use accomplice to include all principals and accessories before the fact, but to exclude accessories after the fact (...), [o]ther writers use accomplice to include all principals and accessories’.<sup>65</sup> Additionally, the terms accomplice and accessory have been used as synonyms: according to Ashworth and Horder ‘[t]he simplest way of drawing a distinction [between a principal and accessories] is to say that a principal is a person whose acts fall within the legal definition of the crime, whereas an accomplice (sometimes called an ‘accessory’ or ‘secondary party’) is anyone who aids, abets, counsels, or procures a principal’.<sup>66</sup> In relation to the *ad hoc* tribunals, however, it appears that there is no consensus concerning the ambit of the term accessory.<sup>67</sup> For the purpose of this work the term accessory denotes only aiding and abetting, unless expressly specified otherwise. Similarly,

<sup>62</sup> Due to the limited information available relating to judges of hybrid tribunals this analysis is restricted to ICTY/ICTR and ICC judges. However, all considerations may, subject to some limitations, also apply to international judges.

<sup>63</sup> See for instance J Ohlin, ‘Second-Order Linking Principles: Combining Vertical and Horizontal Modes of Liability’ (2012) 25 *Leiden Journal of International Law* 771; J Ohlin, ‘Towards a Unique Theory of International Criminal Sentencing’ in G Sluiter and S Vasiliev (eds), *International Criminal Procedure: Towards a Coherent Body of Law* (Cameron May 2008); van Sliedregt, *Individual Criminal Responsibility* (n 4) 65.

<sup>64</sup> B A Garner, *Garner’s Dictionary of Legal Usage* (3<sup>rd</sup> edn OUP 2011) 12.

<sup>65</sup> *Ibid.*

<sup>66</sup> Garner (n 64) 12; A Ashworth and J Horder, *Principles of Criminal Law* (7<sup>th</sup> edn OUP 2013) 419. See also Oxford Dictionary of Law (8<sup>th</sup> edn OUP 2015).

<sup>67</sup> *Furundžija* Trial Judgment (n 21) para 257; *Prosecutor v Kordić and Čerkez* (Trial Judgment) IT-95-14/2-T (26 February 2001) 373; *Prosecutor v Orić* (Trial Judgment) IT-03-68-T (30 June 2006) 292; *Prosecutor v Mpambara* (Trial Judgment) ICTR-01-65-T (11 September 2006) 37.

in view of the quantitative study, where it was necessary to group modes of liability, only aiding and abetting is considered to be a mode of “indirect perpetration”, while all other forms of individual criminal responsibility are comprised by the term “direct perpetration”.<sup>68</sup>

## 1.6 LITERATURE REVIEW

Although individual criminal responsibility and particularly the application of different modes thereof, has been subjected to thorough research,<sup>69</sup> empirical and particularly quantitative analyses concerning the relationship between modes of liability and sentence severity have been rather scarce. Moreover, to the author’s knowledge, such studies do not include all hybrid tribunals subject to this study. It may be pointed out that while literature concerning individual criminal responsibility and international sentencing is generally extensive, the specific question whether or not a normative distinction between the principal perpetrator and the accessory to a crime is merely of terminological nature or whether it is linked to corresponding penological consequences has not yet been researched, analysed and thus answered as profoundly as in this work. Due to the fact that some of the following, already existing, studies only partially cover the issues under study, and instead mainly seek to answer the question of consistency, predictability of sentencing and emerging patterns in general, a comprehensive summary of utilised research methods and findings would exceed the scope of this work.

To date a few highly valuable empirical analyses<sup>70</sup> have been conducted. In 2001 Meernik and King conducted the first empirical analysis of the ICTY sentencing practice at that time by using regression analysis in order to assess the influence of various sentencing factors, including the mode of liability, on the sentence length.<sup>71</sup> Thereafter, further, at least partially empirical studies into international sentencing practice were conducted by Meernik<sup>72</sup> and by Meernik and King together<sup>73</sup> and a few years

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<sup>68</sup> See Chapter 3 II for the justification of the exclusive categorisation as indirect perpetration.

<sup>69</sup> See for instance (n 4).

<sup>70</sup> See J Meernik and K L King, *The Effectiveness of International Law and the ICTY - Preliminary Results of an Empirical Study* (2001) *International Criminal Law Review* 1, 343; J Meernik and K L King, ‘The Sentencing Determinants of the International Criminal Tribunal for the Former Yugoslavia: An Empirical and Doctrinal Analysis’ (2003) 16 *Leiden Journal of International Law* 717; Holá and others, ‘Is ICTY Sentencing Predictable?’ (n 33) 79; U Ewald, ‘“Predictably Irrational”- International Sentencing and its Discourse against the Backdrop of Preliminary Empirical Findings on the ICTY Sentencing Practices’ (2010) *International Criminal Law Review* 10, 365; S D’Ascoli *Sentencing in International Criminal Law: The UN ad hoc Tribunals and Future Perspectives for the ICC* (Hart 2010); S Jodoin, ‘Understanding the Behaviour of International Courts: An Examination of Decision-Making at the *ad hoc* and International Criminal Tribunals’ (2010) *Journal of International Law and International Relations* 6, 1; J Meernik ‘Sentencing Rationales and Judicial Decision Making at the International Criminal Tribunals’ (2011) *Social Science Quarterly* 92, 588; B Holá, A Smeulers and B Bijleveld ‘International Sentencing Facts and Figures’ *Journal of International Criminal Justice* (2011) 9, 411; B Holá, A Smeulers and B Bijleveld, ‘Consistency of International Sentencing: ICTY and ICTR Case Study’ (2012) *European Journal of International Criminal Justice* 9, 541.

<sup>71</sup> Meernik and King, *The Effectiveness of International Law and the ICTY* (n 70) 343.

<sup>72</sup> J Meernik, ‘Victor’s Justice or the Law? Judging and Punishing at the International Criminal Tribunal for the Former Yugoslavia’ *Journal of Conflict Resolution* (2003) 47, 140; J Meernik ‘Sentencing Rationales and Judicial Decision Making at the International Criminal Tribunals’ (2011) *Social Science Quarterly* 92, 588.

<sup>73</sup> Meernik and King, *The Sentencing Determinants* (n 70).



later by D'Ascoli, Ewald and Jodoin<sup>74</sup> In past years, Holá and others have produced several highly valuable empirical studies<sup>75</sup> *inter alia* revolving around the consistency of the international sentencing practice. Most of these studies focus on a number of sentencing factors and their role in the sentencing process and mostly examine whether international sentencing bears consistency and whether specific patterns have emerged. Ewald's study additionally examines judicial behaviour throughout the decision-making, while Jodoin's analysis explores judges' behaviour by 'drawing on different models of judicial behaviour developed for domestic courts'.<sup>76</sup> Towards the end of the course of writing, in 2014 Aksenova published her dissertation, *Complicity in International Law*.<sup>77</sup> As part of her work, Aksenova also examined *inter alia* the correlation between modes of liability and sentencing in relation to the *ad hoc* tribunals the SCSL and the ECCC in one chapter.

However, only a limited number of the above studies examined the role of modes of liability throughout sentencing. Those which focused on the subject under study, did so to a comparably rather limited extent. In her book *Sentencing in International Criminal Law: The UN ad hoc Tribunals and Future Perspectives for the ICC*, Sylvia D'Ascoli<sup>78</sup> provides a thorough analysis and evaluation of the sentencing process of both *ad hoc* tribunals. Thus D'Ascoli's study examines the sentencing practice of the *ad hoc* tribunals by means of a doctrinal and empirical analysis in order to verify the influence of 'sentencing determinants' on the length of the sentence. Although D'Ascoli's valuable work covers a part of the subject under study, she does not differentiate between various modes of liability; a distinction is restricted to a differentiation between convictions based on direct and convictions grounded on indirect perpetration. None of the aforementioned studies shifted the focus entirely to the relationship between modes of liability and sentencing. While Meernik and King,<sup>79</sup> as well as Ewald and D'Ascoli, only distinguish between individuals found guilty under Articles 7(1) and 7(3) ICTY (Articles 6(1) and 6(3) ICTR) Statute respectively, Holá and others differentiate between each mode of liability in their studies. Most of the above mentioned studies and more specifically those examining whether there is a correlation between the modes of liability and the severity of the sentence, are confined to the sentencing practice of the ICTY, ICTR and lately also extended to comprise the SCSL and the ECCC. Moreover, they do not thoroughly analyse and evaluate the impact of various modes of liability on the length of the sentence. Although Aksenova also embarked on an analysis concerning whether there is a correlation between complicity and sentencing at the *ad hoc* tribunals, the SCSL and the ECCC, it must be noted that due to the fact that it is limited to one chapter of her dissertation, it is

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<sup>74</sup> D'Ascoli (n 70); Ewald N (70); Jodoin (n 70).

<sup>75</sup> See *inter alia* Holá, Smeulers and Bijleveld 'Is ICTY Sentencing Practice Predictable?' (n 33); Holá, Smeulers and Bijleveld 'International Sentencing Facts and Figures' (n 70); Smeulers and Bijleveld, 'Consistency of International Sentencing' (n 70).

<sup>76</sup> Jodoin (n 70) 1.

<sup>77</sup> Aksenova (n 20).

<sup>78</sup> D'Ascoli (n 70).

<sup>79</sup> Meernik and King, The Sentencing Determinants (n 70).

not as profound as this work aims to be in relation to the assessment of the relationship between principal and accessorial liability and sentence severity.

This dissertation adds to the existing literature by providing a systematic and methodological examination of the relationship between modes of individual criminal responsibility and the severity of the punishment. It comprises a doctrinal analysis against the backdrop of the ICC, SCSL, Kosovo Panels, WCCBiH, SICT, STL, SPSC and ECCC in relation to the treatment of principals and accessories in their sentencing practice, provides the opportunity to carry out a precise assessment of their actual status and to identify the reasons for the pertinent practice. For statistical reasons, explained in Chapter 3, the quantitative analysis will be conducted based on the WCCBiH, SPSC and the *ad hoc* tribunals.

### 1.7 OUTLINE OF CHAPTERS

This work consists of four chapters, which can roughly be divided into three parts, namely, (i) a comprehensive analysis of the current situation by means of jurisprudential analysis, (ii) statistical verification of pertinent results, and finally (iii) an exploration of the rationales behind the respective practice. Following the introduction in Chapter 1, Chapter 2 provides an introduction to the issues revolving around the role of modes of liability in international criminal sentencing practice, thereby turning to the roots of the concept of individual criminal responsibility and exploring various domestic approaches in a comparative inquiry. Chapter 3 consists of two parts, which comprise the jurisprudential and the quantitative analyses respectively. Thus, the latter aims to verify the outcome of the jurisprudential analysis by assessing the relationship between modes of liability and specifically the principal-accessory distinction and the severity of the sentences as handed down by the *ad hoc* and hybrid tribunals. Finally, Chapter 4 explores potential reasons for discrepant approaches from various angles.

Chapter 2 provides an overview of different modes of liability. Thus, attention is particularly drawn to the distinction of attribution concepts used by the *ad hoc* tribunals and the ICC and internationalised tribunals, eg the concepts of JCE and co-perpetration, indirect perpetration and indirect co-perpetration. Further, the chapter outlines different participation models deriving from domestic criminal law, as international courts and tribunals have frequently adopted some of these concepts. This serves as a basis for understanding why various domestic systems include one or the other or even a mixed model<sup>80</sup> of participation, which is usually reflected in and justified by their sentencing practice. Accordingly, a number of domestic concepts are described in the light of their particular implication on the sentencing practice. In this context this chapter also seeks to address and underline statutory differences of the *ad hoc* tribunals, the ICC and internationalised tribunals concerning the

<sup>80</sup> Modes can be overlapping; see van Sliedregt *Individual Criminal Responsibility* (n 4) 65.

application of modes of liability and available sentencing provisions. After an analysis of the differences, the chapter points out the problem of international courts “borrowing” domestic concepts and “installing” these in a largely different context. A comparative study concerning the role of modes of liability in the sentencing process of various domestic legal systems shall thereby help to understand conceptual differences, in order to scrutinise pertinent approaches concerning the implementation of domestic concepts in international criminal law.

It is argued that a clear pattern has evolved concerning the principal-accessory distinction in an international sentencing context in that accessories are, despite some opposing remarks, indeed perceived to be less blameworthy.

Chapter 3 describes the framework of current sentencing practice of the *ad hoc* tribunals, the ICC, the SCSL, the Regulation 64 Panels in Kosovo, the War Crimes Chambers for Bosnia and Herzegovina (WCCBiH), the Supreme Iraqi Criminal Tribunal (SICT), the Special Tribunal for Lebanon (STL), the Special Panels for Serious Crimes (SPSC) in the Dili District Court, and the Extraordinary Chambers in the Courts of Cambodia (ECCC) in order to identify which position modes of liability occupy in this framework. In addition, a jurisprudential analysis (Part I) identifies and evaluates statements made by judges regarding modes of liability, in order to examine the approach taken when sentencing perpetrators. Moreover, this chapter is devoted to a quantitative study (Part II) in order to identify and verify the findings concerning the influence of various modes of liability on the length of the sentence imposed. The techniques used to carry out this study are multiple regression analysis and multilevel analysis. These analyses enable the assessment of the relationship between different factors and their impact on a dependent variable. Therefore, in order to determine the strongest predictors for the length of the sentence, the sentence is the dependent variable. Accordingly, it can be examined which combination of factors (as independent variables) maximally relate to the final sentence. It follows that the independent variables in this study include amongst others modes of liability, while other independent variables comprise factors generally considered to be determinants in international criminal sentencing. This facilitates filtering out the impact of modes of liability on the sentence and thus provides an answer to the question whether or not accessories are perceived to be less blameworthy.

As Chapter 3 addresses, in describing the limitations of this study, the analyses are for statistical reasons, only based on sentencing data from the ICTY, ICTR, the SPSC and the WCCBiH. As can be seen the quantitative analyses both reveal that accessories are punished more mildly than all other perpetrators, thereby verifying the findings of the jurisprudential analyses.

Chapter 4 explores the reasons for pertinent practice from various angles. It seeks to take a closer look at the composition of the bench and the legal cultural background of judges in cases where modes of liability were expressly accorded legal weight in relation to the punishment and thus facilitates an examination of whether there is a correlation between the composition of the bench and a differentiated approach. Moreover, an interdisciplinary approach takes shape by approaching the issues in question under consideration of the psychology of law-making and behavioural economics. Other potentially influential factors, such as the role of subconscious behaviour in judicial decision-making, are explored in order to understand the interplay of several factors which may influence judges. It is argued that the reason for an established differentiated theory in the sentencing practice of the *ad hoc* tribunals is rooted in a plurality of factors, which may to a large degree derive from the legal cultural background of a judge and ultimately lead to overreliance on previous case law.

## CHAPTER 2

### INDIVIDUAL CRIMINAL RESPONSIBILITY AND ITS MODES OF ATTRIBUTION: THE PRINCIPAL ACCESSORY DIVIDE IN INTERNATIONAL CRIMINAL LAW

#### 2.1 INTRODUCTION

Individual criminal responsibility for core international crimes is a long established concept, according to which a person is individually criminally responsible if a respective crime can be attributed to this person. Attribution of a crime can take place via different models, which have different requirements. Accordingly an individual cannot only be held criminally responsible when he ‘materially commits the crime’, but also when he contributes to the commission in different ways.<sup>81</sup> Generally, attribution of a crime requires that certain factors are satisfied, namely that all elements of the *actus reus* of the crime are present and that the individual was in possession of the required *mens rea*.<sup>82</sup> However, in addition to the requirements of the substantive crime, the accused must have satisfied the elements of the respective mode of liability.<sup>83</sup>

#### 2.2 INDIVIDUAL CRIMINAL RESPONSIBILITY IN INTERNATIONAL CRIMINAL LAW

I am (...) unpersuaded that it will assist the work of the Court to establish a hierarchy of seriousness that is dependent on creating rigorous distinctions between the modes of liability within Article 25(3) of the Statute.<sup>84</sup>

This recent separate opinion of Judge Fulford in the *Lubanga* judgment pinpoints the problem, which denotes the contrary perceptions relating to the punishment of principals and accessories.

In international criminal law crimes are frequently carried out by a plurality of persons ‘acting in pursuance of a common criminal design’.<sup>85</sup> Domestic legal systems have developed different legal concepts in order to assess the individual’s role in collectively committed offences and in responding with legal consequences thereto.<sup>86</sup> Some of these concepts have been partly borrowed by international judicial institutions.<sup>87</sup>

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<sup>81</sup> Cassese and others, *Cases and Commentary* (n 9) 323.

<sup>82</sup> I Bantekas, *International Criminal Law* (4<sup>th</sup> edn, Hart 2010) 51.

<sup>83</sup> Werle, ‘Individual Criminal Responsibility in Article 25 ICC Statute’ (n 4) 955 seq.

<sup>84</sup> Separate Opinion of Judge Adrian Fulford (n 15) para 9.

<sup>85</sup> *Tadić* Appeal Judgment (n 23) para 191; Olásolo *Responsibility of Senior Political and Military Leaders* (n 4) 20; van Sliedregt, *Individual Criminal Responsibility* (n 4) 65; G Werle, *Principles of International Criminal Law* (2<sup>nd</sup> edn, TMC Asser Press 2009) 167.

<sup>86</sup> A Cassese and others, *Cassese’s International Criminal Law* (3<sup>rd</sup> edn, OUP 2013) 162.

<sup>87</sup> van Sliedregt *Individual Criminal Responsibility* (n 4) 65.

To date, two main approaches can be observed on the international level; on the one hand, the unitary approach,<sup>88</sup> which converges with the view held *inter alia* by Judge Fulford<sup>89</sup> and Judge Van den Wyngaert,<sup>90</sup> and on the other hand the differentiated approach.<sup>91</sup> The former is followed by a few national legal systems,<sup>92</sup> which do not distinguish between the principal perpetrator and a participant or accessory respectively. As a result, every person who contributes to a crime and possesses the required *mens rea*, irrespective of the derivative nature of the criminal responsibility, is considered to be a principal.<sup>93</sup> This is, as Olásolo observes, a ‘purely casual approach to the notion of perpetration’.<sup>94</sup> Nevertheless, judges will commonly take into consideration the circumstances of the perpetrator and thereby include his actual role and contribution to the commission of the crime in order to assess his culpability and to reflect these findings in the final sentence.<sup>95</sup>

International judicial institutions typically follow the approach of categorising every charge according to the specific mode(s) of liability, despite the lack of any statutory requirement thereof.<sup>96</sup> Accordingly discussions as to which mode(s) is specifically applicable occupy a solid position in the case law of the international criminal courts.<sup>97</sup> Yet these detailed considerations are rather a feature of the legal systems following a differentiated approach.<sup>98</sup> According to the differentiated model, a distinction is made between the physical or primary perpetrator and the accessory or participant, whose liability derives from the liability of the principal.<sup>99</sup> This approach of distinction is manifest in countries such as Germany, Spain and Latin America and is of importance as liability as an accessory will normally

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<sup>88</sup> Also referred to as “monistic”, see Cassese and others (n 86) 162, fn 1.

<sup>89</sup> Separate Opinion of Judge Adrian Fulford (n 15) para 9.

<sup>90</sup> Concurring Opinion of Judge Christine Van den Wyngaert (n 17) para 22: ‘Although I can see that there is a conceptual difference between principal and accessorial criminal responsibility (one is direct and the other is derivative), I do not believe that this necessarily translates to a different legal treatment of those who are found guilty under one or the other form’. At para 23: ‘Like Judge Fulford, I see no proper basis for concluding that acting under Article 25(3)(b) of the Statute is less serious than acting under Article 25(3)(a)’. At para 24: ‘The same applies to aiding and abetting under Article 25(3)(c) of the Statute. Although in some legal systems, aiding and abetting may be treated as less serious than committing, I see no legal basis for this in the Statute. In fact, I fail to see an inherent difference in blameworthiness between aiding and abetting and committing a crime’.

<sup>91</sup> Also referred to as “normative”, see van Sliedregt, *Individual Criminal Responsibility* (n 4) 77; or as “dualistic”, see Cassese, *Cases and Commentary* (n 9) 162, fn 1.

<sup>92</sup> Such as Austria, France, Italy, Denmark and the United States of America.

<sup>93</sup> Olásolo, *Responsibility of Senior Political and Military Leaders* (n 4) 19; Cassese, *Cassese’s International Criminal Law* (n 9) 162;

<sup>94</sup> Olásolo, *Responsibility of Senior Political and Military Leaders* (n 4) 19.

<sup>95</sup> J Vogel, *How to Determine Individual Criminal Responsibility in Systemic Contexts: Twelve Models*, <<http://www.defensesociale.org/02/16.pdf>> accessed 18 December 2013 p. 152; Cassese and others (n 86) 162.

<sup>96</sup> Cassese and others, *Cassese’s International Criminal Law* (n 86) 162. Moreover, van Sliedregt notes that in international criminal law a differentiated approach is favoured, adding that that this is primarily expressed in the language used in the provisions about individual criminal responsibility; see van Sliedregt, *Individual Criminal Responsibility* (n 4) 74.

<sup>97</sup> Cassese and others, *Cassese’s International Criminal Law* (n 86) 162.

<sup>98</sup> Cassese and others, *Cassese’s International Criminal Law* (n 86) 162; van Sliedregt, *Individual Criminal Responsibility* (n 4) 66.

attract a lower sentence and therefore serve as mitigation.<sup>100</sup> As suggested above, international judicial institutions can be said to have heavily drawn on such a distinction,<sup>101</sup> which could be motivated by the fact that the differentiated model is embodied in a number of domestic legal systems and holds a solid position in the concept of individual criminal responsibility.<sup>102</sup> At the same time the unitary approach has not received much attention in international criminal justice.<sup>103</sup> Nevertheless it has to be highlighted that the statutes of the ICC and the *ad hoc* tribunals, as well as those internationalised tribunals that are the subject of this study, do not prescribe any particular legal consequence to one or the other specific mode of liability as such and therefore do not distinguish between principals and accessories in relation to penalties.

It can be seen that the two main approaches set out above contradict each other and lead to inconsistencies in the sentencing practice of 58 modern international courts and tribunals. As Stewart points out, ‘courts will inevitably take inspiration from domestic standards as practitioners (...) [and] draw on domestic concepts in the day-to-day operation of modern international courts’.<sup>104</sup> As a result, given the variety of domestic approaches, discrepancies are predetermined when various domestic legal concepts are “borrowed” interchangeably.

In order to allocate and grasp the concepts applied by international courts for attributing liability to an individual involved in collective criminality, it is essential to understand the domestic practice in response to collective criminality and in particular its legal context, ie the implications on the sentencing practice. Therefore, various modes of liability as utilised by modern international courts are briefly explained and then discussed below within the framework of a principal-accessory distinction. Subsequently a closer look at domestic concepts from a comparative perspective seeks to clarify the reason for the use of respective participation concepts by international courts and tribunals.

## 2.2.1 MODES OF INDIVIDUAL CRIMINAL RESPONSIBILITY AT THE ICTY AND ICTR

The concept of individual criminal responsibility is codified and embodied in Article 7(1) of the ICTY Statute and Article 6(1) of the ICTR Statute, which are essentially identical<sup>105</sup> and thus both provide that the ICTY and the ICTR respectively have the power to hold individuals individually responsible

<sup>100</sup> H Olásolo, ‘Current Trends on Modes of Liability for Genocide, Crimes against Humanity and War Crimes’ in C Stahn and L van den Herik (eds), *Future Perspectives in International Criminal Justice* (TMC Asser 2009) 522; Cassese and others, *Cassese’s International Criminal Law* (n 86) 162.

<sup>101</sup> Cassese and others, *Cassese’s International Criminal Law* (n 86) 162. See also, H Olásolo, ‘Current Trends on Modes of Liability’ (n 100) 523: ‘(...) The Distinction between Principal and Accessorial Liability in Article 7(1) ICTY Statute has been Consistently Embraced by the ICTY Case Law’.

<sup>102</sup> van Sliedregt, *Individual Criminal Responsibility* (n 4) 68.

<sup>103</sup> J G Stewart, *The End of ‘Modes of Liability’ for International Crimes*, (2 November 2011) *Leiden Journal of International Law*, 9 <<http://ssrn.com/abstract=1953521>> accessed January 2013.

<sup>104</sup> Stewart, ‘The End of Modes of Liability’ (n 103).

<sup>105</sup> The only differences are that Article 6 of the ICTR Statute makes reference to Articles 2 to 4 as opposed to 2 to 5, as is the case in Article 7 of the ICTY Statute; Schabas, *The UN International Criminal Tribunals* (n 34) 289, 290.

for crimes falling within their jurisdiction. There are a number of models for the attribution of criminal conduct; because international criminal law has borrowed and occasionally modified such concepts, a comparative study of certain domestic systems in relation to modes of liability and their impact on the sentencing process will be inevitable. However, first and foremost it is essential to distinguish the modes of individual criminal responsibility, which are frequently employed by the *ad hoc* tribunals.

Articles 7(1) ICTY Statute and 6 (1) ICTR Statute provide:

A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 5 (2 to 4) of the present Statute, shall be individually responsible for the crime.

It follows that according to the foregoing provisions, the modes of liability employed at the ICTY and ICTR are (i) planning, (ii) instigating, (iii) ordering, (iv) committing, and (v) aiding and abetting in the planning, preparation or execution of a crime. Moreover, considering that this paper does not seek to discuss the boundaries of certain modes of liability, but rather how these have been interpreted in the light of a “principal-accessory” distinction and international sentencing practice, each mode is not discussed in depth. This has been done thoroughly in other works,<sup>106</sup> and therefore a brief overview of the modes of liability as utilised in international judicial institutions is given.

### 2.2.1.1 PLANNING

The first mode of liability, enumerated in Articles 7(1) and 6(1) is planning. Although it is in principle very similar to the Common Law concept of conspiracy and the civil law concept of complicity, planning must clearly be distinguished.<sup>107</sup> Unlike conspiracy and complicity, planning can constitute an act committed by one person alone.<sup>108</sup> The ICTR Trial Chamber provided in *Akayesu* for a frequently cited definition of planning, namely:

Planning can (...) be defined as implying that one or several persons contemplate designing the commission of a crime at both, preparatory and execution phases.<sup>109</sup>

According to the Appeal Chamber in *Kordić and Čerkez*, the *actus reus* is established if ‘one or more persons design the criminal conduct constituting one or more statutory crimes that are later perpetrated’ and that ‘it is sufficient to demonstrate that the planning was a factor substantially contributing to such criminal conduct’.<sup>110</sup> Further, the Appeals Chamber held that the *mens rea* of planning requires that ‘the perpetrator acted with direct intent in relation to his own planning (...)’.<sup>111</sup>

<sup>106</sup> See for instance van Sliedregt, *Individual Criminal Responsibility* (n 4); E van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (Springer 2003); Olásolo, *Responsibility of Senior Political and Military Leaders* (n 4); Damgaard (n 4).

<sup>107</sup> *Prosecutor v Akayesu* (Trial Judgment) ICTR-96-4-T (September 1998) para 480.

<sup>108</sup> *Ibid.*

<sup>109</sup> *Prosecutor v Krstić* (Trial Judgment) IT-98-33 (2 August 2001) para 601; *Prosecutor v Blaškić* (Trial Judgment) IT-95-14-T (3 March 2000) paras 278, 279.

<sup>110</sup> See *inter alia* *Prosecutor v Dario Kordić and Mario Čerkez* (Appeal Judgment) IT-95-14/2-A (17 December 2004) para 26.

<sup>111</sup> *Kordić and Čerkez* Appeal Judgment (n 110) para 26.



### 2.2.1.2 INSTIGATING

Instigation is held to involve ‘prompting another to commit an offence’,<sup>112</sup> through both, an act or an omission.<sup>113</sup> The ICTR Appeals Chamber held that ‘[t]he *mens rea* for this mode of responsibility is the intent to instigate another person to commit a crime or at a minimum the awareness of substantial likelihood that a crime will be committed in the execution of the act or omission instigated’.<sup>114</sup> ‘[I]t is sufficient to demonstrate that the instigation was a factor substantially contributing to the conduct of another person committing the crime’.<sup>115</sup> Nevertheless, there is no requirement to prove that the offence would not have taken place without the contribution of the instigator.<sup>116</sup>

### 2.2.1.3 ORDERING

The mode of “ordering” requires that the person in question is in possession of authority and utilises it in order to instruct another individual to commit a crime.<sup>117</sup> Notwithstanding the pre-condition of “authority”, there is no requirement which prescribes that the order giver is in a “superior-subordinate” relationship with the person receiving the order.<sup>118</sup>

### 2.2.1.4 COMMISSION

Commission does not pose any doubt as to the categorisation into modes attracting principal or accessory liability as it is the basic mode giving rise to principal liability. The principal to a crime imposes liability by fulfilling the *actus reus* and *mens rea* of the offence.<sup>119</sup> The ICTR Trial Chamber held that the commission of a crime ‘implies, primarily physically perpetrating a crime’.<sup>120</sup> It is, however, additionally possible to attract such principal liability by omission.

<sup>112</sup> *Akayesu* Trial Judgment (n 108) para 482; *Prosecutor v Nahimana et al.* (Appeal Judgment) ICTR-99-52-A (28. November 2007) para 480; *Blaškić* Trial Judgment (n 109) para 280.

<sup>113</sup> *Blaškić* Trial Judgment (n 109) para 280; *Kordić and Čerkez* Trial Judgment (n 67) para 387.

<sup>114</sup> *Nahimana et al.* Appeal Judgment (n 112) para 480.

<sup>115</sup> *Kordić and Čerkez* Appeal Judgment (n 110) para 27; *Prosecutor v Popović et al.* (Trial Judgment) IT-05-88-T (10 June 2010) Volume I, para 1009.

<sup>116</sup> *Kordić and Čerkez* Appeal Judgment (n 110) para 27.

<sup>117</sup> *Kordić and Čerkez* Appeal Judgment (n 110) para 28; *Prosecutor v Stanislav Galić* (Appeal Judgment) IT-98-29-A, 20 (30 November 2006) para 176; *Prosecutor v Boškoski and Tarčulovski* (Appeal Judgment) IT-04-82-A (19 May 2010) para 160. *Prosecutor v Milošević* (Appeal Judgment) IT-98-29/1-A (12 November 2009) para 290; *Prosecutor v Gotovina et al.* (Trial Judgment) IT-06-90-T (15 April 2011) Volume II, para 1959.

<sup>118</sup> *Kordić and Čerkez* Appeal Judgment (n 110) para 28; *Prosecutor v Semanza* (Appeal Judgment) ICTR-97-20 A (20 May 2005) para 361: ‘All that it required was the implied existence of a superior-subordinate relationship’. *Prosecutor v Kalimanzira* (Appeal Judgment) ICTR-05-88-A (20 October 2010) para 213.

<sup>119</sup> When considering whether responsibility for participation in a JCE was within the ambit of Article 7(1) ICTR Statute, the Appeals Chamber considered the meaning of commission in the *Tadić* case and stated that, ‘This provision covers first and foremost the physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law’. *Tadić* Appeal Judgment (n 23) para 188; *Kordić and Čerkez* Trial Judgment (n 67) para 376; *Prosecutor v Kayishema and Ruzindana* (Appeal Judgment) ICTR-95-1-A (1 June 2001) para 187; *Prosecutor v Gacumbitsi* (Trial Judgment) ICTR-2001-64-T (17 June 2004) para 285; *Prosecutor v Gacumbitsi* (Appeal Judgment) ICTR-2001-64-A (7 July 2006) para 60.

<sup>120</sup> *Prosecutor v Kalimanzira* (Trial Judgment) ICTR-05-88-T (22 June 2009) para 161; *Kalimanzira* Appeal Judgment (n 118) para 218; *Nahimana et al.* Appeal Judgment (n 112) para 482.

### 2.2.1.5 AIDING AND ABETTING

Another mode enumerated by Articles 7(1) ICTY Statute and 6(1) ICTR Statute respectively, is the mode of aiding and abetting, which ‘may occur before, during, or after the commission of the principal crime’.<sup>121</sup> It contains two different concepts, which must be distinguished from each other.<sup>122</sup> While aiding can be referred to as assisting someone, abetting was held to involve ‘facilitating the commission of an act by being sympathetic thereto’.<sup>123</sup> While the *actus reus* of aiding and abetting<sup>124</sup> entails ‘practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime’,<sup>125</sup> the required *mens rea* is that the aider and abettor had the ‘knowledge that these acts assist the commission of the offence’.<sup>126</sup> The ICTY Trial Chamber further held in *Blaškić* that the *actus reus* of aiding and abetting could also be fulfilled through an omission if the ‘failure to act had a decisive effect on the commission of the crime’ and if the required *mens rea* was present.<sup>127</sup> In the Appeals judgment, the Chamber held that, ‘The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (...), and this support has a substantial effect upon the perpetration of the crime’.<sup>128</sup> It then contrasted the participation in a JCE by stating that ‘it is sufficient for the participant to perform acts that in some way are directed to the furthering of the common plan or purpose’.<sup>129</sup> The Appeals Chamber in *Vasiljević* confirmed this definition of the *mens rea* and *actus reus* of aiding and abetting and added the ‘requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal. (...)’.<sup>130</sup>

In subsequent case law there has been confusion as to whether “specific direction” of an act is an essential element of the *actus reus* of aiding and abetting.<sup>131</sup> While the Trial Chamber held in the *Perišić* case that the specific direction requirement was not a requisite element of the mode of aiding and abetting, thereby relying on the *Mrkšić and Šljivančanin*, and *Blagojević and Jokić* Appeal

<sup>121</sup> *Prosecutor v Blaškić* (Appeal Judgment) IT-95-14-A (29 July 2004) para 48; *Gotovina et al.* (n 117) Volume II, para 1960.

<sup>122</sup> *Akayesu* Trial Judgment (n 108) para 484; *Kordić and Čerkez* Trial Judgment (n 67) para 389.

<sup>123</sup> *Akayesu* Trial Judgment (n 108) para 484.

<sup>124</sup> However, the mode of aiding and abetting originally derives from English criminal law and denotes four separate modes of liability. While aiding means giving support, helping or providing assistance, abetting refers to the act of inciting by aid, or to instigate or encourage.

<sup>125</sup> *Nahimana et al.* Appeal Judgment (n 112) para 482; *Prosecutor v Simić* (Appeal Judgment) IT-95-9-A (28 November 2006) para 85; *Blagojević and Jokić* (Appeal Judgment) IT-02-60-A (9 May 2007) para 127.

<sup>126</sup> *Furundžija* Trial Judgment (n 21) para 249; *Blaškić* Trial Judgment (n 109) para 283; *Gotovina et al.* Trial Judgment (n 117), para 1960.

<sup>127</sup> *Blaškić* Trial Judgment (n 109).

<sup>128</sup> *Tadić* Appeal Judgment (n 23) para 229 (iii).

<sup>129</sup> *Ibid.*

<sup>130</sup> *Vasiljević* Appeal Judgment (n 1) para 102.

<sup>131</sup> The discussion revolving around the “specific direction requirement” is extensive and a thorough account of the issues exceeds the scope of this essay. See *inter alia* *Prosecutor v Šainović et al.* (Appeal Judgment) IT-05-87-A (23 January 2014) paras 1615 seq.

Judgments,<sup>132</sup> the Appeals Chamber subsequently found by a majority<sup>133</sup> in its 2013 *Perišić* Appeal Judgment that the Trial Chamber erred in law by stating that specific direction was not an element of the *actus reus* of aiding and abetting.<sup>134</sup> The Appeal Chamber further underlined the essential nature of the ‘specific direction element’<sup>135</sup> by emphasising that no conviction for aiding and abetting could be entered if the presence of the specific direction requirement was not proven beyond reasonable doubt.<sup>136</sup>

In the *Šainović* Appeal Judgment, the Chamber acknowledged the two conflicting approaches between the *Mrkšić and Šljivančanin* and *Lukić and Lukić* Appeal Judgments in relation to the ‘specific direction element’ on the one hand and the *Perišić* Appeal Judgment on the other hand. It first considered ‘the jurisprudence of the Tribunal [ICTY] and the ICTR as well as customary international law to ascertain where the law stands on the issue of specific direction’.<sup>137</sup> The Appeal Chamber then turned to previous jurisprudence<sup>138</sup> and thus to the definition of aiding and abetting in *Tadić*, pointing out that the definition was made in the context of distinguishing JCE from aiding and abetting and

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<sup>132</sup> *Mrkšić and Šljivančanin*, Appeal Judgment (n 30) para 159; *Blagojević and Jokić* Appeal Judgment (n 125) paras 182, 185, 189. The Appeals Chamber held in *Blagojević and Jokić* at para 189: ‘(...) while the *Tadić* definition has not been explicitly departed from, specific direction has not always been included as an element of the *actus reus* of aiding and abetting. This may be explained by the fact that such a finding will often be implicit in the finding that the accused has provided practical assistance to the principal perpetrator, which had a substantial effect on the commission of the crime. The Appeals Chamber also considers that, to the extent specific direction forms an implicit part of the *actus reus* of aiding and abetting, where the accused knowingly participated in the commission of an offence and his or her participation substantially affected the commission of that offence, the fact that his or her participation amounted to no more than his or her “routine duties” will not exculpate the accused’.

In *Prosecutor v Lukić and Lukić* (Appeal judgment) IT-98-21/1-A (4 December 2012) para 424, the Appeal Chamber relied on the *Mrkšić and Šljivančanin* (n 30) and *Blagojević and Jokić* (n 125) Appeal Judgments and stated: ‘The Appeals Chamber has previously considered within the discussion of the *actus reus* of aiding and abetting the finding that an act or omission of an aider or abettor be “specifically directed” toward the furtherance of the crimes of the principal perpetrators. The Appeals Chamber recalls, however, that “specific direction has not always been included as an element of the *actus reus* of aiding and abetting”. It further recalls its conclusion that such a finding of specific direction “will often be implicit in the finding that the accused has provided practical assistance to the principal perpetrator which had a substantial effect on the commission of the crime”’. In *Mrkšić and Šljivančanin*, the Appeals Chamber had clarified ‘that “specific direction” is not an essential ingredient of the *actus reus* of aiding and abetting’.

<sup>133</sup> Judge Liu dissenting.

<sup>134</sup> *Mrkšić and Šljivančanin*, Appeal Judgment (n 30) para 159.

<sup>135</sup> The Appeal Chamber pointed out that there was a lack of sufficient analysis in order to identify the evidence, which proves specific direction. The Appeal Chamber then referred to the *Tadić* Appeal Judgment, which suggested that ‘that specific direction involves finding a closer link between acts of an accused aider and abettor and crimes committed by principal perpetrators than is necessary to support conviction under JCE’. *Prosecutor v Perišić* (Appeal Judgment) IT-04-81-A (28 February 2013) para 44.

<sup>136</sup> *Perišić* Appeal Judgment (n 135) para 36: ‘Accordingly, despite the ambiguity of the *Mrkšić and Šljivančanin*, Appeal Judgment, the Appeals Chamber, Judge Liu dissenting, considers that specific direction remains an element of the *actus reus* of aiding and abetting liability. The Appeals Chamber, Judge Liu dissenting, thus reaffirms that no conviction for aiding and abetting may be entered if the element of specific direction is not established beyond reasonable doubt, either explicitly or implicitly’. See also *Šainović et al.* Appeal Judgment (n 131) para 1618.

<sup>137</sup> *Šainović et al.* Appeal Judgment (n 131) para 1622.

<sup>138</sup> The Appeals Chamber made *inter alia* reference to *Prosecutor v Aleksovski* (Appeal Judgment) IT-95-14/1-A, (24 March 2000) para 111: ‘Where, in a case before it, the Appeals Chamber is faced with previous decisions that are conflicting, it is obliged to determine which decision it will follow, or whether to depart from both decisions for cogent reasons in the interests of justice.’

concluded<sup>139</sup> that ‘the analysis of the previous case law conducted in the *Perišić* Appeal Judgment relied on the flawed premise that the *Tadić* Appeal Judgment established a precedent with respect to specific direction, often repeating verbatim the language used in the *Tadić* Appeal Judgment’.<sup>140</sup> Finally, after examining pertinent jurisprudence concerning crimes committed during WWII,<sup>141</sup> followed by an examination of national law<sup>142</sup> and “international instruments”<sup>143</sup> such as the ILC draft code with the intention to identify elements constitution aiding and abetting liability,<sup>144</sup> it concluded after an examination of 32 jurisdictions,<sup>145</sup> that no ‘clear common principle’ could be deduced ‘from the major legal systems of the world’<sup>146</sup> and that “‘specific direction’ was not an element of aiding and abetting established in customary international law’.<sup>147</sup> Hence, based on the above, the Appeals Chamber, Judge Tuzmukhamedov dissenting, ultimately rejected ‘the approach adopted in the *Perišić* Appeal Judgment’.<sup>148</sup>

Despite the distinguishing features of the concept, the mode “aiding and abetting” is usually invoked ‘together as a single broad legal concept’.<sup>149</sup> Aiding and abetting is an accessory mode of liability and has been treated as such in the case law of the *ad hoc* tribunals. According to the Appeal Chamber in *Tadić*, “The aider and abettor is always an accessory to a crime perpetrated by another person, the principal.”<sup>150</sup> Moreover, the ICTY Appeals Chamber went further by stating that ‘(...) aiding and abetting is a form of responsibility which generally warrants a lower sentence than is appropriate to responsibility as a co-perpetrator’.<sup>151</sup>

<sup>139</sup> Judge Tuzmukhamedov dissenting.

<sup>140</sup> *Šainović et al.* Appeal Judgment (n 131) para 1623.

<sup>141</sup> *Ibid* para 1627 seq.

<sup>142</sup> *Ibid* para 1643.

<sup>143</sup> *Ibid* para 1647.

<sup>144</sup> *Ibid*.

<sup>145</sup> The Appeals Chamber examined the elements of aiding and abetting liability of the following jurisdictions: Mexico, India, Singapore, Vietnam, Indonesia, Cambodia, Laos, Hong Kong, New Zealand, South Africa, France, Belgium, Luxembourg, Algeria, Morocco, Senegal, Tunisia, Madagascar, Mauritius, Democratic Republic of Congo, Mali, Bulgaria, China, Japan, Australia, Canada, Ghana, Israel, England, US, Burundi, and Germany.

<sup>146</sup> *Šainović et al.* Appeal Judgment (n 131) para 1644.

<sup>147</sup> *Ibid* para 1649.

<sup>148</sup> *Ibid* para 1650.

<sup>149</sup> *Prosecutor v Semanza* (Judgment and Sentence) ICTR-97-20-T (15 May 2003), para 384, see also fn 639 making reference to *Mewett & Manning on Criminal Law* (3<sup>rd</sup> edn Butterworths Law, 1994) 272, where it is stated that aiding and abetting is ‘most universally used conjunctively’.

<sup>150</sup> *Tadić* Appeal Judgment (n 23) para 229 (i); *Prosecutor v Perišić* (Trial Judgment) IT-04-81-T (6 September 2011) para 127 and see further para 28 of the *Perišić* Appeal Judgment (n 135). The Appeals Chamber further made reference to ICTR practice in relation to the “specific direction” requirement: ‘To date, no judgment of the Appeals Chamber has found cogent reasons to depart from the definition of aiding and abetting liability adopted in the *Tadić* Appeal Judgment. Moreover, many subsequent Tribunal and ICTR appeal judgments explicitly referred to “specific direction” in enumerating the elements of aiding and abetting, often repeating verbatim the *Tadić* Appeal Judgment’s relevant holding’. For extensive sources see para 28 fn 70.

<sup>151</sup> *Vasiljević* Appeal Judgment (n 1) para 182.

### 2.2.1.6 JOINT CRIMINAL ENTERPRISE

The most heinous crimes – and thus specifically macro crimes on an international level – are generally committed by a number of individuals acting together in order to achieve a common goal.<sup>152</sup> Accordingly, the strongest distinctive feature in comparison to a single direct perpetrator, is the fact that the initiators or even the most powerful persons involved in such a “system” are frequently “behind the scene” and thus locally detached from the place where the offence is committed. Others may merely be receivers of orders and act according to instructions given to them.<sup>153</sup> In response to this reality, the *ad hoc* tribunals and particularly the ICTY have created, adopted and developed the doctrine of joint criminal enterprise (JCE) in order to attribute criminal liability even to those perpetrators absent from the “scene”, thereby reflecting their culpability. This doctrine can be divided into three categories, namely JCE I, JCE II and JCE III, and it has its origin in the case law of the ICTY.<sup>154</sup> The three JCE categories share the same *actus reus* requirement, according to which a plurality of persons must have made at least a significant contribution to a plan,<sup>155</sup> which is common to all of the individuals involved.<sup>156</sup> In relation to the concept of co-perpetration as utilised at the ICC one should recall that neither is the individual required to exercise control over the crime, nor does the contribution have to be “substantial”.<sup>157</sup> However, the *mens rea* requirements differ in relation to the three categories of JCE. The *mens rea* requirement of JCE I is the intent to commit a specific offence, which is common to the other joint perpetrators.<sup>158</sup> In relation to JCE II, which regards the so-called “concentration camp cases”, the *mens rea* requirement is that, in addition to the intent, as required for JCE I, the accused must have personally known of the ‘system of ill treatment’, and that he intended to ‘further this common concerted system of ill-treatment’.<sup>159</sup> Finally, for JCE III to be applicable, the

<sup>152</sup> M Bohlander, *Principles of German Criminal Law* (Hart 2009) 153.

<sup>153</sup> Ibid 153.

<sup>154</sup> *Tadić* Appeal Judgment (n 23) paras 227, 228, 229.

<sup>155</sup> However, there may be exceptions to the general rule that the contribution does not have to be substantial; see *Prosecutor v Kvočka et al.* (Appeal Judgment) IT-98-30/1-A (28 February 2005) para 97: ‘However, there may be specific cases which require, as an exception to the general rule, a substantial contribution of the accused to determine whether he participated in the joint criminal enterprise. In practice, the significance of the accused’s contribution will be relevant to demonstrating that the accused shared the intent to pursue the common purpose’.

<sup>156</sup> This frequently cited definition of JCE was laid down in the *Tadić* Appeal Judgment (n 23). According to this judgment certain elements must be given in order to incur JCE liability, para 227: ‘In sum, the objective elements (*actus reus*) of this mode of participation in one of the crimes provided for in the Statute (with regard to each of the three categories of cases) are as follows: (i) *A plurality of persons*. They need not be organised in a military, political or administrative structure, as is clearly shown by the *Essen Lynching* and the *Kurt Goebell* cases. (ii) *The existence of a common plan, design or purpose, which amounts to or involves the commission of a crime provided for in the Statute*. There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise. (iii) *Participation of the accused in the common design* involving the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of those provisions (for example, murder, extermination, torture, rape, etc), but may take the form of assistance in, or contribution to, the execution of the common plan or purpose’. See also *Kvočka et al.* Trial Judgment (n 22) para 266.

<sup>157</sup> *Kvočka et al.* Appeal Judgment (n 155) paras 97, 98; *Prosecutor v Brđanin* (Appeal Judgment) IT-99-36-A (3 April 2007) para 430; Wirth (n 55) 332.

<sup>158</sup> *Tadić* Appeal Judgment (n 23) para 228.

<sup>159</sup> Ibid.

mental element requires that there was the ‘intention to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group’.<sup>160</sup> It is noteworthy that liability for a crime, which was outside the agreed plan, is incurred when the consequences were foreseeable.<sup>161</sup> Accordingly, the latter is the most far-reaching category of JCE, which has been subject to criticism.<sup>162</sup> The ECCC has held that JCE III does not constitute customary international law.<sup>163</sup> In the context of a normative distinction between principals and accessories, the common purpose arguably attracts the most attention amongst the different modes of liability. The ICTY particularly has demonstrated in the past that it follows a differentiated approach by clearly distinguishing between principals and accessories despite the fact that, when looking at the origin JCE doctrine, namely the *Tadić* case, one can observe rather contradictory statements in relation to its classification.<sup>164</sup> However, in its subsequent case law, the ICTY has expressly stated in a number of cases that participation as a member of a JCE incurs principal liability.<sup>165</sup> Yet there is still much confusion as to the nature of JCE, as there have been a few attempts to follow a rather unitary approach.<sup>166</sup> The Trial Chamber in *Krnojelac* clearly expressed its

<sup>160</sup> Ibid.

<sup>161</sup> Ibid.

<sup>162</sup> See for instance the Decision on the Applicability of Joint Criminal Enterprise, Case No. 002/19-09-2007(ECCC/TC, 12.09.2011, para 27.

<sup>163</sup> Ibid.

<sup>164</sup> *Prosecutor v Milan Milutinović et al.* (Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction – Joint Criminal Enterprise) IT-99-37-AR72 (21 May 2003) para 31; H Olásolo, ‘Current Trends on Modes of Liability’ (n 100) 523; Damgaard (n 4) 193; *Tadić* Appeal Judgment (n 23) para 188: ‘This provision covers (...) the physical perpetration of a crime by the offender himself (...) However, the commission of one of the crimes (...) might also occur through participation in the realisation of a common purpose’. Para 192: ‘Under these circumstances, to hold criminally liable as a perpetrator only the person who materially perform 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, (...) to hold the latter liable only as aiders and abettors might understate the degree of their criminal responsibility’. Cf para 220: ‘(...) 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’. In para 229: ‘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’.

<sup>165</sup> *Milan Milutinović et al.*, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction (n 164) para 20; *Kvočka et al.* Appeal Judgment (n 155) para 91: ‘(...) The Appeals Chamber emphasizes that joint criminal enterprise is simply a means of committing a crime; it is not a crime in itself (...)’. *Prosecutor v Krnojelac* (Appeal Judgment) IT-97-25-A (17 September 2013) para 73: ‘(...) The Chamber views participation in a joint criminal enterprise as a form of “commission” under Article 7(1) of the Statute. (...)’. *Vasiljević* Appeal Judgment (1) para 102: ‘Participation in a joint criminal enterprise is a form of “commission” under Article 7(1) of the Statute. The participant therein is liable as a co-perpetrator of the crime(s). Aiding and abetting the commission of a crime is usually considered to incur a lesser degree of individual criminal responsibility than committing a crime (...)’. *Nahimana et al.* Appeal Judgment (n 112) para 478 with reference to para 188 of the *Tadić* Appeal Judgment (n 23): ‘The Appeals Chamber recalls that commission covers, primarily, the physical perpetration of a crime (with a criminal intent) or a culpable omission of an act that is mandated by a rule of criminal law, but also participation in a joint criminal enterprise’. See also Olásolo, ‘Current Trends on Modes of Liability’ (n 100) 523.

<sup>166</sup> Separate Opinion of Judge David Hunt on Challenge by Dragoljub Ojdanić to Jurisdiction – Joint Criminal Enterprise (n 14) para 31; H Olásolo, ‘Developments in the Distinction between Principal and Accessorial Liability in the Light of the First Case-Law of the ICC’ in C Stahn and G Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill 2009) 345.

stance by rejecting the idea of embracing a normative approach in relation to modes of liability, as follows:

74 The purpose behind the Prosecution's approach appears to be to classify the participant in a joint criminal enterprise who was not the principal offender as a "perpetrator" or a "co-perpetrator", rather than someone who merely aids and abets the principal offender. The significance of the distinction appears to be derived from the civil law, where a person who merely aids and abets the principal offender is subject to a lower maximum sentence.

75 The Trial Chamber does not accept that this distinction is necessary for sentencing in international law, and in particular holds that it is irrelevant to the sentencing practice of this Tribunal. The Appeals Chamber has made it clear that a convicted person must be punished for the seriousness of the acts which he has done, whatever their categorisation.<sup>167</sup>

As previously discussed in Chapter 1, there are two different positions regarding the legal consequences attached to either accessories, namely aiders and abettors and principals, particularly if they are involved in a JCE. In the *Krnjelac* Trial Judgment it was held that the distinction between a principal and someone who 'merely aids and abets' was immaterial for sentencing purposes.<sup>168</sup> Similarly, Judge David Hunt clarified in his Separate Opinion Challenge by Dragoljub Ojdanić to Jurisdiction, that categorisation into different modes of liability for sentencing purposes is unnecessary.<sup>169</sup>

Notwithstanding that, the position that a principal accessory distinction is material for sentencing purposes has been corroborated by a number of judgments. In *Vasiljević* the Appeals Chamber reduced the sentence imposed by the Trial Chamber from 20 to 15 years. The sentence was reduced purely on the basis that he was held to be an aider and abettor as opposed to a co-perpetrator.<sup>170</sup> In a similar vein, following an appeal, it was held in *Krstić* that the sentence had to be adjusted<sup>171</sup> on the basis that Krstić was found to be an aider and abettor to genocide and not a co-perpetrator, as was held by the Trial Chamber. Thus, the Appeals Chamber also relied<sup>172</sup> on the Criminal Code of the SFRY<sup>173</sup> and further stated with reference to *Vasiljević* that aiding and abetting generally attracts a lower sentence than responsibility as a co-perpetrator. Moreover, this approach was demonstrated in the very recent case of *Ndahimana*,<sup>174</sup> where the Appeals Chamber increased<sup>175</sup> Ndahimana's sentence

<sup>167</sup> *Krnjelac* Trial Judgment (n 3) paras 74, 75.

<sup>168</sup> Ibid.

<sup>169</sup> Separate Opinion of Judge David Hunt on Challenge by Dragoljub Ojdanić to Jurisdiction – Joint Criminal Enterprise (n 14) para 31.

<sup>170</sup> *Vasiljević* Appeal Judgment (n 1) para 181; *Krstić* Appeal Judgment (n 28) para 268.

<sup>171</sup> *Krstić* Appeal Judgment (n 28) paras 266, 268.

<sup>172</sup> Ibid para 270: '(...) the Appeals Chamber has considered the sentencing practice of the courts of the former Yugoslavia applicable in this case, and has taken those practices into account. In particular, the sentence of a person who aided a principal perpetrator to commit a crime can be reduced to a sentence less than the one given to the principal perpetrator'.

<sup>173</sup> Article 24 CC SFRY: 'A person, who premeditatedly aided another person in perpetration of a criminal act, will be punished as if he had committed it, his sentence can also be reduced'.

<sup>174</sup> *Ndahimana* Appeal Judgment (n 2).

<sup>175</sup> 'The Appeals Chamber considers that, in the circumstances of this case, the elevation of Ndahimana's responsibility from that of an aider and abettor to that of a participant in a joint criminal enterprise results in an increase of his overall culpability which calls for a higher sentence'. *Ndahimana* Appeal Judgment (n 2) para 252.

from 15 to 25 years based on the finding that he was a member of a JCE, and not merely an aider and abettor.<sup>176</sup> A more detailed examination in relation to the sentencing practice of international courts and tribunals in the context of individual criminal responsibility will be carried out in Chapter 3.

It appears that, although the majority seems to embrace a differentiated model, the contradictory approach of following a unitary system in sentencing practice is clearly present. Hence, this leads inevitably to confusion and unpredictability in particular in view of the link to sentencing, which will be discussed in the next chapter. As van Sliedregt notes, the reason for such contradictory approaches is based on the fact that ‘JCE as a unique concept which originates from a mixed civil and common law system is composed of elements originating from different legal cultures and applied by persons from varying legal backgrounds’.<sup>177</sup> While the ICTY has engaged in extensive discussions in relation to the nature of the JCE doctrine in the context principal-accessory distinction, the ICTR has come to the same conclusion, but with less discussion.<sup>178</sup> In *Karutunimama*, the Appeals Chamber first reproduced the ICTY’s finding in *Tadić*<sup>179</sup> that JCE was a form of commission and then went on to clarify that, due to the fact that Articles 7(1) ICTY and 6(1) mirrored each other, it was satisfied that the case law of the ICTY should be applied at the ICTR.<sup>180</sup> This was thereafter again confirmed in the 2007 Appeals judgment of *Gacumbitsi*.<sup>181</sup>

## 2.2.2 MODES OF INDIVIDUAL CRIMINAL RESPONSIBILITY AT THE ICC

Article 25 of the Rome Statute embodies the concept of individual criminal responsibility. While paragraph 1 stipulates that natural persons are subject to the jurisdiction of the court, paragraph 2 establishes individual criminal responsibility for an individual ‘who commits a crime within the jurisdiction of the Court’. Paragraph 3 then goes on to list various modes of liability in detail; subsection (a) lists various forms of commission, namely, individual commission, co-perpetration and indirect perpetration. Thereafter, in subsection (b) various forms of contribution, ie ordering, soliciting and inducing are incriminated.<sup>182</sup> According to Werle, Article 25(3) not only lists various modes of

<sup>176</sup> It is worth mentioning that in the *Ndahimana* Appeal Judgment (n 2) para 252 fn 642 the Appeals Chamber clarified that the membership in a JCE constitutes a form of “commission”. Reference was made to *Milan Milutinović et al.*, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction (n 164) para 20; *Tadić* Appeal Judgment (n 23) para 188 and *Nahimana et al.* Appeal Judgment (n 112) para 478.

<sup>177</sup> E van Sliedregt, ‘Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide’ (2014) 5 *Journal of International Criminal Justice* 184, 199.

<sup>178</sup> H Olásolo, ‘Current Trends on Modes of Liability’ (n 100) 523.

<sup>179</sup> *Tadić* Appeal Judgment (n 23).

<sup>180</sup> *Prosecutor v Ntakirutimana and Ntakirutimana* (Appeal Judgment) ICTR-96-10-A and ICTR-96-17-A (13 December 2004) para 468: ‘Given the fact that both the ICTY and the ICTR have mirror articles identifying the modes of liability by which an individual can incur criminal responsibility, the Appeals Chamber is satisfied that the jurisprudence of the ICTY should be applied to the interpretation of Article 6(1) of the ICTR Statute’.

<sup>181</sup> *Gacumbitsi* Appeal Judgment (n 119) para 158: ‘The Appeals Chamber, following ICTY precedent, has recognised that an accused before this Tribunal may be found individually responsible for “committing” a crime within the meaning of Article 6(1) of the Statute under one of three categories of “joint criminal enterprise” (“JCE”) liability (...)’. See also regarding the relevance for the indictment: *Prosecutor v Simba* (Judgment and Sentence) ICTR-2001-76-T (13 December 2005) para 389.

<sup>182</sup> This includes the attempt of any of these forms of participation.



participation, but it categorises them into four groups: (i) commission, (ii) ordering and instigating, (iii) assistance, and (iv) contributing.<sup>183</sup> He further contends that ‘(...) the distinction between different modes of participation is not just a question of correct phenomenological description’ but that a ‘value oriented hierarchy of participation’ is created.<sup>184</sup> This stance clearly opposes Judge Fulford’s position, who holds that the forms of participation in Article 25 (3) are not mutually exclusive and do not create a hierarchy of seriousness descending from subsection a) to subsection d).<sup>185</sup> Similarly Judge van den Wyngaert clarified in her concurrent opinion concerning the judgment of *Prosecutor v Mathieu Ngudjolo Chui* with reference to Judge Fulford’s Separate Opinion<sup>186</sup> that despite the fact that there is a conceptual difference between principal and accessorial liability, ‘there is no proper basis for concluding that acting under Article 25(3)(b) of the Statute is less serious than acting under Article 25(3)(a)’.

Initially, the practice of the ICC has demonstrated that judges were inclined to follow a principal-accessory distinction.<sup>187</sup> In the *Lubanga* decision on Confirmation of Charges<sup>188</sup> the Pre Trial Chamber made reference to three different approaches, which all serve the distinction between principal and accessory, namely the objective approach,<sup>189</sup> the subjective approach,<sup>190</sup> and the concept of control over the crime.<sup>191</sup> It thereby clarified that it rejects the objective approach, according to which only those individuals who physically carry out the crime can be considered to be principals.<sup>192</sup> However, it also dismissed the subjective approach, followed by the ICTY, in line with the self-created doctrine of joint criminal enterprise. Pre Trial Chamber I criticised that the subjective approach shifts the focus from the ‘level of contribution to the commission as the distinguishing criterion between principals

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<sup>183</sup> Werle, ‘Individual Criminal Responsibility in Article 25 ICC Statute’ (n 4) 957.

<sup>184</sup> Ibid.

<sup>185</sup> Separate Opinion of Judge Adrian Fulford (n 15) para 8: ‘Some have suggested that Article 25(3) establishes a hierarchy of seriousness as regards the various forms of participation in a crime, with Article 25(3)(a) constituting the gravest example and Article 25(3)(d) the least serious. I am unable to adopt this approach. In my judgment, there is no proper basis for concluding that ordering, soliciting or inducing a crime (Article 25(3)(b)) is a less serious form of commission than committing it “through another person” (Article 25(3)(a)), and these two concepts self-evidently overlap. Similarly I am unable to accept that the criminality of accessories (Article 25(3)(c)) is greater than those who participate within a group (Article 25(3)(d)), particularly since many of history’s most serious crimes occurred as the result of the coordinated action of groups of individuals, who jointly pursued a common goal’.

<sup>186</sup> Ibid para 9.

<sup>187</sup> van Sliedregt *Individual Criminal Responsibility* (n 4) 79.

<sup>188</sup> Concurring Opinion of Judge Christine Van den Wyngaert (n 17) paras 22, 23.

<sup>189</sup> *Lubanga* Decision on Confirmation of Charges) (n 46) para 328: ‘The objective approach to such a distinction focuses on the realisation of one or more of the objective elements of the crime. From this perspective only those who carry out one or more of the objective elements of the offence can be considered principals to the crime’.

<sup>190</sup> *Lubanga* Decision on the Confirmation of Charges (n 46) para 329: ‘The subjective approach – which is the approach adopted by the jurisprudence of the ICTY through the concept of joint criminal enterprise or the common purpose doctrine – moves the focus from the level of contribution to the commission of the offence as the distinguishing criterion between principals and accessories and places it instead on the state of mind in which the contribution to the crime was made. As a result, only those who make their contribution with the shared intent to commit the offence can be considered principals to the crime, regardless of the level of their contribution to its commission’.

<sup>191</sup> Ibid paras 330-332.

<sup>192</sup> Ibid para 328.

and accessories' on the perpetrator's *mens rea* when he contributed to the crime.<sup>193</sup> This leads to the result that, irrespective of the gravity of the individual's contribution, only those who 'make their contribution with a shared intent' can be labelled as principals to the crime.<sup>194</sup> Therefore, the principal accessory distinction at the ICC is made on the basis of the "control over the crime theory," which derives from the writings of the German criminal law scholar Claus Roxin. According to Pre Trial Chamber I, it includes both a subjective and an objective component and is not restricted to one or the other:<sup>195</sup>

The notion underpinning this third approach is that principals to a crime are not limited to those who physically carry out the objective elements of the offence, but also include those who, in spite of being removed from the scene of the crime, control or mastermind its commission because they decide whether and how the offence will be committed.<sup>196</sup>

As can be seen, the ICC did not follow the approach of the *ad hoc* tribunals and particularly of the ICTY at the attribution stage, but it did follow a principal-accessory distinction (at least terminologically) based on the differentiated theory. In fact, the approach of the ICC is closely based on the German approach, which will be further discussed in the context of the comparative study in Chapter 2.

To date, however, the ICC appears to distance itself from a differentiated approach. In *Katanga*<sup>197</sup> it clarified:

(...) In effect, Article 25 of the Statute merely identifies various forms of unlawful conduct and, in that sense, the distinction between the liability of a perpetrator of and an accessory to a crime does not under any circumstances constitute a "hierarchy of blameworthiness", let alone enunciate a tariff, not even implicitly. Hence, it is not precluded that having adjudged guilt, a bench may choose to mete out mitigated penalties to accessories, although to do so is not peremptory. The fact remains that neither the Statute nor the Rules of Procedure and Evidence prescribe[s] a rule for the mitigation of penalty for forms of liability other than commission and the Chamber sees no automatic correlation between mode of liability and penalty. From this it is clear that a perpetrator of a crime is not always viewed as more reprehensible than an accessory.<sup>198</sup>

Ultimately, the distinction between perpetrator of and accessory to a crime inheres in the Statute but does not, nonetheless, entail a hierarchy, whether in respect of guilt or penalty. Each mode of liability has different characteristics and legal ramifications which reflect various forms of involvement in criminality. However, this does not necessarily signify that accused persons will be found less culpable or will incur a lesser penalty.<sup>199</sup>

Accordingly it can be seen that the ICC rejects the idea of a principle of mitigation for accessories to a crime, although it remains to be seen whether it will continue with this approach in the future.

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<sup>193</sup> Ibid para 329.

<sup>194</sup> Ibid para 329.

<sup>195</sup> Ibid para 331.

<sup>196</sup> Ibid para 330.

<sup>197</sup> *Prosecutor v Katanga* (Trial Judgment) ICC-01/04-01/07 (14 March 2014) paras 1386, 1387; see also *Prosecutor v Katanga* (Sentencing Judgment) ICC-01/04-01/07 (23 May 2014) para 61.

<sup>198</sup> *Katanga* Trial Judgment (n 197) para 1386.

<sup>199</sup> Ibid para 1387.

## 2.2.3 INTERNATIONALISED TRIBUNALS AND SPECIAL DOMESTIC COURTS

### 2.2.3.1 SPECIAL COURT FOR SIERRA LEONE (SCSL)

Due to the fact that section 1 of the English Accessories and Abettors Act 1861 was incorporated into the national law of Sierra Leone,<sup>200</sup> it is clear that a unitary approach is embraced by the criminal law of Sierra Leone. The provisions on individual criminal responsibility are set out in Article 6(1) SCSL Statute, which is literally identical to Article 7(1) ICTY and Article 6(1) ICTR. It follows that the modes of liability expressly enumerated in Article 6(1) coincide in terms of their interpretation with the respective provisions of the *ad hoc* tribunals. However, the SCSL does not limit itself to the statutory prescribed modes of liability, and thus follows the approach of the *ad hoc* tribunals by introducing the doctrine of JCE in its case law. In the *Charles Taylor* judgment,<sup>201</sup> the SCSL resorted to ‘Applicable Law: Law on Individual Criminal Responsibility’<sup>202</sup> when discussing the individual criminal liability of Taylor based on JCE. A closer look reveals that the term “applicable law” referred to constitutes the pertinent basis of the JCE doctrine, as elaborated by the ICTY.<sup>203</sup> Nevertheless, Taylor was ultimately not found liable as a participant in a JCE, but as an aider and abettor and for planning. In the *Taylor Appeals Judgment*,<sup>204</sup> an extensive discussion revolved around the differentiated and unitary approaches. Thus, the SCSL Appeals Chamber made reference to Judge Fulford’s Separate Opinion in *Lubanga*:

In the Appeals Chamber’s view, the Trial Chamber’s holding that aiding and abetting generally warrants [a] lesser sentence than other forms of participation is not consistent with the Statute, the Rules and this Appeals Chamber’s holdings. First, the plain language of Article 6(1) of the Statute clearly does not refer to or establish a hierarchy of any kind. Second, a hierarchy of gravity among forms of criminal participation in Article 8(1) is contrary to the essential requirement of individualisation that derives from the mandate of the Court, principles of individual criminal liability and the rights of the accused.<sup>205</sup>

The Appeals Chamber then went on to reject the ICTY/ICTR jurisprudence, which was put forward by the defence and subsequently adopted by the Trial Chamber<sup>206</sup> and which derived from the holding in *Vasiljević*.<sup>207</sup> It then went even further by criticising the ICTY Appeal Chamber in *Vasiljević* for

<sup>200</sup> Pursuant to section 74 of the Courts’ 1965 Act, see *Prosecutor v Taylor* (Trial Judgment) SCSL-03-01-T (18 May 2012) *inter alia* para 6891 fn 15495.

<sup>201</sup> *Ibid*.

<sup>202</sup> *Ibid* para 6891 at FN 15495.

<sup>203</sup> Such as, *Tadić* Appeal Judgment (n 23) para 227; *Kvočka et al.* Trial Judgment (n 22) para 266.

<sup>203</sup> *Kvočka et al.* Appeal Judgment (n 155) paras 97, 98; *Brđanin* Appeal Judgment (n 157) para 430.

<sup>204</sup> *Prosecutor v Taylor* (Appeal Judgment) SCSL-03-01-A (26 September 2013).

<sup>205</sup> *Ibid* para 666.

<sup>206</sup> *Taylor* Trial Judgment (n 200) para 21.

<sup>207</sup> *Vasiljević* Appeal Judgment (n 1) para 182: ‘The Appeals Chamber is of the view that aiding and abetting is a form of responsibility which generally warrants a lower sentence than is appropriate to responsibility as a co-perpetrator. The Appeals Chamber recalls that the sentence to be imposed must reflect the inherent gravity of the criminal conduct of an accused. The Appeals Chamber is of the view that the Appellant committed very serious crimes. Therefore, taking into account the particular circumstances of this case as well as the form and degree of the participation of the Appellant in the crimes, the Appeals Chamber finds that a sentence of 15 years is appropriate’.

relying on pertinent provisions of national legal systems such as the US and Austria, despite the fact that these systems follow a unitary approach as opposed to differentiated.<sup>208</sup> Thereafter, the Appeals Chamber drew on domestic law, namely section 1 of the Accessories and Abettors Act 1861,<sup>209</sup> according to which an accessory (before the fact) can incur liability to the same extent as a principal in every respect. With this Appeals Judgment, the Appeals Chamber has clearly attempted to distance itself from a differentiated approach, which reads as follows:

In applying the Statute and customary international law, the Appeals Chamber is guided by the decisions of the ICTY and ICTR Appeals Chamber. The Chamber looks as well to the decisions of the Appeals Chamber of the ECCC and STL and other sources of authority. The Appeals Chamber, however, is the final arbiter of the law for this Court, and the decisions of other courts are only persuasive, not binding, authority. The Appeals Chamber recognises and respects that the ICTY Appeals Chamber is the final arbiter of the law for that Court.<sup>210</sup>

Notwithstanding that, the above discussion clearly indicates that the case law of the SCSL appears to be influenced by the case law of the *ad hoc* tribunals, and particularly the ICTY, and suggests that there is a trend of following the ICC in this regard. Considering the extent of the disputes concerning the differentiated and the unitary approach at the *ad hoc* tribunals and the ICC, a more uniform approach seems impossible and discrepancies are predetermined. Nevertheless, it should be highlighted that the SCSL critically scrutinised the alleged principle in accordance with pertinent jurisprudence prior to rejecting it.

#### 2.2.3.2 EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA (ECCC)

The concept of individual criminal responsibility is embodied in Article 29(1) of the ECCC Statute, which reads: ‘[a]ny Suspect who planned, instigated, ordered, aided and abetted, or committed the crimes referred to in Article 3 new, 4, 5, 6, 7, and 8 of this law shall be individually responsible for the crime’.<sup>211</sup> Just as with Articles 7(1) ICTY and 6(1) ICTR, Article 29(1) ECCC Statute does not expressly include the JCE doctrine.<sup>212</sup> It can be observed that the Pre Trial Chamber regards JCE as a mode of liability falling within the ambit of commission liability, thereby following the predominant approach of the *ad hoc* tribunals: ‘The Pre-Trial Chamber is of the view that both the domestic form of co-perpetration and participation in a JCE are modes of responsibility which fall within the purpose of

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<sup>208</sup> *Taylor* Appeal Judgment (n 204) para 667.

<sup>209</sup> The Accessory and Abettors Act 1861, which applies in Sierra Leone reads as follows: ‘Whosoever shall become an Accessory before the Fact to any Felony, whether the same be a Felony at Common Law or by virtue of any Act passed or to be passed, may be indicted, tried, convicted, and punished in all respects as if he were a principal Felon’.

<sup>210</sup> *Taylor* Appeal Judgment (n 204) para 472.

<sup>211</sup> See *Kaing Guek Eav alias Duch* (Trial Judgment) Case File/Dossier No. 001/18-07-2007/ECCC/TC (26 July 2010) para 470.

<sup>212</sup> The concept and notion of JCE is not originally embraced by Cambodian national law, but adopted from international criminal law; see F Eckelmans, ‘The ECCC in the Context of Cambodian Law’ in H Peng and others (eds), *Introduction to Cambodian Law* (Konrad Adenauer Stiftung 2012) 462. However, it has been noted by the ECCC that the notion of JCE in its “basic and systemic forms” resembles the concept of co-perpetration under the Cambodian Penal Code of 1965, it stressed however that the notions are not identical, see *Kaing Guek Eav alias Duch*, Case File/Dossier No. 001/18-07-2007/ECCC/TC, Judgment, 26 July 2010, para 510.

Article 29 of the ECCC Law and are forms of commission'.<sup>213</sup> In relation to the applicability of JCE III, both the Pre-Trial<sup>214</sup> and Trial Chamber<sup>215</sup> held that the extended form of JCE did not form a principle of customary international law during 1975 -1979 and was therefore not applicable. This was only recently confirmed in the Decision on Meas Muth's motions on the application of JCE III, where it was noted that the 'applicability of JCE III is the subject of an appeal' and currently 'pending before the Supreme Court Chamber'.<sup>216</sup>

In a similar manner, it can be observed that, in relation to aiding and abetting liability, the ECCC also uses a wording which is very similar to the diction laid down in the Statutes of the ICTR and ICTY.<sup>217</sup> Considering that the ECCC is mostly following the jurisprudence of the *ad hoc* tribunals in relation to the attribution of individual criminal responsibility, it appears unlikely in this instance that it will be exempted from the confusion and inconsistency revolving around the principal accessory distinction and pertinent legal consequences.

### 2.2.3.3 SPECIAL PANELS FOR SERIOUS CRIMES (SPSC)

A relatively large number of judgments rendered by the Special Panels for Serious Crimes involve low-rank physical perpetrators, charged with murder.<sup>218</sup> This is particularly true for trials which took place in 2000 and 2001, and the number of such cases descends in 2002.<sup>219</sup>

The principle of individual criminal responsibility is anchored in section 14.3 of Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences. It entirely conforms with Article 25 of the Rome Statute. Despite the fact that the ICC approach towards different modes of liability has been adopted, reference to the case law of the *ad hoc* tribunals has been made in the past by parties before the Special Panels.<sup>220</sup> This is particularly true for the doctrine of JCE, which, along with other modes of liability, was thoroughly discussed in the judgment of

<sup>213</sup> *Co-Prosecutors v Ieng Thirith, Ieng Sary and Khieu Samphan* (Public Decision on the Appeals against the Co-investigative Judges' Order on Joint Criminal Enterprise (JCE)) Criminal Case File No. 002/19-09-2007-ECCC/OCIJ (PTC38) (20 May 2010) para 102.

<sup>214</sup> *Ibid* paras 75-89.

<sup>215</sup> Decision on the Applicability of Joint Criminal Enterprise (n 52) 26-38.

<sup>216</sup> *Co-Prosecutors v Meas Muth* (Decision on Meas Muth's motions on the application of JCE III) Criminal Case File No. 003/07-09-2009-ECCC-OCIJ, paras 8, 9.

<sup>217</sup> G Boas and others, *Forms of Responsibility in International Criminal Law*, International Criminal Law Practitioner Library (Volume 1, CUP 2011) 337.

<sup>218</sup> In such cases defendants are generally charged under S. 8 UNTAET Regulation 2000/15 and Article 340 of the Penal Code of Indonesia. The former provides in the case of murder: 'For the purposes of the present regulation, the provisions of the applicable Penal Code in East Timor shall, as appropriate, apply'. Further, Article 340 of the Indonesian Penal Code stipulates that: 'The person who with deliberate intent and with premeditation takes the life of another person, shall, being guilty of murder, be punished by capital punishment of life imprisonment or a maximum imprisonment of twenty years'. See also Boas and others, *Forms of Responsibility* (n 217) 377.

<sup>219</sup> See among others, *Prosecutor v Joseph Leki* (Trial Judgment) Case No.05/2000, SPSC (11 June 2001); *Prosecutor v Augusto Dos Santos* (Trial Judgment) Case No. 06/2001, SPSC (14 May 2002).

<sup>220</sup> Boas and others, *Forms of Responsibility* (n 217) 133.

*Prosecutor v Joni Marques et al.*, one of the most detailed judgments rendered by the Special Panels for Serious Crimes.<sup>221</sup> Thus, prior to evaluating the evidence and reaching a verdict, the Panel recapitulated the submissions of the prosecution and of the defence. It first stated that, according to the prosecution, the modes of participation laid down in 14.3(a), (b) and (c) were of ‘particular relevance’ to the case, as ‘all of the offences charged have co-accused’.<sup>222</sup> The Panel then restated the prosecution’s reference to *Tadić* in relation to the pertinent modes of participation applicable in this case. In relation to a principal-accessory distinction, specific reference was made to *Tadić*, where the Appeals Chamber stated that ‘[i]n the 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. The aider and abettor is always an accessory to a crime perpetrated by another person, the principal (...)’.<sup>223</sup> In relation to the consultation of sources, the panel clarified in *Marques et al.* that, when meting out the sentence, it ‘considered all the aggravating and mitigating circumstances upheld both by the practices of East Timorese courts in applying the Penal Code of Indonesia (KUHP) and the standards derived from the ICTY and the International Tribunal for Rwanda, apart from those provided for under UR-2000/15 as well as under general principles of law (...)’.<sup>224</sup>

It follows that the following sources for assessment of mitigating and aggravating features were consulted by the tribunal: (i) Jurisprudence of the East Timorese courts, (ii) the Indonesian Penal Code, (iii) UNTAET Regulation No. 2000, and (iv) general principles of law. Indonesian criminal law distinguishes between the punishment of principals and accessories, and hence a differentiated approach is embraced. Article 57 of the Indonesian Penal Code provides *inter alia* that the punishment of an accessory shall be mitigated by one third from ‘the maximum of the basic punishments’.<sup>225</sup> Further, according to subsection (2) accessories are entitled to receive a maximum of 15 years, if the crime in question gives rise to life imprisonment or capital punishment.

It has been criticised that there was a lack of clarity concerning the legal reasoning in attributing responsibility to each perpetrator, particularly in relation to the distinction between ‘the elements of the substantive crime and the elements of one or more of the forms of responsibility’.<sup>226</sup> Similarly, to the author’s knowledge, no statement was made in relation to the legal consequences attaching to either principal or accessorial liability.

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<sup>221</sup> *Prosecutor v Joni Marques et al.* (Trial Judgment) Case No. 09/2000, SPSC (11 December 2001); see also Boas and others, *Forms of Responsibility* (n 217) 133.

<sup>222</sup> *Joni Marques et al.* Trial Judgment (n 221) 38, 39.

<sup>223</sup> *Ibid* paras 42 (page 27) citing *Tadić* Appeal Judgment (n 23) para 229 (i).

<sup>224</sup> *Ibid* para 981.

<sup>225</sup> Article 57 (1) KUHP.

<sup>226</sup> Boas and others, *Forms of Responsibility* (n 217) 134, 135.

#### 2.2.3.4 SUPREME IRAQI CRIMINAL TRIBUNAL (SICT)

The Supreme Iraqi Criminal Tribunal is, strictly speaking, a domestic tribunal. Nevertheless it can be seen as a “semi-hybrid” judicial institution and is included for the sake of completeness. The Statute of the SICT provides for international provisions and also stipulates the resort to domestic law:

##### Article 16

The Court shall apply the Rules of Procedure stipulated in the Iraqi Criminal Procedure Law No. 23 for the year 1971, as amended, and the Rules of Procedure and Evidence appended to this Statute, which is an indivisible and integral part of the Statute.

##### Article 17 First:

In case a stipulation is not found in this Statute and the rules made thereunder, the general principles of criminal law applicable in connection with the prosecution and trial of any accused person shall be those stipulated in the following laws:

- A. For the period between July 17, 1968 and December 14, 1969, the Baghdadi Criminal Code of 1919.
- B. For the period between December 15, 1969 and May 1, 2003, the Criminal Code No. 111 of 1969, without regard to any amendments made thereafter.
- C. The Military Criminal Code No. 13 for the year 1940, as amended and the Military Criminal Procedure Code No. 44 for the year 1941, as amended.

Further, since the amendment of the Statute of the SICT in 2005 and its adoption by Iraq’s Transitional National Assembly, Article 15 almost mirrors Article 25(3) of the Rome Statute.<sup>227</sup> Accordingly the same modes of liability are recognised by the SICT. Article 15(2) of the Statute clearly makes reference to the application of Iraqi criminal law.<sup>228</sup> Hence, the Iraqi Penal Code No. 111 of 1969 finds application for crimes committed between 15 December 1969 and 1 May 2003. Section 5 of the Code governs the liability of parties to a crime, thereby the provisions are divided between principal – and accessory modes of liability. Paragraph 47 of the Code, stipulates that the following participation modes give rise to principal liability:

- (1) Any person who commits an offence by himself or with others.
- (2) Any person who participates in the commission of an offence of a number of acts and who wilfully carries out one of those acts during the commission of that offence.
- (3) Any person who incites another in any way to commit an act contributing to an offence if that person is not in any way criminally liable for the offence.

Further, Paragraph 48 enumerates participants in a crime, which are regarded as accessories:

- (1) Any person who incites another to commit an offence and that offence is committed on the basis of such incitement.
- (2) Any person who conspires with others to commit an offence and that offence is committed on the basis of such conspiracy.
- (3) Any person who knowingly supplies the principal to an offence with a weapon, instrument or anything else to commit an offence or deliberately assists him in any other way to carry out those acts for which he has received assistance.

<sup>227</sup> There are deviations in subsection (f) relating to attempts.

<sup>228</sup> Article 15(2) SICT: ‘Second: In accordance with this Law, and the provisions of Iraqi criminal law, a person shall be criminally responsible if that person (...)’, see also *Al Dujail Lawsuit* (Case), Case No 1/9 First/2005, Introduction to the Judgment Decision, Final Outcome (Unofficial Translation) 5, 6.

This labelling is not final, as the Code further stipulates that:

An accessory is considered to be a principal to an offence under the provisions of Paragraph 48, if he is present during the commission of that offence or any act contributing to that offence.

Interestingly, when it comes to the punishment of principals and accessories, the code does not attach generic legal consequences – despite the approach of clear distinction and categorisation of modes under the headings principal and accessory. This categorical, clear-cut approach is rarely found in such a striking style in national penal codes, particularly if the distinction is immaterial for sentencing purposes. Paragraph 50, which governs the punishment of principals and accessories, provides:

- (1) Any person who participates in the commission of an offence as principal or accessory is punishable by the penalty prescribed for that offence unless otherwise stipulated by law.
- (2) An accessory is punishable by the penalty prescribed by law, even though the principal is not punishable due to lack of criminal intent of his part or for other circumstances in respect of him.

Thus, as for the punishment, the code is very clear in relation to the equality of treatment of principals and accessories. It does emphasise it even further in Paragraph 51:

If there exist material circumstances in the offence that would by their nature increase or decrease the penalty, then they will affect all parties to the offence, principal or accessory, whether they are aware of those circumstances or not (...).

In the *Dujail* case, jurisprudence of the *ad hoc* tribunals on JCE has frequently been referred to and relied on when examining the role of the participants in the commission of the crime to direct the application of the “common purpose doctrine”, embraced by the Statute of the ICT.<sup>229</sup> Yet, upon closer examination, one can observe a failure to distinguish and apply adequately concepts of JCE I, II and III, in line with the jurisprudence of the *ad hoc* tribunals.<sup>230</sup>

#### 2.2.3.5 SPECIAL TRIBUNAL FOR LEBANON (STL)

To date, the Special Tribunal for Lebanon, having commenced the first trial on 16 January 2014, has not yet rendered a verdict. Therefore, examination of the approach, or likely approach, taken concerning the issue in question is conducted by means of the available materials. Article 3 of the Statute of the STL provides for individual criminal responsibility. Subsection (a) imposes liability on principals and accessories, who ‘organised or directed others to commit’ the respective crime. Additionally, subsection (b) entails the common purpose doctrine and imposes liability on ‘groups of persons acting with a common purpose’. However, according to Article 2 of the Statute, the provisions of the Lebanese criminal code referring to complicity are amongst some others applicable.<sup>231</sup>

<sup>229</sup> Boas and others, *Forms of Responsibility* (n 217) 139.

<sup>230</sup> Ibid.

<sup>231</sup> Article 2 (a) Statute of the Special Tribunal for Lebanon reads as follows: ‘The following shall be applicable to the prosecution and punishment of the crimes referred to in article 1, subject to the provisions of this Statute:



Therefore, the domestic provisions on participation should be considered in more detail. In relation to the punishment of accessories and principals, Article 220 of the Lebanese Criminal Code provides the following:

An accomplice without whose assistance the offence would not have been committed shall be punished as if he himself were the perpetrator. Other accomplices shall be punishable by hard labour for life or by fixed-term hard labour for 10 to 20 years if the perpetrator is sentenced to death.

If the perpetrator is sentenced to hard labour for life or life imprisonment, accomplices shall be sentenced to the same penalty for 7 to 15 years. In other cases, they shall incur the same penalty as the perpetrator, with a reduction in its duration of between one sixth and one third. Preventive measures may be imposed on accomplices as though they were the perpetrators of the offence.

Accordingly, the Lebanese criminal code distinguishes between principals ‘without whose assistance the offence would not have been committed’ and *vice versa*. While setting out that the former accomplices are to be punished as principal perpetrators, the others are entitled to mandatory mitigation. In the Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, the meaning and applicability of domestic and international modes of liability were discussed in depth.<sup>232</sup> While Article 2 stipulates that the Tribunal shall consult the provisions regarding participation, Article 3 lists the modes of liability drawn on in international criminal law.<sup>233</sup> Thus, it was first and foremost held that in deciding whether domestic or international modes of liability had to be applied, the Trial Judge and the Trial Chamber have to: (i) assess for each case, whether a conflict between the respective domestic law norm and the international provision exists, (ii) if no collusion between the two bodies of law exists, then Lebanese law is applicable but, if there is a clash, (ii) the respective the ‘body of law that would lead to a result more favourable to the accused’ is applicable.<sup>234</sup> The Appeals Chamber then went on to discuss the modes of ‘[p]erpetration and [c]o-perpetration’, ‘[c]omplicity ([a]iding and [a]betting)’ and ‘[p]articipation in a [g]roup with a [c]ommon [p]urpose’ in the light of their meaning in domestic and international criminal law.<sup>235</sup> Unsurprisingly perpetration is defined identically in Lebanese and international criminal law. However, co-perpetration is termed ‘participation in a group with common purpose’ in Lebanese law: (i) while the *actus reus* requirement for aiding and abetting in international criminal law requires the contribution in form of a ‘substantial assistance’,<sup>236</sup> Lebanese law expressly enumerates specific means by which assistance can be provided by an accessory and (ii) in international criminal law the *mens rea* requirement constitutes that the accused intended ‘to further the general illegality of the principal’s conduct’. Instead, in Lebanese law, the *mens rea* threshold of an aiding and abetting is

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(a) The provisions of the Lebanese Criminal code relating to the prosecution and punishment of acts of terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crimes and offences, including the rules regarding the material elements of a crime, criminal participation and conspiracy.’

<sup>232</sup> Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Case No. STL-11-01/1 (16 February 2011).

<sup>233</sup> Ibid 4.

<sup>234</sup> Ibid.

<sup>235</sup> Ibid.

<sup>236</sup> Ibid.

higher in that an aider and abettor not only has to know of the crime to be committed, he also has ‘to share the intent to further that particular crime’.<sup>237</sup>

Finally, the question in which relationship the Lebanese concept of “participation in a group with a common purpose” stands with the JCE concept modes I and III, was raised. The Appeals Chamber concluded that ‘[t]he two bodies of law coincide in requiring a subjective element: both rely on intent or advertent recklessness (*dolus eventualis*)’.<sup>238</sup> Thus, Lebanese law and international criminal law overlap in punishing the execution of a criminal agreement, where all the participants share the same criminal intent although each of them may play a different role in the execution of the crime. The two bodies of law also

overlap in punishing those participants in a criminal enterprise who, although they had not agreed upon the perpetration of an “extra” crime, could be expected to know and did know of the reasonable possibility that such crime may be committed and willingly took the risk of its occurrence (so-called JCE III). However, under international criminal law, this notion cannot apply to “extra” crimes requiring special intent (as is the case with terrorism).<sup>239</sup>

#### 2.2.3.6 WAR CRIMES CHAMBER IN BOSNIA AND HERZEGOVINA (WCCBiH)

It is difficult to examine all of the judgments rendered by the War Crimes Chamber of the Court of Bosnia and Herzegovina, particularly as those rendered in 2013 and 2014 are largely not translated into English; however, despite these instances, the overwhelming majority of judgments rendered by the WCCBiH has been examined in relation to the role ascribed to modes of liability. The War Crimes Chamber of the State Court generally applies two different criminal codes, namely, the Criminal Code of Bosnia and Herzegovina and Criminal Code of the Former Socialist Federal Republic of Yugoslavia.<sup>240</sup> Articles 29-32 of the Criminal Code of Bosnia and Herzegovina<sup>241</sup> provide for different forms of liability. Article 29<sup>242</sup> of the Criminal Code provides that an accomplice to a crime is to be punished as principal perpetrator. In a similar manner, Article 30(i)<sup>243</sup> stipulates that an inciter is subjected to the same penalty as the principal perpetrator who has committed the crime. Furthermore,

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<sup>237</sup> Ibid .

<sup>238</sup> Ibid.

<sup>239</sup> Ibid.

<sup>240</sup> OSCE, *Moving towards a Harmonized Application of the Law Applicable in War Crimes Cases before Courts in Bosnia and Herzegovina*, OSCE BiH (August 2008) 5.

<sup>241</sup> For a discussion revolving around the principle of legality and applicable law if the offence in question has been committed before it was defined as an offence in the Criminal Code of Bosnia and Herzegovina, see *Prosecutor v Ranko Vuković and Rajko Vuković* (First Instance Verdict) Case No. X-KR-07/405 (4 February 2008) 30-33; *Prosecutor v Radomir Vuković and Zoran Tomić* (First Instance Verdict) Case No. X-KR-06/180-2 (22 April 2010) paras 610-613.

<sup>242</sup> Article 29: ‘If several persons who, by participating in the perpetration of a criminal offence or by taking some other act by which a decisive contribution has been made to its perpetration, have jointly perpetrated a criminal offence, shall each be punished as prescribed for the criminal offence’.

<sup>243</sup> Article 30(i): ‘(1) Whoever intentionally incites another to perpetrate a criminal offence, shall be punished as if he has perpetrated such offence. (2) Whoever intentionally incites another to perpetrate a criminal offence for which a punishment of imprisonment for a term of three years or a more severe punishment is prescribed by law, and the criminal offence has never been attempted, shall be punished as for the attempt of the criminal offence’.

Article 31 governs liability of accessories of a crime. While Article 31(2)<sup>244</sup> lists examples of the provision of help, Article 31(1)<sup>245</sup> stipulates that an accessory is to be punished as a principal perpetrator, but the judge has the discretion to reduce the sentence. However, it is crucial to distinguish discretionary mitigation of the sentence from mandatory mitigation, which attaches in certain legal systems such as Germany and Turkey to all accessories.<sup>246</sup> Further, Article 180 of the CC of Bosnia and Herzegovina, which is derived from Article 7(1) ICTY Statute, applies to criminal offences specifically referenced therein and is charged together with Article 29 providing for different degrees of liability.<sup>247</sup>

(1) A person who planned, instigated, ordered, perpetrated or otherwise aided and abetted in the planning, preparation or execution of a criminal offence referred to in Article 171 (Genocide), 172 (Crimes against Humanity), 173 (War Crimes against Civilians), 174 (War Crimes against the Wounded and Sick), 175 (War Crimes against Prisoners of War), 177 (Unlawful Killing or Wounding of the Enemy), 178 (Marauding the Killed and Wounded at the Battlefield) and 179 (Violating the Laws and Practices of Warfare) of this Code, shall be personally responsible for the criminal offence. The official position of any accused person, whether as Head of State or Government or as a responsible Government official person, shall not relieve such person of criminal responsibility nor mitigate punishment.

(2) The fact that any of the criminal offences referred to in Article 171 through 175 and Article 177 through 179 of this Code was perpetrated by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

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

The CC SFRY specifies the jurisdiction over international crimes in Article 142. In addition, Article 22 expresses a unitary approach by providing that accomplices are to be ‘punished as prescribed for the act’. The same applies to the punishment of inciters.<sup>248</sup> Article 24(1) supplements Article 22 in that it stipulates that the sentence may be mitigated on a discretionary basis.<sup>249</sup>

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<sup>244</sup> Article 31(2): ‘The following, in particular, shall be considered as helping in the perpetration of a criminal offence: giving advice or instructions as to how to perpetrate a criminal offence, supplying the perpetrator with tools for perpetrating the criminal offence, removing obstacles to the perpetration of criminal offence, and promising, prior to the perpetration of the criminal offence, to conceal the existence of the criminal offence, to hide the perpetrator, the tools used for perpetrating the criminal offence, traces of the criminal offence, or goods acquired by perpetration of the criminal offence’.

<sup>245</sup> Article 31(1): ‘Whoever intentionally helps another to perpetrate a criminal offence shall be punished as if he himself perpetrated such offence, but the punishment may be reduced’.

<sup>246</sup> Except instigators, which are technically regarded as accessories, but trigger principal liability, mandatory mitigation applies to the final sentence of an instigator in both criminal law systems, Germany and Turkey.

<sup>247</sup> *Prosecutor v Milorad Trbić* (First Instance Verdict) Case No. X-KR-07/386 (16 October 2009) paras 203-205.

<sup>248</sup> Article 23(1) CC SFRY.

<sup>249</sup> Article 24(1) CC SFRY: ‘Anybody who intentionally aids another in the commission of a criminal act shall be punished as if he himself had committed it, but his punishment may also be reduced’.

In the case of *Mirko Pekez and Milorad Savić* the War Crimes Chamber had to examine the criteria, which would lead to more lenient punishment<sup>250</sup> of the defendant in accordance with the principle of legality *inter alia* in the context of accomplice liability with regard to the accused Milorad Savić.<sup>251</sup> The Panel first stated the legal basis for doing so was to consider ‘the punishment prescribed for the criminal offense at issue’.<sup>252</sup> After the Appellate Panel had established that the punishment prescribed by the CC BiH was more lenient to the accused, the court turned to examine the applicable provision providing for accomplice liability, namely Article 29 CC BiH and the Article 22 of the CC of SFRY. In relation to Article 29 the Panel stated that ‘in addition to the joint participation of a number of persons in the commission of the offense concerned, it is necessary that the awareness also exists on their part that the committed offense represents a common result of their actions’.<sup>253</sup> It then contrasted this requirement with Article 22 CC SFRY, which was applicable at the time of commission and which reads: ‘If several persons jointly commit a criminal act by participating in the act of commission or in some other way, each of them shall be punished as prescribed for the act’. Although, from the outset, both provisions appear to imply identical legal consequences, the Panel further examined the scope of the two provisions and thus went on to point out that they differ fundamentally in relation to their definition of accomplice liability in that ‘[t]he difference concerns the fact that according to the new code, the notion of complicity is given in a narrower sense, because the participation that does not represent an action of execution is now restricted to those contributions that in a decisive manner contribute to the criminal offence, which is far more difficult to prove, while the earlier code only required that a general contribution to a joint consequence of the offense be established’.<sup>254</sup> Due to the fact that the Panel had established beyond reasonable doubt that the issue in relation to the accused Milorad Savić were his ‘actions of complicity’, it concluded that the applicable provisions of the CC BiH were more lenient.<sup>255</sup>

In the first instance verdict of *Mitar Rašević and Savo Todović*, one of the first cases of the War Crimes Chamber, the Trial Panel discussed the scope and applicability of JCE and the reference to the jurisprudence of the *ad hoc* tribunals. Thereby it first clarified that Article 180 CC BiH had to be

<sup>250</sup> See *Prosecutor v Mirko Pekez and Milorad Savić* (Second Instance Verdict) Case No. X-KRZ-05/96-1 (5 May 2009) para 162: ‘(...) [B]earing in mind *ratio legis* of Article 4(2) of the CC BiH pursuant to which provides for the *application of the law more lenient to the perpetrator* rather than the application of a *more lenient law*, the Panel found that that having in mind the direction of meting out the punishment for both Accused (in the special maximum direction), the Panel found that the CC BiH is more lenient law in this specific case, considering that its maximum is lower in relation to the CC SFRY’.

<sup>251</sup> *Ibid* para 156: ‘The principle of legality is prescribed by both national Criminal Code (Article 3 of the CC BiH) and Article 7(1) of the European Convention on Human Rights (ECHR), that has primacy over all laws on BiH (Article 2.2 of the Constitution of BiH), and Article 15(1) of the International Covenant on Civil and Political Rights (ICCPR)’.

<sup>252</sup> *Ibid* para 159; cf contrary: *Prosecutor v Abduladhim Maktouf* (Second Instance Verdict) Case No. KPZ 32/05 (4 April 2006) 18, where the Panel held that ‘mandatory mitigation of more lenient law’ was not applicable.

<sup>253</sup> *Mirko Pekez and Milorad Savić* Second Instance Verdict (n 250) para 164.

<sup>254</sup> *Ibid* para 167.

<sup>255</sup> *Ibid*.

charged together with Article 29 CC BiH.<sup>256</sup> It then emphasised that, due to the fact that Articles 180(1) and (2) ‘are derived from and are identical to Article 7 of the ICTY Statute’,<sup>257</sup> there is an obligation for domestic courts to consider the jurisprudence of international judicial bodies in relation to their interpretation of such ‘parent norms’.<sup>258</sup> The Trial Panel thereby further explained that ‘when Article 7 was copied into the law of BiH, it came with its international origins and its international judicial interpretation and definitions’.<sup>259</sup> The Trial Panel then referred to Commentary on the Criminal Code of Bosnia and Herzegovina in order to corroborate that Article 180 integrates international law into national law.<sup>260</sup>

The provisions of paragraph 1 [of Art 180] are worded exactly the same way as Art 7 paragraph 1 of the ICTY Statute. It is obvious that the legislator followed the basic rules of criminal liability deriving from international criminal law and from the provisions in the ICTY Statute, as well as by the provisions in Art 25(3)(a) through (e) of the Rome Statute, as he [the legislator] significantly broadened the possible acts of perpetration and of accessory in the perpetration of criminal acts.<sup>261</sup>

Thereafter, the Panel engaged in a thorough discussion,<sup>262</sup> establishing that systemic JCE liability (JCE II) was a rule of customary international law that had been so ‘since before April 1992’,<sup>263</sup> and consequently emphasised in accordance with the principle of legality that ‘it was reasonably foreseeable that the accused would be criminally liable’.<sup>264</sup> Furthermore, it pointed out that the defendant ‘could reasonably foresee criminal liability arising from activities in maintaining a criminal system’ as Article 26 of the Criminal Code of the SFRY established liability for participants and organisers of criminal associations.<sup>265</sup> Further, the panel made reference to the Commentary on Article 26 Criminal Code of the SFRY according to which the participant or organiser of a joint criminal

<sup>256</sup> *Prosecutor v Mitar Rašević and Savo Todović* (First Instance Verdict) Case No. X-KR/06/275 (28 February 2008).

<sup>257</sup> *Mitar Rašević and Savo Todović* First Instance Verdict (n 256) 103, the Trial Panel further notes with reference to the *Tadić* Appeal Judgment that ‘Article 180(1) became part of the CC of BiH after Article 7(1) had been enacted and interpreted by the ICTY to include, specifically, joint criminal enterprise as a mode of co-perpetration by which personal criminal liability would attach’.

<sup>258</sup> *Ibid*; the Chamber stated that it is a well-established principle of international law that when international law is incorporated into domestic law, ‘Domestic Courts must consider the parent norms of international law and their interpretation by international courts’. The Trial Panel made reference to (fn 94): Werle, *Principles of International Criminal Law* (n 85) 80. See also R Gardiner, *International Law* (Pearson 2003) 156; R Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1994) 206.

<sup>259</sup> *Mitar Rašević and Savo Todović* First Instance Verdict (n 256) 103.

<sup>260</sup> *Ibid* 104; see also *inter alia*: *Prosecutor v Marko Radić et al.* (First Instance Verdict) Case No. X-KR-05/139 (20 February 2009) 174, 175; *Prosecutor v Milorad Trbić* (First Instance Verdict) Case No. X-K-07/386 (16 October 2009) para 205; *Prosecutor v Miladin Stevanović* (First Instance Verdict) Case No. X-KR-05/24-2 (29 July 2008) 91; *Prosecutor v Miloš Stupar et al.* (First Instance Verdict) Case No. X-KR-05/24 (29 July 2008) 135.

<sup>261</sup> *Mitar Rašević and Savo Todović* First Instance Verdict (n 256) 104.

<sup>262</sup> Discussion concerning the principle of legality in relation to the application of the JCE liability theory exceeds the scope of this work; for elaboration see: *Mitar Rašević and Savo Todović* First Instance Verdict (n 256) 105-109.

<sup>263</sup> *Ibid* 105; *Radić Marko et al.* First Instance Verdict (n 260) 181: ‘This form of systemic joint criminal enterprise as part of customary international law was also accepted and confirmed by the ICTY (...)’; *Milorad Trbić* First Instance Verdict (n 260) para 211: ‘Joint criminal enterprise generally, and basic joint criminal enterprise in particular, were already part of customary international law by July 1995, and the elements and definition were established’.

<sup>264</sup> *Mitar Rašević and Savo Todović* First Instance Verdict (n 256) 106, 107.

<sup>265</sup> *Ibid* 108.

association ‘will be sentenced in the same way as the perpetrator of the crime’.<sup>266</sup> The WCCBiH did not consider the status of JCE III as it observed that it ‘will fall to other panels’ to examine the existence of JCE III in customary international law,<sup>267</sup> but held that due to the facts of the case it was only concerned with JCE II, which was established in customary international law.<sup>268</sup> The practice of the WCCBiH in relation to the categorisation of modes of liability into those raising either commission or accessorial liability appears to be heavily influenced by the jurisprudence of the *ad hoc* tribunals – at least by those cases where it was held that JCE is a form of commission liability. In the case of *Radomir Vuković and Zoran Tomić*<sup>269</sup> the Chamber stated that ‘the jurisprudence of international criminal tribunals (the ICTR, ICTY, Special Court for Sierra Leone and the East Timor Special Panels) recognizes joint criminal enterprise as a form of commission liability in the commission of crimes recognized under international criminal law’.<sup>270</sup> However, according to the cases consulted, which involve JCE liability, it is notable that “express-distinctions” between principals and accessories can rarely be found and do not occupy an equally prominent position, which can be observed in the jurisprudence of the *ad hoc* tribunals. One of the reasons could be that despite the fact that the two Criminal Codes (CC BiH and CC SFRY) differ in many regards, they share the common legal consequence that accessories are to be punished as principals. Moreover, JCE liability has been prominently treated as a form of commission liability; it appears that the BiH follows this approach. Notwithstanding that, in cases involving accessorial liability such discussions can be found, although legal implications may not be expressly mentioned: in the Second Instance Verdict of *Mirko Pekez et al.*, the War Crimes Chamber established that Mirko Pekez was responsible as an accessory, as opposed to an accomplice, as charged in the indictment. It distinguished these two modes by stating that there was no evidence that he participated directly in the killings and that ‘other members of the armed group relied to a decisive extent’<sup>271</sup> on his contribution. Therefore, the Chamber concluded that, because Pekez did not ‘contribute in a decisive manner to the commission’, he could not be found guilty as an accomplice. Despite the fact that it was not expressly mentioned that this form of liability attracts more lenient sentences, the terminology used implies a lower degree of culpability. Generally it can be observed that although the “degree of liability” is taken into consideration when meting out the sentence, one cannot deduce that generic legal consequences are attached to each mode. Instead, many judgments provide a brief summary of the specific criminal conduct, sometimes labelled as an “aggravating or mitigating” feature. Frequently, it is not obvious

<sup>266</sup> Ibid: ‘The Commentaries to this section recite that a perpetrator convicted under this provision: 1) is responsible for the acts that are directly included by the plan of the criminal group as well as those acts that are the result of this plan if they are of such a nature that their perpetration is in line with the realisation of the goals of this group; 2) is liable for the single criminal acts perpetrated, even if he/she himself/herself did not take part in the perpetration at all; 3) will be sentenced in the same way as the perpetrator of the crime’.

<sup>267</sup> *Mitar Rašević and Savo Todović* First Instance Verdict (n 256) 111.

<sup>268</sup> Ibid.

<sup>269</sup> *Radomir Vuković and Zoran Tomić* First Instance Verdict (n 241).

<sup>270</sup> Ibid para 588.

<sup>271</sup> *Mirko Pekez and Milorad Savić* Second Instance Verdict (n 250) para 106.

which impact that the pertinent degree of liability has on the final sentence. Moreover, it must be recalled that Articles 31(1) CC BiH and 24(1) CC SFRY provide the judges with the discretion to invoke mitigation in cases of aiders and abettors. Therefore, it is possible that although it is not mentioned expressly, it is still likely that the judges have considered or applied more lenient sentences based *inter alia* on the finding that the defendant has been found guilty as an accessory. However, in some cases express references as to the legal implications of a liability mode can also be found at the sentencing stage. In the Second Instance verdict of *Abduladhim Maktouf*, the Panel reduced the sentence also based on the fact that the defendant was an accessory.<sup>272</sup> Despite the fact that criminal responsibility in the stricter sense was not the sole reason for imposing a more lenient sentence, the wording suggests that it was a crucial reason, as it held that ‘[c]onsidering the degree of criminal responsibility of the Accused and consequences of the criminal offense, and considering the mitigating circumstances in favour of the Accused, the Panel applied the provision on reduction of punishment and reduced the sentence to the maximum extent possible (...)’.<sup>273</sup> When reducing the sentence, the Panel did not make explicit reference to Article 31(1), which provides for discretionary mitigation in the case of accessories; instead it based its reasoning on Articles 48(1) and 50(1)(a) CC of BiH.<sup>274</sup> In the case of *Mirko Pekez and Milorad Savić*, discussed above, the Panel based the reduction of the punishment additionally on Article 31(1).<sup>275</sup> It also pointed out that ‘it was indisputably established that in the commission of the criminal offence as charged, the Accused acted wilfully (with direct intent) as an accessory, in the manner that he participated in the action of collection of Bosniak civilians whereby he aided the direct perpetrators to commit the criminal offense of murder’.<sup>276</sup>

Thus, it can be seen that even if certain jurisdictions employ a unitary approach by virtue of pertinent criminal law provisions, not providing for mandatory mitigation, it is still possible that a differentiated approach is followed, although this may be due to the influence of the *ad hoc* tribunals. This inevitably creates room for inconsistencies in regard to the particular approach taken, be it unitary or differentiated – as the discretion to mitigate the sentence leaves inevitably room for both approaches.

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<sup>272</sup> *Abduladhim Maktouf* Second Instance Verdict (n 252) 18: ‘(...) the Panel took into consideration the degree of criminal responsibility of the Accused and the fact that he assisted in commission of criminal offence and that the Criminal Code of BiH includes possibility of more lenient punishment for accessory in commission of criminal offenses (...)’.

<sup>273</sup> *Ibid* 18.

<sup>274</sup> *Ibid* 18, 19.

<sup>275</sup> *Mirko Pekez and Milorad Savić* Second Instance Verdict (n 250) para 177: ‘In individualising the sentences, the Panel also took into account Article 31(1) of the CC BiH which prescribes that the person who intentionally helps another to perpetrate a criminal offence may be punished by a reduced punishment. Therefore, the Panel imposed on the accused Pekez a more lenient punishment in relation to the accused Savić, having found that the imposed sentences are appropriate to the extent of criminal liability of each Accused individually’.

<sup>276</sup> *Ibid* para 170.

### 2.2.3.7 KOSOVO PANELS<sup>277</sup>

The Kosovo Panels or “64 Panels”<sup>278</sup> ‘are formed *ad hoc*’ and the applicable criminal law is the same as enforced in courts<sup>279</sup> across Kosovo.<sup>280</sup> Initially, according to UNMIK Regulation 1999/24<sup>281</sup> courts were to apply<sup>282</sup> (i) UNMIK Regulations and (ii) the law in force in Kosovo on 22 March 1989.<sup>283</sup> In order to avoid lacunae, provisions of the Criminal Code of the Federal Republic of Yugoslavia were applicable, when the former two sources did not provide for specific provisions applicable to the specific circumstance in question.<sup>284</sup> However, following a criminal justice review, the Provisional Criminal Code of Kosovo<sup>285</sup> was promulgated<sup>286</sup> on 6 July 2003. Finally, in 2013 the Kosovan Criminal Code entered into force.

Due to the fact that, at the time of writing, access to the judgments rendered by the Kosovo Panels was difficult as they were not publicly available, only a limited number of judgments have been examined. As suggested above, the issue revolving around the application of respective criminal law in Kosovo is

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<sup>277</sup> For composition and structure of the Kosovo Panels, applicable law and criminal procedure in general, see: OSCE, *Kosovo’s War Crimes Trials: An Assessment Ten Years on 1999-2009*, Department of Human Rights and Communities, OSCE Mission in Kosovo (May 2010); OSCE, *Kosovo’s War Crimes Trials, A Review*, Department of Human Rights and Rule of Law, Legal Systems Monitoring Section, OSCE Mission in Kosovo (September 2002); M E Hartmann, *International Judges and Prosecutors in Kosovo, A New Model for Post-Conflict Peacekeeping*, Special Report, United States Institute of Peace, Special Report 112 (October 2003) 11; S de Bertodano, ‘Current Developments in Internationalized Courts’ (2003) 1 *Journal of International Criminal Justice* 226, 237 seq; J-C Cady and N Booth, ‘Internationalized Courts in Kosovo: An UNMIK Perspective’ in C Romano and others (eds), *Internationalized Criminal Courts, Sierra Leone, East Timor, Kosovo and Cambodia, International Courts and Tribunals Series* (OUP 2004) 59 seq; G Knoops, *An Introduction to the Law of International Criminal Tribunals, A Comparative Study* (Brill Nijhoff 2003) 15 seq; S Williams, *Hybrid and Internationalised Criminal Tribunals* (n 34) 79 seq; M Bohlander, ‘The Legal Framework of the Prosecution and the Courts’ in K Ambos and M Othman (eds), *New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone and Cambodia*, Max-Planck-Institut für ausländisches und internationales Strafrecht, Reihe Interdisziplinäre Untersuchungen aus Strafrecht und Kriminologie (2003) 21 seq; I Risch, ‘Some Practical Issues Concerning the Development of the Judicial System in Kosovo’ in K Ambos and M Othman (eds), *New Approaches in International Criminal Justice: Kosovo, East Timor, Sierra Leone and Cambodia*, Max-Planck-Institut für ausländisches und internationales Strafrecht, Reihe Interdisziplinäre Untersuchungen aus Strafrecht und Kriminologie (2003) 61 seq; Amnesty International, *Kosovo (Serbia): The Challenge to Fix a Failed UN Justice System* (January 2008) 13 seq; See also, Amnesty International ‘*Burying the Past, Kosovo: 10 Years of Impunity for Enforced Disappearances and Abductions in Kosovo*’ (June 2009).

<sup>278</sup> UNMIK/REG/2000/64 (emphasis added) was one of the two crucial regulations which were enacted by UNMIK. It entered into force on 15 December 2000 in order to ensure impartiality of judges and prosecutors in Kosovan courts.

<sup>279</sup> The cases are heard in the District Courts in Kosovo (Prishtina, Prizren, Peja, Mitrovica, Gjilan), and hearing of appeals takes place in the Supreme Court

<sup>280</sup> M E Hartmann ‘International Judges and Prosecutors in Kosovo, A New Model for Post-Conflict Peacekeeping’ Special Report 112, United States Institute of Peace (2003) Special Report 11.

<sup>281</sup> As amended by UNMIK/REG/2000/59 27 October 2000.

<sup>282</sup> If a clash occurred between the two sources, UNMIK regulations prevailed.

<sup>283</sup> Section 1.1 REG/1999/24 On the Law Applicable in Kosovo; see also M. Bohlander, ‘The Direct Application of International Criminal Law in Kosovo’ (2001/I) 1 *Kosovo Legal Studies*, 7, 8,9 and A Simmons and others, ‘Mixed Tribunals’ in M Bohlander and others, *Defense in International Criminal Proceedings* (2006 Martinus Nijhoff) 620.

<sup>284</sup> Section 1.1 (a), (b) UNMIK/REG/1999/24; de Bertodano (n 277) 238; Knoops (n n 277) 16; S Williams (n 60) 86.

<sup>285</sup> UNMIK/REG2003/25.

<sup>286</sup> Along with the Provisional Code of Kosovo. Both legal instruments comprise law of UNMIK regulations.



complex.<sup>287</sup> For the purpose of this work it is essential to discuss pertinent provisions of the Provisional Criminal Code of Kosovo (PCCK), the Criminal Code of Kosovo as well as the Criminal Code of the SFRY respectively, since the former is not applied retroactively.<sup>288</sup> The PCCK referred to different modes of participation as ‘Collaboration in Criminal Offences’. This section encompasses four different modes of liability, namely co-perpetration, incitement, assistance and membership in a criminal association. Each of the foregoing provisions indicates how the participant is to be punished:

Co-Perpetration (Article 23):

When two or more persons jointly commit a criminal offence by participating in the commission of a criminal offence or by substantially contributing to its commission in any other way, each of them shall be liable and punished as prescribed for the criminal offence.

Incitement (Article 24):

Whoever intentionally incites another person to commit a criminal offence shall be punished as if he or she committed the criminal offence if the criminal offence was committed under his or her influence.

Assistance (Article 25):

(1) Whoever intentionally assists another person in the commission of a criminal offence shall be punished as provided for in Article 65(2) of the present Code.

(2) Assistance in committing a criminal offence includes giving advice or instruction on how to commit a criminal offence, making available for the perpetrator the means to commit a criminal offence (...).

Criminal Association (Article 26): (1) Whoever agrees, explicitly or implicitly, with one or more persons to commit or to incite the commission of a criminal offence punishable by imprisonment of at least five years and undertakes preparatory acts for the fulfilment of such agreement participates in a criminal association and shall be punished for in Article 65(2) of the present Code.

Thus, it can be observed that the PCCK established that co-perpetrators and inciters were to be punished like principals, whereas individuals who gave ‘assistance’ or were members in a ‘criminal association’ were to be punished in accordance with Article 65(2), according to which ‘[t]he punishment imposed for attempt, assistance and criminal association shall be no more than three-quarters of the maximum punishment prescribed for the criminal offence. In the cases where the punishment of a fine has been imposed, the same will apply to the maximum fine provided for by law’.<sup>289</sup> Hence, according to the PCCK, mandatory mitigation was triggered if an individual was held to be an assistant or member of a criminal association. Contrary to the differentiated approach in the PCCK, the new Criminal Code of Kosovo embodies a unitary approach akin to the provisions of BiH,

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<sup>287</sup> Thorough discussion exceeds the scope of this paper; see further: OSCE, *Kosovo’s War Crimes Trials: An Assessment Ten Years on 199-2009* (n 277); *Kosovo’s War Crimes Trials, A Review* (n 277) 29-33; M Bohlander, ‘The Legal Framework of the Prosecution and the Courts’ (n 277) 24 seq; Cady and Booth (n 277) 69 seq; Knoops (n 277) 16.

<sup>288</sup> S Nouwen, “Hybrid Courts”: The Hybrid Category of a New Type of International Crimes Courts’ (2006) 2 *Utrecht Law Review* 190, 207 fn 157; see also *Prosecutor v Momcilo Trajčević* (Verdict) Nr. P: 68/2000 (6 March 2001) District Court of Gilan, 7: ‘Indeed, the Regulation 1999/24 states that the applicable laws in Kosovo are those in force on 22 March 1999, but adds that post 1989 laws apply if they address a subject matter that is not already covered (section 1.2) or if they contain provisions more favourable to a criminal defendant (...)’.

<sup>289</sup> See generally Article 65(1): ‘The punishment imposed on a perpetrator is the punishment prescribed for the criminal offence, while a more lenient or severe punishment may be imposed only in accordance with the conditions provided for by the present Code’.

Croatia and Serbia and Montenegro. However, it also entails a differentiated element in that the code expressly provides for corresponding mitigated penalties to the initial minimum term of imprisonment if the conditions for mitigation are given. The crux is that, although Article 33(1) provides that assistants may be punished more leniently and thus falls within the ambit of Article 75, which sets out the conditions for mitigation, this mitigation is still discretionary. Interestingly, Article 74(3), which provides examples in relation to mitigating factors, which may be considered, also lists as a potential factor ‘the fact that the convicted person participated in the criminal offence not as the principal perpetrator but through aiding, abetting, or otherwise assisting another’. When comparing the approach of the PCCK with the course taken by pertinent provisions of the Criminal Code of the SFRY it becomes apparent that these two approaches are different if not almost obverse. While accessories charged under the PCCK are entitled to mandatory mitigation, Articles 22-24 of the Criminal Code of the SFRY allot the same punishment to accessories as to principal perpetrators, whereas discretionary mitigation may only be available for aiders. As can be seen, the new Criminal Code has found a compromise between both approaches.

In the appeals case of *Prosecutor v Krasniqi et al.*,<sup>290</sup> the Panel discussed liability ‘in complicity or within the activity of a criminal group’. Thus, it defined complicity in Article 22 of the Criminal Code of SFRY as follows:

Complicity (Art 22 CC SFRY) can exist in relation to a single crime, committed jointly by several persons, each of them on one side is a carrier of the decision and of the will to commit the criminal offence and on the other side performs the typical act prohibited by the law (murder, theft) or a segment of this, or according to some commentators also an act which falls outside this but represents “an essential segment in the process of committing a criminal act”.<sup>291</sup>

The panel then clarified that co-perpetrators and instigators are to be distinguished from aiders in relation to the severity of the punishment to which they are subjected as the conduct of co-perpetrators and instigators ‘is deemed more important’.<sup>292</sup> Thus, irrespective of the fact that an aider is not by domestic law entitled to mitigation, the Panels clearly demonstrate in this case that a hierarchy of modes of liability is present, or at least that accessories to a crime perform a less significant role and therefore receive less punishment.<sup>293</sup> The Panel then quoted the Confirmation Judge: ‘[a]s already stated (...) “the provision of Article 26 CC SFRY is analogous to the doctrine of joint criminal enterprise (or common purpose or design) as interpreted by the ICTY in the *Tadić* case (...)”’.<sup>294</sup>

<sup>290</sup> *Prosecutor v Selim Krasniqi, Bedri Zyberaj and Agron Krasniqi* (Appeal Verdict) Case No. Ap.-KZ No. 371/2008 (10 April 2009) Supreme Court of Kosovo.

<sup>291</sup> Ibid 15; the Chamber made reference to Article 22 CC SFRY.

<sup>292</sup> Ibid 15: ‘The law distinguished co-perpetrators (accomplices) from instigators and abettors also in the punishment because the conduct of the first ones (to perform the typical criminal act) is deemed more important’.

<sup>293</sup> This does not apply to participants in a criminal association: Article 26 CC SFRY, Criminal responsibility and punishability of the organisers of criminal associations; see also *Selim Krasniqi, Bedri Zyberaj and Agron Krasniqi* Appeal Verdict (n 290) 15: ‘The notion of “criminal liability and punishability of the organizers of criminal associations” (Art 26 CC SFRY) has a different meaning and importance’.

<sup>294</sup> Ibid 16.

Thereby it ascertained that Article 26 CC SFRY is substantially the same as Article 26 PCCK<sup>295</sup> by stating that, '[a]part from the different literal formulation of the two legal provision, their identity must be seen in the agreement to commit (one or more) criminal offences (26 PCCK) which is the same of the criminal design or purpose of committing criminal acts as mentioned in Article 26 CC SFRY'.<sup>296</sup>

Having examined this discussion, it is apparent that the Panel did not raise the point of punishment in the context of the identity of these two provisions. While Article 26 CC SFRY expressly states that a person who engages in a criminal organisation 'shall be punished as if he himself has committed the crime', Article 26 PCCK lays down that members of a criminal organisation shall be punished in accordance with provision 65(2), and therefore 'the punishment imposed for (...) criminal association shall be no more than three-quarters of the maximum punishment prescribed for the criminal offence'. Nevertheless, the Panel considered 'the limits imposed by Article 65 PCCK for the participation in the criminal association'.<sup>297</sup>

In conclusion it can be said that, first of all, the limited access to judgments rendered by the Kosovo Panels makes it impossible to extract the particular approach taken by judges in relation to the weight attached to modes of liability. Notwithstanding that, it is obvious that the CC of the FSRY and the PCCK opt for contrary approaches in this regard, while the new Criminal Code of Kosovo affiliates to the approach opted for by the CC SFRY by embracing a unitary approach. Additionally, the *ad hoc* tribunals' jurisprudence in this regard, which is likely to have wider implications, is immensely discrepant, which seems to render it more unlikely that a consistent approach is taken in regard to a principal accessory distinction and the potential legal consequences thereof.

### **2.3 MODES OF LIABILITY AND SENTENCING IN PURELY DOMESTIC LEGAL SYSTEMS: A COMPARATIVE STUDY**

While at the very beginning of the practice of the Tribunals, reliance on domestic law might have sometimes been the only option to avoid lacunae, the Tribunals have by now developed a substantial body of case law, thus inviting reference to points of law, despite the lack of binding precedent. The question remains as to which path judges should follow in relation to the treatment of accessories at the sentencing stage – previous international case law or domestic approaches. In relation to the latter, the existence of the two camps – differentiated and unitary – makes it impossible to speak of a manifestation as customary international law in relation to one approach. Furthermore, as regards the former, it is important to recall that in the absence of statutory guidance, judges have been forced to

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<sup>295</sup> Ibid: 'Here can be added that the provision of Article 26 CC SFRY is substantially the same of the Article 26 of PCCK, which punishes the participants in a criminal association because they agree with other persons to commit or to incite the commission of a criminal offence and undertake preparatory acts for the fulfilment of such agreement. (...) In other words, to make use of an association for the purpose of committing criminal acts (26 CC SFRY) is the same as to undertake preparatory acts for the fulfilment of the agreement to commit criminal offences (26 PCCK)'.

<sup>296</sup> Ibid.

<sup>297</sup> Ibid 63 (Selim Krasniqi), 71 (Bedri Zyberaj) and 86 (Agron Krasniqi).

fall back on domestic solutions, and thus international criminal jurisprudence has legal domestic imprints in this regard. As discussed above, the mandatory mitigation for aiders, being one concept, embodied in some legal systems, has shaped the approach towards the treatment of accessories in international criminal justice.

It is therefore interesting to examine and contrast various domestic modes while at the same time exploring the reasons for a respective approach, particularly in relation to the legal consequences attached to each mode in a pertinent system. Moreover, it is clear that, as elaborated in Chapter 1, Article 38(1)(c) ICJ Statute provides that ‘general principles of law recognised by (...) nations’<sup>298</sup> is a source of international law. Likewise, Article 21(1)(c) of the Rome Statute stipulates that the ICC shall resort to ‘general principles of law derived by the Court from national laws of States that would normally exercise jurisdiction over the crime’. Accordingly the concept of individual criminal responsibility, deeply rooted in national legal systems, has been applied in a variety of ways as set out above and a ‘micro-comparative study’<sup>299</sup> of such concepts embodied in different legal systems enable the reader to (i) see the variety of approaches that different legal systems follow in relation to the punishment of accessories; (ii) identify intersection points; and (iii) view different manifestations and nuances of the unitary approaches respectively. This will also enable verification of the origins of the domestic concepts utilised in international criminal justice.

Due to the fact that there is no consensus as to the exact ambit of commission and accessorial liability, respectively, this work includes various modes of participation. It follows that this study sets out the actual practice of the selected jurisdictions in relation to the legal relevance ascribed to accessorial liability, thereby revealing various facets of the respective approaches. Finally, the unitary approach is contrasted with the differentiated approach. This study does not attempt to compare the concepts of participation in a crime *per se*; rather, it is intended to compare the concepts of criminal responsibility in relation to their legal implications on the sentence. Notwithstanding that, this will inevitably lead to the inclusion (to a rather limited extent) of the functioning of concepts of complicity. While this chapter predominantly deals with general norms of attribution and as such with those providing for legal consequences, the next chapter is devoted to the sentencing practice in relation to modes of secondary liability.

There is a concern that comparative studies based on domestic systems in this field are to be treated with caution. Peter De Cruz notes that ‘(...) there is the question of comparability or transferability of concepts and principles. It is certainly doubtful whether domestic law concepts can be transposed

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<sup>298</sup> ‘The phrase “general principles of law recognised by civilised nations” refers to principles which find expression in the municipal laws of various nations. These principles, therefore, can be ascertained only by the comparative method’, P De Cruz, *Comparative Law in A Changing World* (3<sup>rd</sup> edn, Routledge-Cavendish 2007) 25.

<sup>299</sup> See generally De Cruz, *Comparative Law in A Changing World*, 233 seq.

simply into the bases of international law decisions'.<sup>300</sup> Indeed, a question of transferability of domestic solutions to collective criminality to the international level has to be raised, as crimes within the jurisdiction of international(ised) courts and tribunals are collective crimes of a macro dimension with unique features. Notwithstanding that, it is not disputed that international courts and tribunals have drawn on domestic modes of liability in one or the other form, as noted above. It is therefore crucial to understand the origin of these concepts and particularly the specific consequences in the domestic system in which they are rooted. Delmas-Marty notes the importance of comparative law due to the fact that some of the sources enumerated in Article 38(b)-(d) ICJ Statute, namely customary international law and general principles, are to some extent based on domestic law.<sup>301</sup> She further notes that 'by allowing the elaboration of hybrid international concepts and by favouring the harmonisation of national criminal systems, comparative law could help promote a more pluralist conception of international criminal law'.<sup>302</sup> Further, Ambos clarifies that international criminal law should be grounded in 'comparative criminal law' as opposed to one domestic 'legal tradition'.<sup>303</sup>

In relation to most domestic law-related comparative studies for the purpose of advancing international criminal law, a few concerns have been raised so far. Badar notes that in many comparative studies in the field of international criminal law, scholars have resorted predominately to the comparison of Western legal systems, which appears to be 'illegitimate' due to a growing community or 'family' of international law.<sup>304</sup> Similarly Drumbl argues that, 'The entire package of international criminal justice remains a reflection of the values of Western retributive criminal justice'.<sup>305</sup> A further objective of this study is linked to this issue, thereby confirming whether there is a substantial reliance on Western concepts on side of modern international courts and tribunals in relation to the application of modes of liability and sentencing practice.

### 2.3.1 COUNTRY SELECTION

For the purpose of this comparative study, several distinguishing features have served as guidance. First and foremost those countries were chosen, which represent the typical features of civil law systems on the one hand and common law systems on the other hand. These two main groups both contain domestic systems, which take similar or even different approaches and frequently utilise varying terminology, but ultimately reach a similar, or even the same, result.

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<sup>300</sup> Ibid 21.

<sup>301</sup> M Delmas-Marty, 'The Contribution of Comparative Law to a Pluralist Conception of International Criminal Law' (2003) 1 *Journal of International Criminal Justice* 13, 16.

<sup>302</sup> Ibid 25.

<sup>303</sup> K Ambos, 'Remarks on the General Part of International Criminal Law' (2006) 4 *Journal of International Criminal Justice*, 660, 662.

<sup>304</sup> M Elewa Badar, *The Concept of Mens Rea in International Criminal Law: The Case for a Unified Approach*, *Studies in International and Comparative Criminal Law* (Hart 2013) 3, 4.

<sup>305</sup> A Drumbl, 'Toward a Criminology of International Crime' (2003) *Washington & Lee Public Law Research Paper No. 03-07*, 19 <<http://ssrn.com/abstract=411780>> accessed 12 November 2013.

Additionally, another decisive factor for the country selection was based on their geographical location with the intention to stretch the confined area beyond Western European boundaries. This rationale led to the inclusion of countries located *inter alia* fully or partly in Asia, Africa and the Balkans. More specifically, England and Wales, the US and New Zealand provide examples of the traditional common law approach. However, France has been chosen in this study, because it is *per se* a civil law country, but embraces a unitary approach. Additional selected jurisdictions are amongst others India as a Commonwealth country, and the East Asian countries, China and Japan, influenced by German and French law and therefore by jurisdictions following two almost opposing theories concerning the treatment of accessories for sentencing purposes. A relevant factor for inclusion was also that these three jurisdictions are not embraced by the term “Western legal system”. Germany and Turkey serve as examples of the Romano-Germanic<sup>306</sup> tradition. Additionally, German law on accessory criminal liability has been particularly relevant in the international context.<sup>307</sup> While the inclusion of Iceland, belonging to the Nordic countries but probably less prominent and influential, allowed an inquiry into a system mixing<sup>308</sup> the unitary and differentiated theories, Egypt, as a North African country, has been chosen as a civil law country, influenced by French law and embracing a unitary approach. Ultimately, particularly in the light of Chapter 4, which analyses the legal cultural backgrounds of judges relating to the role they ascribe to modes of liability in sentencing, it should be mentioned that the overwhelming majority of these jurisdictions is represented by judges in international tribunals.

This comparative study has been conducted in line with the three-stage approach as suggested by Kama: (i) a descriptive phase; (ii) the identification phase; and (iii) the explanatory phase.<sup>309</sup> A potential difficulty could have arisen through varying uses of terminology; nonetheless, overall, it appears that the concepts referring to individual criminal responsibility are relatively uniform in relation to their meaning.

In the light of the *ad hoc* tribunals’ reliance on national liability concepts<sup>310</sup> applicable to domestic crimes, only the general provisions of individual criminal responsibility for domestic crimes are subject to this comparative study. Thus, relevant incorporated international criminal law provisions (BiH), providing for different modes of liability, or a completely new criminal code applicable to

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<sup>306</sup> H Olásolo, ‘Developments in the Distinction between Principal and Accessorial Liability’ (n 166) 341; Olásolo notes that in these systems ‘the principle of mitigation for accessory liability is an important additional reason for the distinction between principals and accessories’.

<sup>307</sup> See M Dubber and T Hörnle, *Criminal Law: A Comparative Approach* (OUP 2014) 304: ‘German criminal law often is held up as a promising alternative, not only as a more sophisticated, or at least systematic, general approach to the question of accessory liability, but also, more specifically, as a means of extending criminal liability to dominating figures who may lie beyond the reach of traditional common law complicity doctrine (...)’.

<sup>308</sup> The mix of unitary and differentiated refers to the normative distinction between two forms of aiders by basing the classification on the nature of the contribution. The central question in this regard is whether the contribution of the accessory was essential for the commission of the offence in question.

<sup>309</sup> De Cruz referred to the three-stage approach suggested by Kama, see De Cruz (n 299) 240.

<sup>310</sup> See *inter alia* Vasiljević Appeal Judgment (n 1) para 182.

international crimes (Rwandan Organic Law), are discussed in the relevant context later in this chapter and in Chapter 3. Moreover, as mentioned in Chapter 1, unitary systems can be divided into pure unitary systems and functional unitary systems. This work only distinguishes between unitary and differentiated systems. Accordingly, only those systems, which provide for mandatory mitigation for accessories, are termed differentiated systems. In order to capture a relatively large – even if incomplete – picture of the state practice<sup>311</sup> in relation to the approaches taken by states in attributing liability and punishing various degrees of culpability of perpetrators, the jurisdictions, which were included can be broadly categorised into four categories, namely:

(i) Civil law countries, which represent the typical features in relation to their approach of attributing criminal liability, which is significant for sentencing purposes, namely the differentiated approach. The countries in this group include Germany, Turkey, Japan and China.

(ii) The second group consists of common law jurisdictions, which embrace the traditional uniform approach. Countries belonging to this group are England, New Zealand, the United States and India.

(iii) The third group includes countries, which belong to either the civil or the common law system, but do not follow an approach typical to their civil-common law categorisation. Some of them include mixed elements, or follow the approach of their civil or common law “counterparts” respectively.

(iv) Within these three groups I have created a sub-group, comprised of countries/jurisdictions either consulted by the hybrid and/or *ad hoc* tribunals subject to this study, or generally located within the territory of the former Yugoslavia. Accordingly this group has common intersection points with all three groups as shown in Table 1 below. However, in order to provide a good overview, these jurisdictions are included in Table 2 and their sentencing system in relation to the modes of liability are identified, but do not form part of this comparative study in the stricter sense, as they have been either addressed at the beginning of this chapter<sup>312</sup> in the context of hybrid tribunals and/or are scrutinised more closely in the light of the sentencing practice if the personal circumstances which relate to the offender have an impact on a more severe or a more lenient punishment, and these circumstances constitute an element of the criminal offence, of the hybrid and international tribunals in subsequent chapters.<sup>313</sup>

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<sup>311</sup> The term “state practice” in the above context is not used in its stricter sense as it is not intended to refer to the formation of a uniform rule of customary international law. It is rather intended to use this terminology in order to embrace the different, similar, but also opposing, approaches of a variety of jurisdictions.

<sup>312</sup> Except for Slovenia, as Slovenia was not as significantly affected by the violence of the Balkan wars (the Ten-Day War was short and had a comparably low intensity).

<sup>313</sup> Due to the fact that, for several reasons mentioned throughout this work, not every hybrid tribunal has been discussed in the same depth as others or as the *ad hoc* tribunals in each chapter of this work, the reference to the domestic penal codes on the territory of the FSRY or referenced by pertinent hybrid tribunals either takes place at the beginning of Chapter 2 or in the context of sentencing in Chapter 3. Some pertinent domestic provisions have been addressed in both chapters.

This study only compares provisions of criminal codes, which are to date in force, with the exception of the Criminal Code of the Former SFRY (and the PCCK, which was only temporarily in force). See Table 1 below for an overview of the categorisation into different groups. Table 1 serves as a mere guidepost to illustrate the rationale on which the selection of pertinent jurisdictions for this work is based.<sup>314</sup>

- Category I: Civil law countries embracing a differentiated approach;
- Category II: Common law countries following a unitary approach;
- Category III: Civil law countries, which follow an approach containing either elements of the unitary common law approach, or adopting it entirely in relation to sentencing; and
- Category IV: Jurisdictions consulted by hybrid tribunals (and countries located on the territory of the (former) SFRY), which can also be subsumed under Category I-III. In relation to the ICTY it has to be noted that, predominantly, the criminal legislation taken into account at the sentencing stage is the SFRY criminal code. Nevertheless, domestic criminal courts of countries emanating from the former Yugoslavia have been included in this study in order to obtain a broader picture.

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<sup>314</sup> For the purpose of the distinction and the subsequent subsumption of Category III under Categories I and II countries, which provide for discretionary mitigation (such as, for instance, Bosnia and Herzegovina), have been treated as following a unitary approach, the same applies to systems, which generally embrace a unitary approach, but impose extra conditions for punishment as a principal, such as Lebanon for instance. Article 220 of the Lebanese Criminal Code provides that an accessory is punished as a principal if the contribution of the secondary perpetrator was essential for the commission. If it was not essential, mitigation is triggered.



TABLE 1: CATEGORISATION OF JURISDICTIONS

Category I	Category II	Category III
China	England	Egypt
Germany <sup>315</sup>	India	France
Japan	New Zealand	Iceland
Turkey	United States	
	Category IV	
Indonesia		Iraq
[Kosovo (PCCK)]	Sierra Leone	Bosnia and Herzegovina
		Lebanon
		Cambodia <sup>316</sup>
		Macedonia
		(Former) SFRY
		Serbia
		Montenegro
		(Slovenia)
		Croatia
		Kosovo (new CC)
		Rwanda <sup>317</sup>

<sup>315</sup> In relation to intentionally committed crimes.

<sup>316</sup> Strictly speaking, it is not possible to categorise the Cambodian legal system as a “pure common law system” or as “pure civil law system”. According to Kong Phallack, the Cambodian legal system is a hybrid system in that it is a fusion of “Cambodian customs”, the French civil law system and also common law, which has influenced the Cambodian system through foreign development aid; K Phallack, ‘Overview of the Cambodian Legal and Judicial System and Recent Efforts at Legal and Judicial Reform’ in H Peng and others (eds), *Introduction to Cambodian Law* (Konrad Adenauer Stiftung 2012) 8. However, according to de Nice and others, documents of the trial of Pol Pot and Ieng Sary (with reference to part II) ‘differs from the style of criminal proceedings in common law countries. It is rather in the civil law tradition as found on the European continent, a fact that is not surprising since the legal system in Cambodia is based on that of France, which ruled Cambodia a colony since World War II.’ H de Nice and others (eds), *Genocide in Cambodia: Documents from the Trial of Pol Pot and Ieng Sary* (University of Pennsylvania Press 2000) 8. Hence, for the purpose of the above categorisation, the Cambodian legal system is classified as a civil law system.

<sup>317</sup> For the purpose of this work, the Rwandan legal system will be labelled a civil law legal system, as the ICTR Trial Chamber referred to it as such in the *Akayesu* Trial Judgment (n 108) para 457. However, it has been noted that the Rwandan legal system is dual and embodies civil and common law elements. It was ‘heavily based on the Belgian civil law system’, notwithstanding that it is said to be moving towards being a common law system; see W E Kosar, ‘Rwanda’s Transition from Civil to Common Law’ (2013) 16(3) *The Globetrotter*, International Law Section, Ontario Bar Association 1, 2.

## 2.4 COMPARATIVE STUDY

### CATEGORY I

#### 2.4.1 CHINA

The principle of individual criminal responsibility is embodied in Chapter 2 of the 1997 Criminal Code of the People's Republic of China. While Article 14 under section 1 provides liability for principal offenders who intentionally commit a crime, the Articles under section 3 govern criminal responsibility for 'joint crimes'. Article 25 describes joint crimes as crimes committed jointly by two or more persons and provides that if such joint crimes are committed negligently as opposed to intentionally, each of the individuals who participated in the joint commission shall be punished on the basis of the crime(s) he has committed and not as a member of this 'joint enterprise'.<sup>318</sup>

In order for a joint crime to be established, three criteria must be met: (i) a minimum of two individuals must be involved in the commission of the crime; (ii) the joint criminal collaboration or criminal design must have led to the "harmful acts" and the criminal result of these acts (*actus reus*); and (iii) each individual must possess the same criminal purpose (*mens rea*).<sup>319</sup> Once such a joint crime is present, Chinese criminal law distinguishes between three different groups of "joint criminals", namely principals, accessories and coerced perpetrators and instigators. This distinction is fundamental as different legal consequences attach to each of these categories.

A principal perpetrator is defined as someone who plays a central and leading role in a 'criminal group' and the commission of the joint crime.<sup>320</sup> However, according to Article 26, a criminal group is only established if its character is "relatively stable" and if it consists of a minimum of three people as opposed to only two. If all these criteria are satisfied, a principal, who is also referred to as the 'ringleader' by the criminal code, is punished for every crime committed by the group he leads. The code further clarifies that principals who are not ringleaders, because they do not satisfy all of the criteria set out above (for instance, the group consists of only two persons), are subject to penalties concerning the crimes they participated in and/or organised. The criminal code describes accomplices as those who play a secondary or generally inferior role in the joint crime. These accomplices, or accessories, are entitled to a mitigation of their sentence or in certain circumstances they may even be exempted from punishment.<sup>321</sup> Coerced perpetrators are also entitled to mitigation of their sentence, or as accessories, they may even be exempted, subject to certain circumstances in relation to the crime committed. Finally, the criminal code provides that instigators are to be punished based on their individual role in relation to the joint crime. Moreover, the code imposes a more severe penalty if the

<sup>318</sup> See also W Luo, 'China' in K J Heller and M Dubber (eds), *The Handbook of Comparative Criminal Law* (Stanford University Press 2010) 151.

<sup>319</sup> Ibid.

<sup>320</sup> Article 26 Criminal Law of the People's Republic of China, 1979.

<sup>321</sup> Article 27.

instigated person is below the age of 18. However, if the crime has committed by the instigated person, the instigator shall according to the criminal code be entitled to a mitigated sentence.<sup>322</sup>

#### 2.4.2 GERMANY

The approach of distinguishing between two types of accessories is embraced by the German Criminal Code, which follows a differentiated approach in relation to offences committed intentionally and a rather unitary approach in relation to administrative offences and those committed negligently.<sup>323</sup> Modes of individual criminal liability in German criminal law are provided for in sections 25-27 of the German Criminal Code (*Strafgesetzbuch, StGB*).<sup>324</sup> The Code provides for criminal liability of (i) principals;<sup>325</sup> (ii) joint criminals;<sup>326</sup> (iii) abettors;<sup>327</sup> and (iv) aiders.<sup>328</sup> Accordingly it can be said that the German Criminal Code distinguishes between three groups of modes of liability, namely, principals (see i and ii); abettors (see iii); and aiders (see iv above).<sup>329</sup> Upon closer look at sections 25(1) and 25(2) it becomes clear that the “principals” can be divided into three different categories, all giving rise to principal liability. These are (i) *Mittelbare Täterschaft* (“principal proxy”); (ii) *Nebentäterschaft* (“independent multiple principals”); and (iii) *Mittäterschaft* (“joint principals”).<sup>330</sup> Abetting (see ii above) and aiding (see iv above) are regarded as modes of accessorial liability. At the sentencing stage, German criminal law makes use of the distinction in that the sentencing regime corresponds with the different categories of participation and provides for specific legal consequences thereto. Principals, including all three forms, namely principals by proxy, joint criminals and multiple principals, are subject to a sentence as the principal to the crime.<sup>331</sup>

<sup>322</sup> Ibid Article 28.

<sup>323</sup> See K Ambos and S Bock, ‘Germany’ in A Reed and M Bohlander (eds), *Participation in Crime: Domestic and Comparative Perspectives* (Ashgate 2013) 321 (the category of “participation” does not exist in relation to offences committed negligently); R Rengier, *Strafrecht Allgemeiner Teil* (5<sup>th</sup> edn CH Beck 2013) 361; T Rotsch, *“Einheitstäterschaft” statt Tatherrschaft* (Mohr Siebeck 2009) 190; see also Bohlander, *Principles of German Criminal Law* (n 152) 154, 155 and particularly 153: ‘In the lowest category of offence, the *Ordnungswidrigkeiten*, the law has abandoned the division between principals and secondary participants and adopted the so-called *Einheitstäterbegriff* or unified perpetrator concept in section 14(1) OWiG. This concept considers anyone a principal whose actions helped cause the result or establish the *actus reus* elements of the offence, regardless of the actual weight of their contribution’.

<sup>324</sup> See Rengier (n 323) 36; M Bohlander, *The German Criminal Code: A Modern English Translation, Studies in International & Comparative Law* (Hart 2008).

<sup>325</sup> Ibid 43, section 25(1) Any person who commits the offence himself or through another shall be liable as a principal.

<sup>326</sup> Ibid section 25(2): If more than one person commit the offence jointly, each shall be liable as a principal (joint principals).

<sup>327</sup> Ibid section 26: Any person who intentionally induces another to intentionally commit an unlawful act (abettor) shall be liable to be sentenced as if he were a principal.

<sup>328</sup> Ibid section 27 (1) Any person who intentionally assists another in the intentional commission of an unlawful act shall be convicted and sentenced as an aider. (2) The sentence for the aider shall be based on the penalty for a principal. It shall be mitigated pursuant to section 49(1).

<sup>329</sup> Ambos and Bock (n 323) 323, 324.

<sup>330</sup> Bohlander, *The German Criminal Code* (n 324) 154.

<sup>331</sup> Ambos and Bock (n 323) 339.

Interestingly, instigators, although not belonging to the first group, but classified as accessories, are ‘treated as if they were principals’.<sup>332</sup> Finally, aiders, who are classed as secondary participants, attract lower sentences, as the German Criminal Code provides a mandatory mitigation for this mode of liability.<sup>333</sup> Accordingly, it is obvious that the reason for such a distinction is deeply rooted and reflected in the sentencing framework of the German legal system.

### 2.4.3 JAPAN

The Japanese Penal Code<sup>334</sup> provides in Chapter XI for various modes of participation in a crime, namely co-principals;<sup>335</sup> inducement;<sup>336</sup> and accessoryship.<sup>337</sup> Article 60 stipulates that if at least two persons commit a crime jointly in concerted action (as co-perpetrators), each of them is considered principal to the crime committed. Thus, each person must share the same intent to act jointly and to commit the offence in question.<sup>338</sup> A further requirement is ‘joint acts of perpetration’;<sup>339</sup> however, it has been held that “sequential acts” suffice.<sup>340</sup> In a similar manner, someone who induces another individual to commit a crime will be punished as principal.<sup>341</sup> This is also true for someone who induces indirectly, in that he induces someone to induce.<sup>342</sup> A central requirement for instigation is that the instigator has “expressly” suggested the commission of the offence in question, which must have then been committed as a result thereof.<sup>343</sup>

Article 62 refers to the liability and punishment of accessories. According to subsection (1) an individual who aids a principal perpetrator is labelled an accessory. Two criteria have to be fulfilled: (i) the person must intend to aid the principal; and (ii) an offence must have taken place.<sup>344</sup> Further, subsection (2) adds that someone who induces an accessory, as opposed to a principal (see Article 61) is entitled to the punishment as accessory. The Criminal Code generally warrants a lower sentence for accessories. Article 63 specifies that ‘the punishment of an accessory shall be reduced from the punishment of a principal’.

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<sup>332</sup> Ibid 339.

<sup>333</sup> Article 27(2) and Article 29(1).

<sup>334</sup> (Japanese) Penal Code (Act No. 45 of 1907).

<sup>335</sup> Ibid Article 60.

<sup>336</sup> Ibid Article 61.

<sup>337</sup> Ibid Article 62.

<sup>338</sup> Ibid Article 61(1); J O Haley ‘Japan’ in K J Heller and M Dubber (eds), *The Handbook of Comparative Criminal Law* (Stanford University Press 2010) 401.

<sup>339</sup> Ibid 401.

<sup>340</sup> Haley (n 338) 401.

<sup>341</sup> Japanese Criminal Code (n 334) Article 61(1); Haley (n 338) 401.

<sup>342</sup> Japanese Criminal Code (n 334) Article 61(2).

<sup>343</sup> Haley (n 338) 401.

<sup>344</sup> Japanese Criminal Code (n 334) Article 61(1); Haley (n 338) 402.

#### 2.4.4 TURKEY

In a similar manner, the Turkish legal system opts for a differentiated model linked with legal consequences attaching to each of the modes of liability.<sup>345</sup> According to the Turkish Criminal Code,<sup>346</sup> a perpetrator, defined in Article 37 of the Turkish Penal Code, will be fully liable as the ‘offender’.<sup>347</sup> Moreover, abettors are to the same extent punishable as principals, despite the fact that they are classified as secondary participants.<sup>348</sup> Aiders are, according to Article 39, punished less severely and gain a statutory discount.<sup>349</sup>

This discount is dependant on the penalty prescribed by law for the commission of the offence – if the crime is subject to aggravated life imprisonment, the mitigated sentence for an aider would be 15-20 years and if the offence in question ‘requires life imprisonment’ the sentence would add up to 10-15 years.<sup>350</sup> It is noteworthy that this statutory mitigation is mandatory, and accordingly not in the judge’s discretion.<sup>351</sup> It can therefore be seen that the Turkish approach to individual criminal liability is influenced by the German concept of participation, as both follow a differentiated approach.<sup>352</sup>

#### CATEGORY II:

#### 2.4.5 ENGLAND AND WALES

Due to the immense influence of the common law doctrine of complicity, particularly on the practice of the *ad hoc* tribunals, England and the US as traditional common law countries are examined in more depth.

In common law, there appears to be a tendency to follow a unitary approach at the sentencing stage. English law distinguishes on the one hand between a principal, who commits an offence by himself, and on the other hand a ‘secondary party’, who either participates through assisting and encouraging by ‘aiding, abetting, counselling, or procuring’ or by participating ‘through a membership of a joint

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<sup>345</sup> R Önok, ‘Turkey’ in A Reed and M Bohlander (eds), *Participation in Crime: Domestic and Comparative Perspectives* (Ashgate 2013) 467.

<sup>346</sup> Turkish Criminal Code (Law No. 5237 of September 26, 2004, as last amended by Law No. 6217 of March 31, 2011).

<sup>347</sup> Ibid Article 37 (1).

<sup>348</sup> Önok (n 345) 459.

<sup>349</sup> Article 39 (1) Turkish Criminal Code (n 346): ‘A person encouraging another person to commit offense [sic] is sentenced to life imprisonment from fifteen years to twenty years if subject to heavy life imprisonment; and from ten years to fifteen years imprisonment if the offense requires life imprisonment’. See also Önok (n 345) 467.

<sup>350</sup> Article 39 (1) Turkish Penal Code: A person encouraging another person to commit offense [sic] is sentenced to life imprisonment from fifteen years to twenty years if subject to heavy life imprisonment; and from ten years to fifteen years imprisonment if the offence requires life imprisonment; Önok (n 345) 467.

<sup>351</sup> Önok (n 345) 467.

<sup>352</sup> Ibid 452.

enterprise that led to the offence'.<sup>353</sup> A secondary party is, according to English law, guilty of a crime which has been committed by the primary perpetrator, despite the fact that neither *mens rea* nor *actus reus* have to be fulfilled directly by the former,<sup>354</sup> as the liability of the former is derivative. Notwithstanding that, an accessory is to be tried, indicted and punished as a principal offender.

An individual can be held liable as a principal in different ways. The straightforward way is if the crime is committed directly by himself alone. However, if two or more individuals jointly commit a crime, thereby fulfilling the *actus reus* and *mens rea* of the crime in question and consequently all causing the result of the offence, each of them can be held liable as a principal.<sup>355</sup> Notwithstanding that, an individual jointly committing a crime with another or several others, can be held liable as a principal, or more specifically joint principal (co-perpetrator), even if he only satisfies several but not all elements of the required *actus reus*.<sup>356</sup> This is the case if each individual possesses the required *mens rea* for the offence and if the sum of each individual contribution cumulatively leads to the fulfilment of the complete *actus reus*. Moreover, English law recognises “indirect perpetration” based on the doctrine of “innocent agency”. In certain circumstances it may be the case that the *actus reus* is not carried out directly or personally by the principal, but instead by another person, namely the ‘innocent agent’, who does not have the required *mens rea* ‘or who has some defence’ such as insanity.<sup>357</sup> Accordingly, principal liability in English law can arise through direct perpetration or commission, through joint perpetration or co-perpetration or through innocent agency or indirect perpetration.

Someone who participates through assisting and encouraging in the form of ‘aiding, abetting, counselling, or procuring’ is an accessory or secondary party.<sup>358</sup> Section 8 of the Accessories and Abettors Act 1861, as amended by the Criminal Law Act 1977, reads as follows:

Whoever shall aid, abet, counsel, or procure the commission of any indictable offence, whether the same be an offence at common law or by virtue of any Act passed or to be passed, shall be liable to be tried, indicted, and punished as a principal Offender.<sup>359</sup>

<sup>353</sup> A P Simester and others, *Simester and Sullivan's Criminal Law, Theory and Doctrine* (5<sup>th</sup> edn, Hart 2013) 203; See generally A Hooper and D Ormerod (eds), *Blackstone's Criminal Practice 2013* (23<sup>rd</sup> edn, OUP 2012) sec A4.

<sup>354</sup> Ibid 205; Ashworth and Horder distinguish between three categories: (i) the principal perpetrator, (ii) the accessory who participates in the commission of a crime by ‘aiding, abetting, counselling and procuring (s.8 Accessories and Abettors Act) and (iii) an individual which participates after the commission of the offence ie by way of “helping to conceal its commission”. However, Ashworth and Horder point out that the latter form has to be distinguished from the other forms of participation as they are covered by other criminal offences, namely attempting to pervert the course of justice and assisting offenders. A Ashworth and J Horder, *Principles of Criminal Law* (7<sup>th</sup> edn OUP 2013) 418, 419.

<sup>355</sup> See for instance Simester and others (n 353) 205 and D Ormerod and K Laird, *Smith and Hogan's Criminal Law, Cases and Materials* (14<sup>th</sup> edn OUP 2015).

<sup>356</sup> Simester and others (n 353) 205.

<sup>357</sup> Ormerod and Laird (n 355) 211; Ibid Ch 7; See generally, Law Commission, *Participating in Crime* (Law Com No 305, 2007) Part 4.

<sup>358</sup> *Attorney General's Reference* (No 1 of 1975) QB 773, 777: ‘The very use of the word “accessory” covers aiding, abetting, counselling and procuring. An accessory, by the very nature of the word is someone who, having one motive or another, gives his support to an enterprise knowing basically what the enterprise is about’.

According to section 44 of the Magistrates Court Act 1980, the same applies to summary offences.<sup>360</sup> Hence, English criminal law stipulates that a secondary party to a crime committed<sup>361</sup> shall be punished as the primary perpetrator or principal to a crime.

Prior to the amendment of the Accessories and Abettors Act 1861 by the Criminal Law Act 1977, section 8 of the former provided the following:

Whosoever shall aid, abet, counsel, or procure the Commission of any Misdemeanour, whether the same be a Misdemeanour at Common Law or by virtue of any Act passed or to be passed, shall be liable to be tried, indicted, and punished as a principal Offender.

Originally, in common law, crimes were categorised in accordance with their gravity for procedural reasons.<sup>362</sup> As a result, three different groups of crimes existed, namely treason, felony and misdemeanour.<sup>363</sup> While felonies were considered to be severe crimes, all other offences were labelled misdemeanour.<sup>364</sup> A distinctive characteristic of the former was that felons could be arrested without charge, had no right to bail and were subject to harsher punishment.<sup>365</sup> Today crimes are 'for procedural purposes' merely classified as either (i) summary, (ii) indictable or (iii) either way offences<sup>366</sup> as the category of offence describes 'the type of court hearing in which the crime will be tried'.<sup>367</sup> The group of indictable offences entails the most severe crimes, such as murder, and can only be tried in the Crown Court. Contrary to that, less grave offences can be tried either summarily in Magistrates' Court or either way in the Crown and Magistrates' Court.

As a consequence to the change in the wording of section 8, whereby 'misdemeanour' was replaced with 'any indictable offence', the applicability of section 8 to the gravest offences, including murder, which imposes a mandatory life sentence, is guaranteed. Hallevy notes that section 8 was amended 'in order to include additional liability to the actual perpetration'.<sup>368</sup> Furthermore, 'the rule laid down in the 1861 Act'<sup>369</sup> has crucial procedural implications in that 'the prosecution can obtain a conviction

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<sup>359</sup> After amendment by the Criminal Law Act 1977 Chapter 45, section 65(4).

<sup>360</sup> Section 44 Magistrates' Courts Act 1980: '(1) A person who aids, abets, counsels and procures the commission by another person of a summary offence shall be guilty of the like offence and may be tried (whether or not he is charged as a principal) either by a court having jurisdiction to try that other person or by a court having by virtue of his own offence jurisdiction to try him. (2) Any offence consisting in aiding, abetting, counselling or procuring the commission of an offence triable either way (other than an offence listed in Schedule 1 to this Act) shall by virtue of this subsection be triable either way'.

<sup>361</sup> However, this participation must take place prior to the completion of the offence, see Simester and others (n 353) 203 seq.

<sup>362</sup> I Marchuk, *The Fundamental Concept of Crime in International Criminal Law, A Comparative Law Analysis* (Springer 2014) 7.

<sup>363</sup> Despite the abolition of the distinction between felony and misdemeanour in English law, it remains in force in the criminal law of Sierra Leone, as can be inferred from the Criminal Procedure Act 1965 (*inter alia* from sections 11 and 13). See *S v Archilla et al.* [2009] SLHC 20, para 4, where the issue of categorising offences into felony and misdemeanour was addressed in the context of accessorial liability.

<sup>364</sup> Marchuk (n 362) 7.

<sup>365</sup> *Ibid* 7.

<sup>366</sup> Ormerod and Laird (n 355) 35.

<sup>367</sup> *Ibid*.

<sup>368</sup> G Hallevy, *The Matrix of Derivative Criminal Liability* (Springer 2012) 11.

<sup>369</sup> Ashworth and Horder (n 354) 421.

without specifying in advance whether the allegation is that D is a principal or an accomplice (...).<sup>370</sup> Ashworth and Horder make the point that this is ‘undoubtedly a great convenience for the prosecution’.<sup>371</sup>

Despite the fact that the legal consequences attaching to the labels of principal or accessory liability are generally the same, the distinction between principals and accessories can be important. This is due to the fact that secondary liability is derivative of principal liability, and thus, the *actus reus* of the offence must have taken place.<sup>372</sup> Further, the *mens rea* requirements of accessories and principals respectively differ. Ashworth and Horder note that in order to distinguish between accessories and principals, one can say that the ‘principal is a person whose acts fall within the legal definition of the crime, whereas an accomplice (sometimes called an ‘accessory’ or ‘secondary party’) is anyone who aids, abets, counsels, or procures a principal’.<sup>373</sup>

Section 8 embraces four forms of participation as a secondary party, which are all equally recognised at common law.<sup>374</sup> However, when an individual is charged with one or the other form of participation, the pertinent “mode” does not have to be mentioned separately in the charge as all four modes ‘may also be used together’.<sup>375</sup> Fletcher notes that the Anglo-American common law systems as well as French law do make a distinction between ‘someone who procures or commands the act, and someone who assists the act by supplying counsel or the means for committing the offense’.<sup>376</sup> The modes’ meaning overlap to varying degrees.<sup>377</sup> Nevertheless, their meanings differ.<sup>378</sup> In Attorney General’s Reference (No 1 of 1975), the Court of Appeal clarified in relation to the interpretation of Section 8 of the 1861 Act that it is approached ‘on the basis that the words should be given their ordinary meaning, if possible’.<sup>379</sup> There is extensive case law relating to the judicial interpretation of the four modes.<sup>380</sup>

<sup>370</sup> Ibid 421; see also *R v Gianetto* [1997] 1 Cr App R1.

<sup>371</sup> Ashworth and Horder (n 354) 421.

<sup>372</sup> See for instance *Thornton v Mitchell* (1940) 1 All ER 339.

<sup>373</sup> See *R v Kennedy* [2007] UKHL 38 para 17, where reference was made to G Williams, ‘Finis for Novus Actus?’ (1989) 48 Cambridge Law Journal 391, 392: ‘Principals cause, accomplices encourage (or otherwise influence) or help. If the instigator were regarded as causing the result he would be a principal, and the conceptual division between principals (or, as I prefer to call them, perpetrators) and accessories would vanish. Indeed, it was because the instigator was not regarded as causing the crime that the notion of accessories had to be developed. This is the irrefragable argument for recognising the *novus actus* principle as one of the bases of our criminal law. The final act is done by the perpetrator, and his guilt pushes the accessories, conceptually speaking, into the background. Accessorial liability is, in the traditional theory, “derivative” from that of the perpetrator’.

<sup>374</sup> *Simester and others* (n 353) 208.

<sup>375</sup> Ibid.

<sup>376</sup> Fletcher, *Rethinking Criminal Law* (n 7) 644, 645.

<sup>377</sup> *Simester and others* (n 353) 208.

<sup>378</sup> See Attorney General’s Reference No 1 of 1975 (n 358) 773: ‘We approach section 8 of the Act of 1861 on the basis that the words should be given their ordinary meaning, if possible. We approach the section on the basis also that if the four words are employed here, “aid, abet, counsel or procure”, the probability is that there is a difference between each of those four words and the other three, because, if there were no such difference, then Parliament would be wasting time in using four words where two or three would do. Thus, in deciding whether that which is assumed to be done under our reference was a criminal offence we approach the section on the footing that each word must be given its ordinary meaning’.

<sup>379</sup> Ibid.



As Ashworth notes, '[i]t appears that one can be convicted of aiding and abetting an offence by applauding (...)'.<sup>381</sup> Therefore it makes sense to consider the ambit of each mode and subsequently understand the difference between the modes or rather "sub-modes" enumerated in section 8<sup>382</sup> before considering the legal consequences attached to them. (i) *Aiding* means giving support, helping or providing assistance. However, the mere attempt to help is not sufficient, as there has to 'be actual assistance'.<sup>383</sup> (ii) *Abetting* refers to the act of inciting by aid, or 'to instigate or to encourage'.<sup>384</sup> (iii) *Counselling* implies two different meanings: while it comprehends the 'provision of advice or information' to the principal, which could also be covered by (i) above,<sup>385</sup> it may also include the act of "urging" someone to commit an offence', in which case an overlap with (ii) above can be observed and the same is true for (iv) below, but 'to a lesser extent'.<sup>386</sup> Finally, (iv) *procuring* has been defined as 'to produce by endeavour'<sup>387</sup> and as 'bringing about an offence, as by deceiving another so that the other commits the offence'.<sup>388</sup> In comparison to the other sub-modes of participation in section 8 of the Accessories and Abettors Act, procuring requires the presence of a stronger nexus between the procurer and the crime *per se*,<sup>389</sup> because the requirement for the procuring a person to commit a crime is that the procurer 'deliberately induces or influences the principal to commit the offence'.<sup>390</sup> These modes vary in relation to the timing when the contribution to the crime is made: while pertinent contributions taking place at the time when the crime takes place are covered by "aiding" and "abetting", those acts taking place before the commission of the offence are covered by the modes "counsel" and "procure".<sup>391</sup> The *mens rea* requirements for accessories have been described as follows:

- (1) the accessory must intend to assist or encourage the principal's conduct, or in the case of procuring, to bring the offence about; and
- (2) the accessory must have knowledge as to the essential elements of the principal's offence, (including any facts as to which the principal bears strict liability). This includes a requirement that D must be aware that the principal might act with *mens rea* when performing the conduct which constitutes the principal offence.<sup>392</sup>

<sup>380</sup> A Ashworth, 'United Kingdom' in K J Heller and M Dubber (eds), *The Handbook of Comparative Criminal Law* (Stanford University Press 2010) 539.

<sup>381</sup> Ibid.

<sup>382</sup> Accessories and Abettors Act 1861.

<sup>383</sup> Simester and others (n 353) 209.

<sup>384</sup> Ibid 210.

<sup>385</sup> Simester and others (n 353) 212; see also Ashworth, 'United Kingdom' (n 380) 539.

<sup>386</sup> Simester and others (n 353) 212.

<sup>387</sup> Attorney General's Reference No 1 of 1975 (n 358) 773: 'To procure means to produce by endeavour. You procure a thing by setting out to see that it happens and taking the appropriate steps to produce that happening'.

<sup>388</sup> Ashworth, 'United Kingdom' (n 380) 539.

<sup>389</sup> Simester and others (n 353) 214.

<sup>390</sup> Ibid.

<sup>391</sup> *Attorney General's Reference No 1 of 1975* (n 358) 773; C Elliott and F Quinn, *Criminal Law* (9<sup>th</sup> edn, Pearson 2012) 303.

<sup>392</sup> Ormerod and Laird (n 355) 188.

In English law an accessory can also be someone who participates in a joint enterprise, which has been subject to debate.<sup>393</sup> According to this doctrine, where a plurality of defendants (minimum two) jointly acted with a ‘common purpose, and where one of them went beyond that purpose and committed a more serious offence, the others were liable to the conviction for that more serious offence if they realized that this was a possible consequence of their joint enterprise’.<sup>394</sup> Accordingly, the Prosecution did not have to prove that the other person(s) who did not commit the other more serious offence(s) intended the commission. The Law Commission has pointed out several issues concerning the doctrine of secondary liability, which are not discussed here as they exceed the scope of this paper.<sup>395</sup>

However, only recently, the Supreme Court gave a landmark decision in *R v Jogee* concerning the joint enterprise doctrine, thereby overruling decades of case law in that it recognised ‘the significance of reversing a statement of principle which has been made and followed by the Privy Council and the House of Lords on a number of occasions’.<sup>396</sup> The Supreme Court criticised that ‘the rule [as it is] brings the striking anomaly of requiring a lower mental threshold for guilt in the case of the accessory than in the case of the principal’<sup>397</sup> and further observed that ‘[t]he error was to equate foresight with intent to assist, as a matter of law’.<sup>398</sup> Instead, the Supreme Court pointed out that ‘the correct approach is to treat it as evidence of intent’.<sup>399</sup>

What becomes clear from the above is that, according to traditional common law, an accessory can generally be subjected to the same penalty as a principal, despite a different liability threshold. Individual culpability is taken into consideration at the sentencing stage, leaving the judge with the discretion to assess blameworthiness and to pronounce the sentence accordingly. Notwithstanding that, as the recent Judgment in *R v Jogee*<sup>400</sup> has shown in relation to the doctrine of joint enterprise, there is a move towards a more nuanced approach with clearer boundaries.

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<sup>393</sup> Ashworth, ‘United Kingdom’ (n 380) 539.

<sup>394</sup> Ibid.

<sup>395</sup> See generally Law Commission, *Participating in Crime*, 4: ‘The doctrine of secondary liability has developed haphazardly and is permeated with uncertainty. Crucially, these features affect not merely the margins of the doctrine but key concepts. Two examples are the fault element of secondary liability and the defences that are available.’ See also A J Ashworth, *Principles of Criminal Law* (4<sup>th</sup> edn, OUP 2003) 441, as cited by the Law Commission on page 4 of their report, *Participating in Crime*: ‘(...) replete with uncertainties and conflict. It betrays the worst features of the common law: what some would regard as flexibility appears here as succession of opportunistic decisions by the courts, often extending the law, and resulting in a body of jurisprudence that has little coherence.’ See also Ashworth, ‘United Kingdom’ (n 380) 539: ‘English law on accessorial liability is in a state of flux.’

<sup>396</sup> *R v Jogee* (Appellant) [2016] UKSC 8, para 79. The Supreme Court held that the error was made in the *Chan Wing Siu* case, *Chan Wing-Siu v The Queen* [1985] AC 168.

<sup>397</sup> Ibid para 84.

<sup>398</sup> Ibid para 87.

<sup>399</sup> Ibid.

<sup>400</sup> *R v Jogee* (n 396).

## 2.4.6 INDIA

Prior to the introduction of the Indian Penal Code of 1860, Indian criminal law was primarily governed jointly by Hindu and Islamic Law. The Penal Code is amongst others, significantly influenced by English criminal law and the French Penal Code.<sup>401</sup> It makes a distinction between a principal and an abettor.<sup>402</sup> Thereby Articles 107 to 120 govern the liability of abettors.<sup>403</sup> The former under Chapter V of the Penal Code provides for different modes of participation in a crime. In order for these provisions to apply, there must be a person who abets (by instigation, conspiracy or intentional aid), the abetted act must have taken place, and the legal consequence of such abetment must constitute an offence.<sup>404</sup> Three forms of abetment are enumerated in Article 107, namely (i) abetment by instigation,<sup>405</sup> (ii) abetment by conspiracy<sup>406</sup> and (iii) abetment by intentional aiding.<sup>407</sup> Thus ‘abetment’ stands as its own offence and is therefore not based on the premise that the abettor committed the ‘substantive offence’.<sup>408</sup> However, according to the jurisprudence of courts, this is only applicable to the modes of conspiracy and instigation, as the third form, “aiding”, implies that an act has been committed and the aider has contributed to it by aiding.<sup>409</sup> These forms of abetment are similar to the English common law term “accessory before the fact”.<sup>410</sup> According to section 109, an abettor is to be punished as a principal if the commission of the crime was a consequence of his act of abetting and if there is no provision expressly providing for a specific punishment. Moreover, section 111 of the Indian Penal Code provides for cases where a person abetted a specific act, but as a result of his abetment another act was undertaken. In this case the abettor is liable to the different act committed if it was a ‘probable consequence of the abetment’.<sup>411</sup>

Another mode of participation is membership in a joint enterprise, governed by section 34 of the Penal Code. The Penal Code labels such participation as ‘acts done by several persons in furtherance of common intention’. According to this doctrine, each individual who participates and shares the

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<sup>401</sup> S Yeo, ‘India’ in K J Heller and M Dubber (eds), *The Handbook of Comparative Criminal Law* (Stanford University Press 2010) 289.

<sup>402</sup> K Gaur, *Textbook on the Indian Penal Code* (Universal Law Publishing 1992) 196.

<sup>403</sup> Ibid 196.

<sup>404</sup> Ibid.

<sup>405</sup> Explanation 1 to Article 107 defines an instigator as ‘[a] person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing’.

<sup>406</sup> Gaur (n 402) 197: ‘A person is said to abet the commission of an offence by conspiracy, if he enters into an agreement with one or more persons to do a legal act by illegal means, or to do an illegal act, and some act is done in pursuance thereof’.

<sup>407</sup> Section 107 Indian Penal Code of 1860; according to Explanation 2 to section 107 of the Indian Penal Code, an aider is defined as follows: ‘Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act’. Yeo (n 401) 289.

<sup>408</sup> Section 107; Yeo (n 401) 289.

<sup>409</sup> Section 107; *Jamuna Singh v State of Bihar* AIR 1967 SC 553 cited by Yeo (n 401) 289.

<sup>410</sup> Gaur (n 402) 197.

<sup>411</sup> Provision to Article 111 of the Indian Penal Code of 1860.

common intention with the objective to further it, is liable as a principal.<sup>412</sup> Similarly, a participant who acts in furtherance of a common intention or design is punished like a principal. However, in order for a participant to be liable he ‘must have been physically or constructively present when the offence occurred’.<sup>413</sup>

#### 2.4.7 NEW ZEALAND

In New Zealand the concept of individual criminal responsibility is embodied in in Part 4 (section 66) of the Crimes Act 1961.<sup>414</sup> While subsection (1)(a) establishes principal liability, subsection 1(b)-(d) and subsection (2) embrace concepts of secondary liability.<sup>415</sup> Thus, a distinction is made between the two latter categories. Subsection (1)(b)-(d) imposes criminal liability on persons who encourage or assist in the commission of a crime:

- (b) does or omits an act for the purpose of aiding any person to commit the offence; or
- (c) abets any person in the commission of the offence; or
- (d) incites, counsels, or procures any person to commit the offence.

Moreover, secondary liability can arise under the ‘doctrine of common intention’, which is laid down in section 66(2) of the Crimes Act 1961.<sup>416</sup> According to this concept, liability is imposed on each individual:

Where 2 or more persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of the common purpose if the commission of that offence was known to be a probable consequence of the prosecution of the common purpose.<sup>417</sup>

Accordingly, the Crimes Act 1961 distinguishes between three categories of participants: the principal on the one hand and two different types of secondary parties on the other hand. Despite the different requirements of each “label” for imputing liability, once liability is established, all participants are convicted for the principal offence<sup>418</sup> and therefore a secondary party can be subjected to the same penalties as the principal perpetrator.

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<sup>412</sup> Section 34 provides: ‘When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone’.

<sup>413</sup> Yeo (n 401) 297.

<sup>414</sup> Section 66 of the Crimes Act 1961 No 43: ‘Everyone is a party to and guilty of an offence who (a) actually commits the offence; or (b) does or omits an act for the purpose of aiding any person to commit the offence; or (c) abets any person in the commission of the offence; or (d) incites, counsels, or procures any person to commit the offence. (2) Where 2 or more persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of the common purpose if the commission of that offence was known to be a probable consequence of the prosecution of the common purpose’.

<sup>415</sup> J Tolmie, ‘New Zealand,’ in A Reed and M Bohlander (eds), *Participation in Crime: Domestic and Comparative Perspectives* (Ashgate 2013) 379.

<sup>416</sup> Ibid.

<sup>417</sup> Article 66(2) Crimes Act 1961.

<sup>418</sup> Tolmie (n 415) 395.

Nevertheless the judge has the discretion to take into consideration the relevant factors in order to assess each individual's contribution.

#### 2.4.8 UNITED STATES

The United States generally reflect another typical common law tradition, because the former colonies embraced English common law in the eighteenth century.<sup>419</sup> The United States embrace 52 diverse criminal codes, it is therefore difficult to refer to something such as a general American position on a particular issue in question concerning American criminal law,<sup>420</sup> which also applies to this comparative study. However, the promulgation of the Model Penal Code by the American Law Institute<sup>421</sup> immensely advanced the codification of 'modern' American criminal law.<sup>422</sup> This is reflected by the fact that since its introduction in 1962, almost three quarters of American states have replaced their criminal codes on the basis of it.<sup>423</sup> Dubber clarifies that certain states still continue to follow the traditional common law principle in relation to attribution of individual criminal liability.<sup>424</sup> Accordingly, for the purpose of this study, three different sources of American criminal law are examined: common law, the Model Penal Code and finally the United States Code.

At common law perpetrators 'were punished as either principals or accessories'.<sup>425</sup> This distinction did not apply to misdemeanour cases, where each participant was considered to be a principal to the offence. Thereby principals were sub-categorised as (i) principals in the first degree; and (ii) principals in the second degree (aider and abettor);<sup>426</sup> while accessories were classified as accessories before the fact (aider and abettor);<sup>427</sup> and (iv) accessories after the fact.<sup>428</sup> Accordingly, the traditional common law system distinguished between four categories of participants.<sup>429</sup> Thus, both the principal and the accessory faced sanctions as 'felons'.<sup>430</sup> Only later a new differentiation emerged whereby 'accessories after the fact' were not considered to be 'true parties' as they contributed to the offence after it had already been completed.<sup>431</sup> The complicity norms of the Model Penal Code<sup>432</sup> can be

<sup>419</sup> P Robinson 'United States' in K J Heller and M Dubber (eds), *The Handbook of Comparative Criminal Law* (Stanford University Press 2010) 564.

<sup>420</sup> P H Robinson and M Dubber, *An Introduction to the Model Penal Code*, <<http://www.law.upenn.edu/fac/phrobins/intromodpencode.pdf>> accessed 24.08.2013.

<sup>421</sup> Also referred to as ALI.

<sup>422</sup> Robinson (n 419) 564.

<sup>423</sup> Ibid.

<sup>424</sup> M Dubber, 'Criminalizing Complicity: A Comparative Analysis' (2007) 5 *Journal of International Criminal Justice* (2007) 977, 980.

<sup>425</sup> L Chiesa, 'United States' in A Reed and M Bohlander (eds), *Participation in Crime: Domestic and Comparative Perspectives* (Ashgate 2013) 469.

<sup>426</sup> W LaFave, *Principles of Criminal Law: Cases, Comments and Questions* (West Group 1978) 513.

<sup>427</sup> The accused was considered to be principal in the second degree if he was present at 'the scene of the crime' and accessory before the fact if they were not present, see Chiesa (n 425) 474.

<sup>428</sup> Dubber Criminalizing Complicity (n 424) 980; Chiesa (n 425) 470.

<sup>429</sup> LaFave (n 426) 513.

<sup>430</sup> Dubber Criminalizing Complicity (n 424) 984.

<sup>431</sup> Chiesa (n 425) 470.

considered as the result of a ‘careful critical analysis’ of the traditional common law complicity scheme and the general norms.<sup>433</sup> One of the consequences thereof was the abolishment of the principal accessory (before the fact) distinction.<sup>434</sup>

The Model Penal Code provides that ‘a person is guilty of an offense if he commits it “by his own conduct” or by the conduct of another person for which he is legally accountable or both’.<sup>435</sup> It defines an accomplice as someone who solicits, ‘aids, agrees to aid or attempts to aid [...] in the planning or commission of the offense, or [...] has a legal duty to prevent the commission, but makes no effort to do so.’<sup>436</sup>

Another source that could be looked at is the United States Code (USC), which defines ‘principals’ in Part I Chapter 1 section 2 as follows:

Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

Whoever wilfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as the principal.<sup>437</sup>

Accordingly, an accessory to a crime committed is in theory as severely punished as a principal. However, the USC isolates the “accessory after the fact” (as the traditional common law approach) from the same legal consequence, by prescribing a mandatory mitigation on the sentencing stage:

Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.

Except as otherwise expressly provided by any Act of Congress, an accessory after the fact shall be imprisoned not more than one-half the maximum term of imprisonment or (...) fined not more than one-half the maximum fine prescribed for the punishment of the principal, or both; or if the principal is punishable by life imprisonment or death, the accessory shall be imprisoned not more than 15 years’.<sup>438</sup>

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<sup>432</sup> According to Dubber, the Model Penal Code makes further sub-categorisations: ‘(1) principal in the first degree: (direct) perpetrator - personally engages in the proscribed conduct; (2) principal in the first degree: (indirect) perpetrator – uses another as an unwitting or unwilling tool to engage in the proscribed conduct; (3) principal in the second degree – aids another in engaging in the proscribed conduct in his presence; (4) accessory before the fact: solicitor – incites another to engage in the proscribed conduct; (5) accessory before the fact: facilitator – aids another in engaging in the proscribed conduct not in his presence’. Dubber, *Criminalizing Complicity* (n 424) 980.

<sup>433</sup> Ibid 980, see also fn 16.

<sup>434</sup> LaFave (n 426) 514: ‘Virtually all states have now expressly abrogated the distinction between principals and accessories before the fact, The most common form of legislation declares that accessories before the fact are now principals, although substantially the same result has been reached providing that those who would have been accessories before the fact may be prosecuted, tried and punished as if they were principals. A much more modern approach to the entire subject of parties to crime is to abandon completely the old common law terminology and simply provide that a person is legally accountable for the conduct of another when he is accomplice of the other person in the commission of the crime’. See also Chiesa (n 425) 474; see also Model Penal Code section 2.06.

<sup>435</sup> J Dressler, *Understanding Criminal Law* (7<sup>th</sup> edn LexisNexis 2015) 35; Model Penal Code § 2.06(1).

<sup>436</sup> Dressler, *Understanding Criminal Law* (n 435) 37, 38; Model Penal Code §2.06(3)(a).

<sup>437</sup> 18 US Code section 2 Principals.

<sup>438</sup> 18 US Code section 3 Accessory after the fact.

Hence, the USC provides that the statutory maximum term of imprisonment for an accessory after the fact is 15 years.

Irrespective of the three different sources on American complicity law subject to this study, one principle, which is common to all three of them, becomes very obvious, namely the intention to grant the judge the discretion to punish an accessory, apart from the accessory after the fact, as severely as a principal (and in some cases more harshly). There is no prescribed statutory mitigation of punishment, as for instance in German criminal law, *e contrario* judges can in principle mitigate the sentence subject to discretion, but they do not have to mitigate the sentence at all. According to Dubber, the Model Penal Code's 'drafters' guiding principle was, each person's criminal liability should reflect his individual culpability'.<sup>439</sup> Accordingly, the reason for such judicial discretion appears to be the ability to assess the individual's guilt independent of the specific label. This appears logical where the defendant, who is charged as aider and abettor, appears to be more blameworthy than the principal, or/and possibly insufficient evidence is available to charge him as a principal. *Vice versa*, it lowers the threshold for imputing "principal" liability, which is in fact accessory liability but has the same legal effect. The 2010 Federal Sentencing Guideline on assessing the punishment of an aider and abettor reads as follows: 'The offense level is the same level as that for the underlying offense'.

Moreover, section 2 (a) of Title 18 USC provides that a defendant convicted of aiding and abetting is punishable as a principal and thus aiding and abetting the commission of an offence has the same offence level as the underlying offence. An adjustment for a mitigating role in accordance with the 2015 USSC Guidelines Manual (section 3B1.2) may however be applicable. Thereby the sentencing judge is given tremendous discretion in deciding whether the accused should be punished as severely as the principal or maybe less. This position was *inter alia* emphasised in the case of *People v Shafou*, where it was stated that:

Accomplices generally are punished as severely as the principal, on the premise that when a crime has been committed, those who aid in its commission should be punished like the principal.<sup>440</sup>

Yet this is not the maximum punishment an accessory can face. Most US jurisdictions recognise the "natural-and-probable-consequences" doctrine, according to which an accomplice is liable for the crimes committed by the principal to a crime if these other crimes were 'a natural and probable consequence' of the original offence – even if they were not desired by the accomplice.<sup>441</sup> Again, the sentencing judge has wide discretion to sentence the accomplice as principal to each of these pertinent crimes, despite the fact that the culpability of an accessory in this specific circumstance is less than the

<sup>439</sup> Dubber Criminalizing Complicity (n 424) 987.

<sup>440</sup> *People v Shafou* 330 NW 2d 647 416 Mich 113 (1982).

<sup>441</sup> See *People v Hoang* 13 P.3d 819 (Colo Ct App 2000); J Dressler, 'Reforming Complicity Law: Trivial Assistance as a Lesser Offense' (2008) 5 Ohio State Journal of Criminal Law 427, 428.

guilt of the principal in the described scenario.<sup>442</sup> Hence, it can be said that in the American system, accessories (except the accessory after the fact) and principal are subject to the same sanctions.

### **CATEGORY III:**

#### 2.4.9 EGYPT

The provisions on individual criminal responsibility are laid down in Part 4 of the Penal Code.<sup>443</sup> Article 39 governs principal liability, referring to persons who directly commit the crime alone, or jointly with others (co-perpetration). Moreover, a person who intentionally commits an act which leads, in accordance with acts committed by others, to the commission of the crime or the criminal result, is also considered to be a principal to the crime. Article 40 of the Penal Code then lists three categories of accomplices, namely (i) someone who instigates to the commission of a crime, where the act leading to the commission of the crime is caused by the instigation; (ii) someone who jointly with another agrees to commit a crime, where the agreement is the cause for the commission of the crime; and finally (iii) someone who supports the actual perpetrator(s) by providing them with a weapon or other objects, while knowing that these objects will either cause the crime, support the preparation of it, or lead to the completion of the pertinent offence.

Article 41 of the Egyptian Penal Code is devoted to the legal consequences resulting from one mode or the other. It provides that accomplices are subject to the same penalty as principals; however, the Penal Code provides exceptions:<sup>444</sup> if for example the principal's liability is 'altered' due to 'special circumstances' and the accessory did not have knowledge of these circumstances, his liability is not affected by them and he is 'punished according to the nature and degree of his (...) own intent or knowledge'.<sup>445</sup> Article 42 provides that the principal's defence to a crime does not affect the accomplice's liability.<sup>446</sup> Moreover, Article 43 governs the situation where an accomplice contributes to a crime, through agreement, instigation or other forms of assistance, but as a result of these acts, another crime, not intended by the accomplice, is committed.<sup>447</sup> If such a scenario arises, the Court of Cassation has held that accomplices are liable for unintended crimes, which they should have foreseen as a result of their respective form of assistance.<sup>448</sup>

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<sup>442</sup> See generally for a critical view of American complicity law among others, Dressler (n 441).

<sup>443</sup> Law No. 58 of 1937 Issuing the Penal Code (as amended up to Law No. 95 of 2003).

<sup>444</sup> Article 41 of the Penal Code; S Reza, 'Egypt' in K J Heller and M Dubber (eds), *The Handbook of Comparative Criminal Law* (Stanford University Press 2010) 189.

<sup>445</sup> Ibid 189.

<sup>446</sup> See also Reza (n 444) 189.

<sup>447</sup> Ibid.

<sup>448</sup> Ibid.



Accordingly, it can be observed that the Egyptian Penal Code shares with the law on individual criminal responsibility of England and Wales, the unitary approach in that an accessory shall be punished like the principal perpetrator. However, contrary to the English concept, the Egyptian Penal Code restricts the unfettered discretion of judges by inserting Article 42, which draws a line between a principal on the one side and an accessory, who did not share the principal perpetrator's intent or knowledge, on the other side. Although this provision does not spell out a generic legal consequence for accessories, akin to a differentiated approach, it can be viewed as providing guidance and limits the vast discretion of judges. Despite the fact that the Egyptian law clearly manifests a unitary approach, it must be differentiated from the unitary approach as established in the criminal law of England and Wales, where such limitation, or guidance, is not expressly pronounced by law.

#### 2.4.10 FRANCE

There are also civil law systems which do not provide for "mitigating punishment" for accessories, such as *inter alia* France, Italy, and Austria, and therefore follow a unitary approach.<sup>449</sup> The French and Anglo-American systems only provide for one group of accessories.<sup>450</sup> The French Criminal Code refers to the principal as *auteur materiel*, which is specified in Article 121-4 of the Code and to accomplices as *les complices*.<sup>451</sup> According to Article 121-4 a principal perpetrator is someone who '1. Commits the criminal conduct; 2. Attempts to commit a serious offence or, in the case provided for by the legislation, a major offence'.<sup>452</sup> The concept of accomplice liability is mainly embodied in Articles 121-6 and 121-7 (1) and (2).<sup>453</sup> The latter defines accomplices as follows:

An accomplice to a serious or major offence is the person who knowingly, by help or assistance, facilitated its preparation or commission. A person is also an accomplice who by gift, promise, threat, order, abuse of authority or power has provoked an offence or gives instructions to commit it.<sup>454</sup>

Accordingly, strictly speaking, French criminal law distinguishes between an accessory who 'knowingly, by help or assistance' furthered the commission of the respective crime and an accessory 'who by gift, promise, threat, order, abuse of authority or power (...)' contributed to the commission.<sup>455</sup>

However, both forms trigger accomplice liability and no distinction is made within this category for sentencing purposes.

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<sup>449</sup> However, judges may still make use of their discretion at the sentencing stage; Fletcher, *Rethinking Criminal Law* (n 7) 636.

<sup>450</sup> Ibid 645.

<sup>451</sup> Articles 121.5, 121.6, 121.7 of the French Criminal Code; C Elliott, 'France' in A Reed and M Bohlander (eds), *Participation in Crime: Domestic and Comparative Perspectives* (Ashgate 2013) 273, 274.

<sup>452</sup> Elliott, *French Criminal Law* (Willan 2001) 84.

<sup>453</sup> Ibid.

<sup>454</sup> Article 121-7 of the French Penal Code; C Elliott 'France' in K J Heller and M Dubber (eds), *The Handbook of Comparative Criminal Law* (Stanford University Press 2010) 222; Elliott, *French Criminal Law* (n 452) 85.

<sup>455</sup> van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (n 106) 62.

Three requirements have to be satisfied in order to establish secondary party liability, namely (i) the principal perpetrator must have committed the offence; (ii) some sort of complicity must be present; and (iii) the secondary party must have the required mental element or *mens rea*.<sup>456</sup>

Article 121-6<sup>457</sup> stipulates that accessories are to be punished as principals to the crime.<sup>458</sup>

#### 2.4.11 ICELAND

Generally, according to the General Penal Code of Iceland,<sup>459</sup> accessories are to be punished as principals; however, as will be seen below, this uniform approach is not strict and statutory mitigation of the sentence applies to several exceptions. Article 22 of the Penal Code provides that '[a]ny person who in word or deed provides aid in the commission of a punishable act defined in this Act, or takes, by persuasion, exhortation or otherwise a part in committing such act' is punishable as the principal offender. The criminal code provides for mitigated punishment in following situations:<sup>460</sup>

- (i) the participant's role in the commission of the crime in question is of "minor nature", or if
- (ii) the participant strengthens another person's determination to commit a crime and this person's determination is already formed prior to the participant's attempt to strengthen it
- (iii) the crime in question has not been committed
- (iv) the intended participation in the crime has failed.

Moreover, para 3 of Article 22 provides that if one of the situations above is applicable and the accessory became involved due to "inadvertence", he may be exempted from punishment if the prescribed penalty for the crime in question does not exceed one year of imprisonment.

### Category IV<sup>461</sup>

#### 2.4.12 SFRY, CROATIA, MONTENEGRO, BIH, SERBIA AND KOSOVO

As laid down in Chapter 2, Article 24 of the criminal code of the SFRY embraces a unitary approach in that accessories to a crime may be punished more mildly. It can be clearly seen that the criminal codes of Croatia, Montenegro, Serbia, and Bosnia and Herzegovina all seem to have drawn on this provision and thus they all embody a unitary approach.

<sup>456</sup> Elliott, 'France' in Heller and Dubber (n 454) 222; Elliott, *French Criminal Law* (n 452) 85.

<sup>457</sup> Article 121.6: 'The accomplice of the offence, as defined in Article 121-7, will be punished as a principal offender'. See also 121-7 of the French Criminal Code; Elliott, *French Criminal Law* (n 452) 84; Elliott, 'France' in Heller and Dubber (n 454) 222.

<sup>458</sup> Elliott, 'France' in A Reed and M Bohlander (n 451) 274; Elliott, 'France' in Heller and Dubber (n 454) 222.

<sup>459</sup> General Penal Code of Iceland No. 19, February 12, 1940.

<sup>460</sup> Article 22 para 2.

<sup>461</sup> Due to the fact that these jurisdictions have been addressed in detail in Chapter 2, they are only briefly referred to here for the sake of completeness, to avoid extensive repetition.

Interestingly, the Provisional Code of Kosovo deviated from this approach in that it provided that a person who assists another in the “commission of a criminal offence” is entitled to mitigated punishment as provided for in Article 65(2) PCCK. Article 65(2) PCCK stipulated that an accessory shall not be punished ‘more than three-quarters of the maximum punishment prescribed for the criminal offence’. However, the new Criminal Code of Kosovo, which entered into force in January 2013, also embodies a unitary approach, although with a differentiated element. Article 33 of the new Criminal Code resembles the aforementioned criminal codes, albeit discretionary mitigation is regulated in more detail. Accordingly it can be concluded that the above addressed jurisdictions all draw on the same principles in that mitigation for accessories may only be invoked on a discretionary basis.

#### 2.4.13 CAMBODIA

The Cambodian Criminal Code also opts for a unitary approach. Article 29 of the Cambodian Criminal Code refers to an accessory to a crime as an ‘accomplice’.<sup>462</sup> Moreover, it provides that an accomplice is a ‘person who intentionally facilitates the attempt or the realisation of a felony or a misdemeanour by providing his/her help or assistance’.<sup>463</sup> With regard to the legal relevance attached to the classification as accomplice, Article 29 section 2 continues to clarify that ‘an accomplice of a felony or misdemeanour receives the same punishment as the perpetrator’. When taking a closer look at the wording, it becomes clear that ‘felony’ and ‘misdemeanour’ are words borrowed from common law. Since the Cambodian legal system is hybrid as it entails civil and common law elements, one can deduce that the unitary approach opted for in relation to the punishment of accessories is heavily influenced by the traditional common law approach in this regard.

#### 2.4.14 SIERRA LEONE

As addressed in Chapter 2, accessories may be punished as principals in accordance with section 1 of the Abettors and Accessories Act 1861.

#### 2.4.15 RWANDA

The Rwandan Organic Law incorporates a differentiated approach in that it distinguishes perpetrators based on their participation<sup>464</sup> for sentencing purposes.

#### 2.4.16 INDONESIA

Article 51 of the Indonesian Penal Code embraces a differentiated approach in that accomplices are

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<sup>462</sup> Criminal Code of the Kingdom of Cambodia 2009.

<sup>463</sup> Ibid Article 29.

<sup>464</sup> *Prosecutor v Serushago* (Trial Judgment) ICTR 98-39-S (5 February 1999) para 17.

entitled to one third punishment in relation to the maximum punishment.<sup>465</sup> In terms of crimes leading to capital punishment or a life sentence, the penalty is limited to a maximum of 15 years' imprisonment.<sup>466</sup>

#### 2.4.17 IRAQ

The Iraqi criminal code embraces a unitary approach in that it stipulates that '[a]ny person who participates in the commission of an offence as principal or accessory is punishable by the penalty prescribed for that offence unless otherwise stipulated by law'.<sup>467</sup>

#### 2.4.18 LEBANON

Generally speaking, the Lebanese Criminal Code distinguishes between the punishment of perpetrators and the sanctions imposed on accomplices. However, it distinguishes between the accomplice 'without whose assistance the offence would not have taken place' and the ordinary accomplice. According to law, the former shall be punished as if he were the principal perpetrator of the offence(s) in question. The latter is punished more mildly. Thus the determination of the exact penalty range is dependent on the specific sentence of the principal.<sup>468</sup>

### 2.5 CONCLUSIONS FROM THE COMPARATIVE STUDY

What all the above systems have in common, despite the differences concerning legal consequences, is the fact that (i) all of the systems distinguish between principals and/or accessories as primary and secondary parties respectively; (ii) even the systems which embrace a unitary approach maintain the discretion to mitigate the punishment of aiders; (iii) all of the systems are based on different *mens rea* requirements for principals and accessories, leading to (iv) a different liability threshold for principals and accessories; and (v) some unitary systems embark on a normative distinction between two categories of accessories, implying different generic penalties. While inciters are mostly punished as principals, most legal systems offer at least the possibility of discretionary mitigation to aiders. Moreover, one can observe that all of the common law systems and a minority of the selected civil law systems such as those of Egypt and France assess the culpability of the individual at the sentencing stage and not during the attribution or "labelling-process". Iceland and Lebanon, for instance, mix a unitary approach with a differentiated approach. Table 2 below comprises the findings of the comparative study relating to the approach embraced in relation to the punishment of participants to an offence.

<sup>465</sup> Article 57(1) Indonesian Penal Code.

<sup>466</sup> Article 57(2) Indonesian Penal Code.

<sup>467</sup> Article 50(1) Penal Code 111, as amended 14 March 2010 (Iraq).

<sup>468</sup> Article 220 Lebanese Criminal Code.

TABLE 2: THE SENTENCING APPROACH IN PERTINENT JURISDICTIONS

Country	Unitary Approach	Differentiated Approach
Bosnia and Herzegovina	X	
Cambodia	X	
China		X
Croatia	X	
Egypt	X	
England & Wales	X	
France	X	
(Former) FSRY	X	
Germany		X
Iceland	X	
India	X	
Indonesia		X
Iraq	X	
Japan		X
Kosovo		X
Lebanon		X*
Macedonia	X	
Montenegro	X	
New Zealand	X	
Rwanda	X	
Serbia	X	
Sierra Leone	X	
Slovenia	X	
Turkey		X
US	X**	

\*If contribution of the aider not essential, mandatory mitigation

\*\*Accessory after the fact, mandatory mitigation

Accordingly, the above examination coupled with Table 2 reveals that a variety of “coping-processes” for collective criminality exist on the domestic level and that to some extent these mechanisms overlap. What each of them has in common is the normative distinction of principals and accessories or secondary parties to a crime. The main intersection, however, is whether domestic systems attach different legal consequences to either accessories or principals. It is clear that generally civil law systems embrace a differentiated approach in relation to sentencing while common law countries follow a unitary approach. Nonetheless this distinction must be treated with caution. The civil and

common law distinction in this regard serves merely as a broad categorisation, since various legal systems such as Austria, Denmark,<sup>469</sup> Italy, France and Sweden, amongst a few others, have opted for a rather unitary approach despite their civil law tradition. Thus, the degree of culpability is not measured and expressed through legally relevant labelling at the attribution stage, but it is rather reflected at the sentencing stage. In contrast, Germany, which can be regarded as one of the countries referred to as ‘a proxy for the laws of all other countries influenced by these legal systems, and as potential building blocks of existing and new universal norms’,<sup>470</sup> does not in fact operate a pure differentiated approach as certain offences will trigger the application of a unitary attribution system.<sup>471</sup> This is, however, only the case for certain offences and does not include graver, intentionally committed offences.

It can clearly be seen that, for instance, the German, Turkish and Japanese criminal law systems embrace a differentiated approach. Thus, the respective criminal codes provide for a statutory mitigation for aiders and at the same time stipulate that abettors/instigators/inducers are to be punished as principals despite the fact that they are categorised as accessories. The latter is not true for Japanese criminal law, as inducement is a separate form of participation, which differs from the category of “accessoryship”. In relation to the punishment of instigators, Chinese criminal law opts for an approach which merges features of the differentiated and unitary approaches: while instigators shall receive a heavier sentence if they have instigated an individual who is below the age of 18,<sup>472</sup> an instigator shall generally be punished in relation to the “role he plays” in the commission of the joint crime.<sup>473</sup> An instigator may also receive mitigated or lighter punishment if the instigated person has not committed the crime.<sup>474</sup> Generally the Chinese criminal code opts for a differentiated approach by providing mitigation or exemption from punishment for accessories. Furthermore, lighter punishment or exemption from penalty is prescribed for coerced participants.<sup>475</sup>

The Anglo-American common law system follows a unitary approach at the sentencing stage. As seen above in relation to England and Wales, America and New Zealand, a differentiated approach is taken at the attribution stage, as secondary participation is derivative from the liability of the principal offender and a classification into one of the two categories takes place. Notwithstanding that, this

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<sup>469</sup> For the law on individual criminal responsibility in Scandinavia, Austria and Germany see K Hamdorf, ‘Beteiligungsmoedelle im Strafrecht: Ein Vergleich von Teilnahme- und Einheitstater- systemen in Skandinavien, osterreich und Deutschland’ in Albin Eser, Beitrage und Materialien aus dem Max-Planck-Institut fur Auslandisches und Internationales Strafrecht (edition iuscrim 2002).

<sup>470</sup> Y Shany, ‘Seeking Domestic Help: The Role of Domestic Criminal Law in Legitimizing the Work of International Criminal Tribunals’ (2013) 11 Journal of International Criminal Justice, 9.

<sup>471</sup> Bohlander, *Principles of German Criminal Law* (n 152) 154, 155 and 153: ‘In the lowest category of offence, the *Ordnungswidrigkeiten*, the law has abandoned the division between principals and secondary participants and adopted the so-called *Einheitstaterbegriff* or unified perpetrator concept in section 14(1) OWiG. This concept considers anyone a principal whose actions helped cause the result or establish the *actus reus* elements of the offence, regardless of the actual weight of their contribution’.

<sup>472</sup> Article 29 Criminal Law of the People’s Republic of China.

<sup>473</sup> Ibid.

<sup>474</sup> Ibid.

<sup>475</sup> Ibid Article 28.

classification as either principal or secondary party has no legal relevance for the final sentence and the secondary party can be punished as severely as the principal perpetrator. It will be at the sentencing stage where the judge can take into consideration the individual contribution of the participant, which will subsequently be reflected in the sentence. Accordingly, it can be said that while the unitary approach requires the ‘assessment of individual guilt’ process at the sentencing stage, without a particular frame, the differentiated approach requires the process at the attribution stage, while the final penalty will be more or less predictable as a result of the labelling process. The Indian Penal Code, influenced by common law and the French Criminal Code, employs a very similar approach at the “labelling stage” by providing three different categories of accessories (abettors). Irrespective of this categorisation each sub-mode raises principal liability in relation to the punishment, if the commission of the crime was the consequence of the abetment. Similarly, the Egyptian Penal Code provides for three different categories of accessories and stipulates that accomplices are subject to the same penalties as principal perpetrators. Further, the Penal Code provides more guidance, by stipulating that the accomplice’s liability is to be assessed in accordance with the “nature and degree” of his own intent as opposed to the “intent and knowledge” of the principal perpetrator.<sup>476</sup>

Interestingly, Iceland, despite the fact that it belongs to the “civil law family”, has adopted an approach which constitutes elements of both the civil law and common law approach to attribution models and their impact on the sentencing. At first glance, it appears that a unitary approach is embraced by the Penal Code of Iceland, as Article 22 provides that aiders are punishable as principal offenders. However, a closer look reveals that statutory mitigation of the sentence is available for a number of situations, for instance, if the contribution of the aider is of ‘minor nature’.<sup>477</sup> Hence, particularly this circumstance to which statutory mitigation applies, may restrict the unfettered judicial discretion at the sentencing stage. This mechanism, according to which the prosecution has to prove that the role or rather contribution of the aider was more than of minor nature and thus imposes a higher threshold, can serve as an emergency break, preventing the “blanket” conviction of aiders, which may lead to an aider’s punishment as principal perpetrator. Similarly, as mentioned in Chapter 2, Lebanon follows a unitary approach in relation to accomplices, ‘without whose assistance the offence would not have been committed’.<sup>478</sup> If their contribution was not required for the commission of the offence, the Lebanese criminal code caps the level of punishment of accessories. Accordingly, if the principal perpetrator is sentenced to death the accessory can only be punished ‘by hard labour for life or by fixed-term hard labour for 10 to 20 years’; if the perpetrator is sentenced to the latter, the accessory may only be punished for 7 to 15 years.<sup>479</sup> Moreover, in other cases concerning the accessory, whose contribution was not required for the commission of the offence, the accessory is

<sup>476</sup> Article 211 Penal Code (Egypt).

<sup>477</sup> Article 22(2) Iceland General Penal Code.

<sup>478</sup> Article 220 Lebanese Criminal Code.

<sup>479</sup> Article 220 Lebanese Criminal Code.

entitled to a reduction ‘between one sixth and one third’ of the penalty received by the principal perpetrator.<sup>480</sup> In light of the above examination it becomes clear that the Criminal Law of Iceland and Lebanon are examples of a “restricted” unitary approach, by capping the scale of punishment for accessories whose role was either “of minor nature” or not required for the commission of the crime. Thus, punishment in violation of the principle of individual culpability<sup>481</sup> in relation to specific intent crimes seems to be prevented, while essential conduct and intention serve as a reference – or rather connection point – in relation to the assessment of the culpability and the degree of punishment resulting therefrom.

A closer look at the traditional common law approach and the normative German approach may serve to highlight the different implications on accessories and principals respectively. Although the individual culpability of the accessory will be taken into account at the sentencing stage, an immensely wide discretion on the part of the judge is implied in English courts. While this approach sounds very sophisticated by requiring the judge to assess various factors contributing to an individual’s blameworthiness in order to ascertain his guilt, it may pose a problem when it comes to offences where a statutory minimum penalty is imposed, which is the case concerning the offence of murder. A case in which this issue, coupled with a procedural error, can be observed, is the case of *R v Craig and Bentley*, a case of ‘miscarriage of justice’.<sup>482</sup> In November 1952, following a police chase, Derek William Bentley shouted to Christopher Craig, who had a gun, ‘let him have it’ and subsequently Craig shot dead a PC Sidney Miles. Both were found guilty, but Bentley was held to have been an accomplice, based on the joint enterprise doctrine. However, while Craig was only 16 years of age at the time and therefore below the age allowed for a death sentence, Bentley, who was 18 at the time, was hanged. In 1993 Derek received a partial pardon posthumously and in 1998 the conviction was quashed<sup>483</sup> on the basis that the judge’s summing up was biased; it was also argued by the defence counsel that it was wrong on a point of law<sup>484</sup> in relation to the legal principle relating to the sanctions faced by an accomplice.<sup>485</sup>

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<sup>480</sup> Ibid.

<sup>481</sup> The principle of culpability presupposes that a person is first and foremost found guilty before being punished. Thus, this individual guilt requires that ‘the crime can be attributed to the offender on the basis of his or her blameworthy conduct’. The second requirement denotes the principle of proportionality, which has to be established ‘between personal guilt and punishment’; G Werle and B Burghardt, ‘Establishing Degrees of Responsibility’ in E van Sliedregt and S Vasiliev (eds), *Pluralism in International Law* (OUP 2914) 303, 304.

<sup>482</sup> *R v Craig and Bentley* (1952) *The Times* 10-13 December; N Lacey and others, *Reconstructing Criminal Law: Text and Materials* (4<sup>th</sup> edn, Cambridge University Press 2010) 195; Elliott and Quinn (n 391) 303.

<sup>483</sup> *R v Derek William Bentley* [1998] EWCA Crim 2561.

<sup>484</sup> See *R v Derek William Bentley* [1998] EWCA Crim 2561, where reference was made to page 136 A of the transcript of the judge’s summing up: ‘Well, now I turn to Bentley. Members of the jury, these two youths are tried together, and they are both tried for the murder of the policeman. It is quite unnecessary, where two or more persons are engaged together in an unlawful criminal act, to show that the hand of both of them committed the act. The simplest illustration I could give you – after all, this is only a matter of common sense – is this: if two men go out house-breaking, it is a very common thing for one of them to break into a house and the other to stand outside and keep watch, but they are both taking part in the unlawful enterprise, and therefore they are both of them guilty, so if one stands outside so that the other may hand out the loot to him, he is not guilty merely of



However, the approach to try and punish accessories as principal offenders also has significant procedural implications, as the prosecution can convict a defendant without expressly articulating in advance whether he is an alleged accomplice or principal.<sup>486</sup> This issue was raised in the case of *Giannetto*,<sup>487</sup> where the defendant appealed against the conviction of murder. There was no scientific evidence corroborating the prosecution case that he had either committed the crime directly himself or as an accessory by instructing someone to do so. Instead, the prosecution relied on circumstantial evidence. When considering the authorities, the Court of Appeal quoted *inter alia* from the decision of the Supreme Court of Canada in *Thatcher v R*,<sup>488</sup> which reflects the legal ‘indifference’ assigned to a principal-accessory distinction by common law countries:

If there is evidence before a jury that points to an accused either committing a crime personally or, alternatively, aiding and abetting another to commit the offence, provided the jury is satisfied beyond a reasonable doubt that the accused did one or the other, it is a “matter of indifference” which alternative actually occurred (...) section 21 includes a requirement of jury unanimity as to the particular nature of the accused’s participation in the offence. Why should the juror be compelled to make a choice on a subject which is a matter of legal indifference?<sup>489</sup>

Ultimately, the Court of Appeal upheld the conviction, stating:

Having considered the authorities with some care we are satisfied that in the circumstances of this case the trial judge was right not to direct the jury that before they could convict they must all be satisfied either that the appellant killed his wife or that he got someone else to do so. They were entitled to convict if they were all satisfied that if he was not the killer he at least encouraged the killing, and accordingly this ground of appeal fails.<sup>490</sup>

This poses the question whether it would contravene the requirement to articulate the indictment as specifically as possible.<sup>491</sup> In *Giannetto*, the Court of Appeal stated in this regard:

When the Crown allege fair and square, that on the evidence, the defendant must have committed the offence either as principal or as secondary offender, and make it equally clear that they cannot say which, the *basis* on which the jury must be unanimous is that the defendant, having the necessary *mens rea*, by whatever means caused the result which is criminalised by the law. The Crown is not required to specify the means, because the legal definition of the crime does not require it; and the defendant knows perfectly well what case he has to meet. Of course, if (as will very often be so) the Crown nail their colours to a particular mast, their case will, generally, have to be established in the terms in which it was put. Our judgment should give no encouragement to prosecutors casting around for alternative possibilities where the essential evidence does not show

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receiving stolen property; he is guilty of breaking-in, because he is a party to the breaking-in; and where two people are engaged on a felonious enterprise – and warehouse-breaking is a felony – and one knows that the other is carrying a weapon, and there is agreement to use such violence as may be necessary to avoid arrest, and this leads to the killing of a person or results in the killing of a person, both are guilty of murder, and it is no answer for one to say “I did not think my companion would go as far as he did”; see also G Slapper and D Kelly, *The English Legal System 2011-2012* (12<sup>th</sup> edn, Routledge 2011) 262.

<sup>485</sup> Lacey and others (n 482) 195; Elliott and Quinn (n 391) 201.

<sup>486</sup> Ashworth and Horder (n 66) 421.

<sup>487</sup> *R v Robert Vincent Giannetto* [1997] 1 Cr. App. R. 1.

<sup>488</sup> *Thatcher v R* (1987) 39 DLR (4<sup>th</sup>) 275 (Canada).

<sup>489</sup> *Giannetto* (n 487) 5.

<sup>490</sup> *Ibid* 7.

<sup>491</sup> See *Maxwell v DDP for Northern Ireland* [1978] 1 WLR 1350 (HL); Ashworth and Horder (n 66) 421.

a clear case against the defendant. But the facts of the present appeal are by no means an instance of that.<sup>492</sup>

Clearly, this does not appear to support the formulation of a very detailed indictment, and attempts to challenge the foregoing principle based on Article 6(3)(a)<sup>493</sup> have been rather unsuccessful.<sup>494</sup>

The German differentiated model stands in direct contrast to the unitary model discussed above, as an accessory to a crime committed is generically entitled to mitigation<sup>495</sup> in accordance with Article 49(1). Article 49(1) provides a guiding framework in that it is fairly specific:

If the law requires or allows for mitigation under this provision, the following shall apply:

1. Imprisonment of not less than three years shall be substituted for imprisonment for life.
2. In cases of imprisonment for a fixed term, no more than three quarters of the statutory maximum term may be imposed. In case of a fine the same shall apply to the maximum number of daily units.
3. Any increased minimum statutory term of imprisonment shall be reduced as follows:  
a minimum term of ten or five years, to two years;  
a minimum term of three or two years, to six months;  
a minimum term of one year, to three months;  
in all other cases to the statutory minimum.<sup>496</sup>

While the above provision clearly restricts the judge's discretion, it seems fair to say that it facilitates both predictability and a rather uniform sentencing practice in relation to cases construed factually in a similar manner. However, an argument put forward against this approach concerns adequate reflection concerning culpability in certain, rather rare, cases, where the accessory's culpability is the same or even higher than the guilt of the direct perpetrator.<sup>497</sup>

This usually involves a scenario where the aider and abettor forces another person to commit a specific offence or act. German criminal law does not provide any specific provision for the case where an accessory is more blameworthy than the direct perpetrator, which leads to the result that an accessory who is highly blameworthy is still entitled to mitigated punishment prescribed by law.<sup>498</sup> In

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<sup>492</sup> *Giannetto* (n 487) 7.

<sup>493</sup> Article 6(3)(a) Human Rights Act 1998: 'Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him'.

<sup>494</sup> Ashworth and Horder (n 66) 421.

<sup>495</sup> Section 27(2), applying to aiders stipulates: (2) Die Strafe für den Gehilfen richtet sich nach der Strafdrohung für den Täter. Sie ist nach section 49 Abs. 1 zu mildern'. Bohlander, *The German Criminal Code* (n 324) 43: section 27(2) 'The sentence for the aider shall be based on the penalty for a principal. It shall be mitigated pursuant to section 49(1)'.

<sup>496</sup> Bohlander, *The German Criminal Code* (n 324) 50; section 49(1) StGB states: '(1) Ist eine Milderung nach dieser Vorschrift vorgeschrieben oder zugelassen, so gilt für die Milderung folgendes: 1. An die Stelle von lebenslanger Freiheitsstrafe tritt Freiheitsstrafe nicht unter drei Jahren. 2. Bei zeitiger Freiheitsstrafe darf höchstens auf drei Viertel des angedrohten Höchstmaßes erkannt werde. Bei Geldstrafe gilt dasselbe für die Höchstzahl der Tagessätze. 3. Das erhöhte Mindestmaß einer Freiheitsstrafe ermäßigt sich im Falle eines Mindestmaßes von 10 oder 15 Jahren auf zwei Jahre, im Falle eines Mindestmaßes von drei oder zwei Jahren auf sechs Monate, im Falle eines Mindestmaßes von einem Jahr auf drei Monate, im Falle eines Mindestmaßes von einem Jahr auf drei Monate, im übrigen auf das gesetzliche Mindestmaß'.

<sup>497</sup> Ashworth and Horder (n 66) 422.

<sup>498</sup> See in general for penalty ranges in German law, G Schäfer and others, *Praxis der Strafzumessung* (5<sup>th</sup> edn, C H Beck 2012).

the latter case, the judges' discretion can be highly significant to enable him to impose a sentence reflecting the defendant's degree of culpability. Hence it can be argued that the German approach is not capable of reflecting every nuance of the culpability of accessories. While the "assessment of individual guilt" approach sounds very sensible, particular where an aider and abettor "appears" to be more blameworthy – the label reveals already that "mere appearance" does not make him a principal. It does not seem equal to allow the same sentence for a lower liability threshold. Someone who is charged as an aider and abettor is potentially not charged as principal due to lack of evidence. The presence of this immense discretion can have particularly vast implications in murder cases, as seen above. Disregarding such a "label" on the sentencing stage could lead to grave sentencing disparities.

Ashworth and Horder suggest the introduction of a guideline on the one hand, but to retain the judge's power to 'impose any lawful sentence on the principal'.<sup>499</sup> Thus they suggest that it is crucial to respect the defendant's right to receive proportionate punishment, which correlates with the pertinent degree of blameworthiness.<sup>500</sup> Such guidelines shall provide that an accessory can only receive up to a maximum of half of the sentence of the principal.<sup>501</sup> However, Ashworth and Horder also suggest that, in the rare situations concerning the "highly blameworthy accessory" who has contributed to the offence in a substantially influential manner, courts shall be permitted to exceed the limit imposed by the guidelines upon them.<sup>502</sup> This approach resembles the theories enshrined in the criminal codes of Iceland and Lebanon. Such a "restricted" unitary approach appears to solve the main issues resulting from a lack of (official legal) distinction of principals and accessories in relation to the punishment, but it is questionable whether such an approach would be taken on in the future. Despite the differences between these two approaches, the disparity diminishes with the growing modification and elaboration of old and new participation models.<sup>503</sup> Moreover, as van Sliedregt notes, these observations are based on the fact that through concepts such as "control over the crime" (*Tatherrschaft*) and "functional perpetration", "commission" is stretched and thus capable of including "non-physical" and "intellectual perpetratorship."<sup>504</sup> Accordingly, it has to be emphasised that, despite the fact that these two models are different in theory, the distinction becomes blurry, as in practice both models "borrow elements from each other", making it difficult to spot a clear-cut line.<sup>505</sup>

While German criminal law generally embraces a differentiated approach, a unitary approach is taken in relation to administrative offences.<sup>506</sup> Thus, two rather contrary solutions<sup>507</sup> are employed in one

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<sup>499</sup> Ibid.

<sup>500</sup> Ibid.

<sup>501</sup> Ibid.

<sup>502</sup> Ibid.

<sup>503</sup> van Sliedregt *Individual Criminal Responsibility* (n 4) 73.

<sup>504</sup> Ibid.

<sup>505</sup> Ibid.

<sup>506</sup> Bloy speaks of a tendency towards a mixed system ("*Tendenz zu einem Mischsystem*") in R Bloy, 'Neuere Entwicklungstendenzen der Einheitstäterlehre in Deutschland und Österreich' in K Geppert and others, *Festschrift für Rudolf Schmitt zum 70. Geburtstag* (1992) 33, 44.

legal system.<sup>508</sup> Article 14 *Ordnungswidrigkeitengesetz (OWiG)* provides that if several individuals participate in a regulatory offence, each of them is regarded as the perpetrator of such regulatory offence.<sup>509</sup> Despite general discussion as to the scope and “practicability” of the unitary approach in relation to administrative offences,<sup>510</sup> the main question raised in the context of this discussion is the justification<sup>511</sup> of such a dualistic approach within one legal system and more specifically why the German legal system has opted on the one hand for a differentiated approach in criminal law, at least in relation to intentionally committed offences, and on the other hand for a unitary approach regarding regulatory offences. This can be taken even further, by rephrasing this thought into the question – what is the reason for considering a unitary approach in relation to regulatory offences admissible but to opt for a differentiated approach regarding intentionally committed criminal offences or *vice versa*?

The reason put forward for utilisation of the unitary approach in relation to regulatory offences is the simplification of the applicable law.<sup>512</sup> The effect thereof is questionable, as scholarly debate suggests.<sup>513</sup> However, when considering how much effort has been spent by German scholars to develop and elaborate theories designed to distinguish homogenously between principal and accessory,<sup>514</sup> a unitary approach appears comparatively simpler,<sup>515</sup> as the intrinsically challenging, complex and otherwise particularly material distinction is circumvented. Further, it is said to be admissible, because generally all participants in such an offence would anyway face the same *Bußgeldrahmen* (fine limit)<sup>516</sup> whereby the assessment of the applicable fine merely requires appreciation for various contributions based on their actual meaning.<sup>517</sup> The unitary approach is also embraced in relation to negligently committed crimes. Article 26 (Instigators) and Article 27 (Aiders), which establish the legal consequences attaching thereto, expressly restrict their application to offences committed intentionally: ‘[a]ny person who intentionally induces another person to

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<sup>507</sup> There was sharp criticism shortly after the legislator abolished the differentiation between principal and participant in administrative offences and introduces the unitary system instead in 1968; see K Detzer, ‘Die Problematik der Einheitstäterlösung: Eine Untersuchung im Lichte der Reform des StGB und des OWiG unter Berücksichtigung des italienischen und österreichischen Strafrechts’ (Inaug. Diss. Universität Erlangen Nürnberg 1972) 2.

<sup>508</sup> Detzer (n 507) 2.

<sup>509</sup> Unofficial translation by the author, section 14(1) OWiG states: ‘(1) Beteiligen sich mehrere an einer Ordnungswidrigkeit, so handelt jeder von ihnen ordnungswidrig. Dies gilt auch dann, wenn besondere persönliche Merkmale (section 9 Abs. 1), welche die Möglichkeit der Ahndung begründen, nur bei einem Beteiligten vorliegen’.

<sup>510</sup> See Rotsch (n 323) 192-195.

<sup>511</sup> Ibid 195.

<sup>512</sup> Ibid 195 with reference to Karlsruher Kommentar (OWiG), section 14 para 2.

<sup>513</sup> Rotsch (n 323) 195.

<sup>514</sup> See E Dreher, ‘Plädoyer für den Einheitstäter im Ordnungswidrigkeitenrecht,’ in E Dreher, *Bemühungen um das Recht*, Gesammelte Aufsätze (C H Beck 1972) 212, emphasising the difficulties of distinguishing between modes of liability in German criminal law, with reference to Roxin’s “Täterschaft und Teilnahme”.

<sup>515</sup> See for example C Roxin, *Täterschaft und Teilnahme* (8<sup>th</sup> edn, Gruyter 2006).

<sup>516</sup> Rotsch (n 323) 195; Dreher (n 514) 214.

<sup>517</sup> Rotsch (n 323) 196.

intentionally commit of an unlawful act’ (Article 26);<sup>518</sup> and ‘[a]ny person who intentionally assists another’ (Article 27).<sup>519</sup>

Ultimately, this discussion raises the question whether the introduction of a unitary approach would be thinkable in German criminal law.<sup>520</sup> It would exceed the scope of this work<sup>521</sup> to examine those questions further; nevertheless such a “dual system”,<sup>522</sup> particularly in relation to negligently committed offences, appears to undermine the argumentation in favour of a “pure” differentiated model. Although employment of two different approaches in one legal system slightly reminds, in the wider sense, of the employment of a unitary and differentiated approach in international criminal law as reflected in current practice, it should be recalled that in German *Ordnungswidrigkeitenrecht* such distinction is said to be immaterial as all participants in regulatory offences face the same fine limits,<sup>523</sup> and thus it cannot be compared to the punishment in international criminal justice. As described above, a main reason for utilisation of the unitary approach is the complicated and time-consuming distinction between principals and accessories for the purpose of punishment. Interestingly, an effort to distinguish between principals and accessories in international criminal law is present, although there is a lack of consensus in relation to the legal consequences thereof.

## 2.6 CONCLUSIONS FROM THE COMPARATIVE STUDY IN RELATION TO INTERNATIONAL CRIMINAL LAW

What also becomes clear from this comparative study when viewed in relation to international criminal law, is that judges of international courts and tribunals have drawn unilaterally on concepts of certain domestic criminal law systems, despite the fact that a variety of solutions and even almost the same concepts have been utilised by some other countries. While the *ad hoc* tribunals have largely drawn on the Anglo-American approach in relation to complicity laws,<sup>524</sup> although frequently not in relation to the relevance of modes of liability in the context of sentencing, the ICC heavily draws on attribution concepts, as set out earlier in this chapter, which are deeply rooted in German criminal law. This inevitably poses the question whether it is legitimate to consult only two or three legal systems when invoking domestic criminal law, and why certain other legal systems, which provide for sophisticated solutions in relation to collective criminality, have not had an impact on the shaping of international criminal law. As is clear from the above study, solutions embraced by jurisdictions such as the criminal codes of Iceland and Lebanon, have not been consulted by purely international

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<sup>518</sup> Bohlander, *The German Criminal Code* (n 324) 43 section 26(1).

<sup>519</sup> *Ibid* section 27(1).

<sup>520</sup> Rotsch (n 323) 195.

<sup>521</sup> *Ibid* 190 seq.

<sup>522</sup> Roth speaks of *Systemdualismus*, see Rotsch (n 323) 190.

<sup>523</sup> Dreher (n 514) 214; Rotsch (n 323) 195.

<sup>524</sup> van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (n 106) 64.

tribunals,<sup>525</sup> despite the fact that they provide a solution in between the unitary-differentiated dichotomy.<sup>526</sup> Shany explains the phenomenon that international courts and tribunals mainly resort to concepts emanating from only a handful of legal systems with reference to the following reasons: First, Shany argues that

[t]he preference accorded to such legal systems can be explained by reference to the sophisticated nature of the rules and doctrines developed by the more established legal systems, the considerable experience they have accumulated in applying criminal law in hard cases and the wealth of academic materials written about them. All of these attributes typically render the more developed legal systems as richer.<sup>527</sup>

Secondly, Shany puts forward that, in order to maintain the claim ‘to speak on behalf of the community’, international criminal law ‘strives to apply universally accepted standards’.<sup>528</sup> Accordingly, principles which are common to the ‘world’s main legal systems’ or ‘at least resonate with the vast majority of them’ are applied.<sup>529</sup> There is also the opinion that international criminal law does not need to be uniform when applying domestic concepts. Greenwalt argues that the international criminal legal system should rather apply laws which are prescribed by the respective legal system, which would normally have jurisdiction over the offender in question.<sup>530</sup> Discussion of this position exceeds the scope of this work, but it should however be pointed out that this would also result in sentencing disparities concerning similar circumstances and crimes, and therefore opposes consistent punishment, which is one of the cornerstones of international and domestic criminal justice.

Against the backdrop of the above discussion it can be observed that there is a lack of consistency in following a unitary or differentiated approach at the sentencing stage but on first sight the differentiated approach seems to prevail. Notwithstanding that, one can clearly see that the majority of jurisdictions selected follow a unitary approach. Nonetheless, this observation *per se* does not allow one to jump to conclusions: since the option of discretionary mitigation is in place, an analysis of pertinent practice such as in the US and the UK may still reveal that the differentiated approach is practised voluntarily at the sentencing stage. On the national level, it can be observed that differentiated and unitary systems do vary and even overlap. However, this is not of relevance for each

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<sup>525</sup> There are more jurisdictions following this or a similar approach; see for instance the Penal Code of Argentina Article 45, 46, (The Penal Code, Law No. 11.179).

<sup>526</sup> Of course it is not intended to presume that such solutions would immediately fit the needs of international criminal justice, but they could serve as a starting point overcoming the immense discrepancy between pure unitary and differentiated approaches.

<sup>527</sup> Shany (n 470) 12.

<sup>528</sup> Ibid.

<sup>529</sup> Ibid 13; Shany clarifies that: ‘(...) ICL presents an interesting venue for studying the harmonising effects of comparative law approaches to domestic law sources given the dual role of DCL, which is reflective of state practice, may represent pre-existing international customary law, or general principles of law; on the other hand, ICL may shape state practices, including their DCL, and push domestic legal systems towards conformity with international legal standards’.

<sup>530</sup> See A K A Greenwalt, ‘The Pluralism of International Criminal Law,’ (2011) 86 Indiana Law Journal, 1063, 1067.

domestic system respectively as a certain level of uniformity in sentencing practice is given within each domestic system. As soon as these systems are blended because various approaches have been deliberately “picked” and “mixed”, inconsistencies in sentencing practice are predetermined. An initial question is which approach which is capable of reflecting the true culpability of the offender, where most crimes are committed by a plurality of persons, frequently acting according to a common plan or under the instruction of an individual locally detached from the crime. As Vogel points out, ‘[t]he dualistic/pluralistic model is said to be closer to social reality where primary and secondary responsibility are distinguished’.<sup>531</sup> Despite the fact that it remains questionable which approach seems more suitable in international criminal justice – it is first and foremost important to maintain a certain degree of consistency when choosing one or the other approach irrespective of the choice of approach. A reason for inconsistency in following a certain approach in relation to attribution or sentencing in international criminal law could be influenced by the origin of the respective judge. As Schabas notes in relation to the judges and lawyers in 1994 at the ICTY:

They were of course experts in the system they had been educated in, but as a general rule the common lawyers had virtually no background, training, or familiarity with so-called civil law systems of criminal procedure, and the same was true for the civilian lawyers with respect to the common law.<sup>532</sup>

The difference between the common and civil law systems also has significant implications on the concepts of attribution of liability and the legal consequences. Accordingly, mixing both approaches, coupled with misconceptions or the wrong use of legal terminology of the respective concept, leads inevitably to confusion. The latter was *inter alia* expressed by the fact that in the Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction<sup>533</sup> the Trial Chamber criticised the terminology used by the Prosecution in the indictment.<sup>534</sup> Thereby it made reference to the Prosecution’s statement in its indictment against Ojdanić, according to which the ‘use of the word “committed” was not intended to suggest that any of the accused physically perpetrated any of the crimes charged, personally’.<sup>535</sup> It went on to repeat the phrasing used by the Prosecution, namely that “[c]ommitting”, (...) refers to participation in a joint criminal enterprise as a co-perpetrator” and then implied that that the use of the term “co-perpetration” in such a context’ appeared ‘inappropriate’.<sup>536</sup> This emphasises the interchangeable use of the terms “co-perpetrator” and “participant in a joint criminal enterprise”, which leads to confusion as such terms do imply – subject to the approach taken – varying degrees of culpability. As the next chapter discusses, the *ad hoc* tribunals have frequently resorted to the differentiated approach, thereby ascribing more or less culpability to a particular label. As Fletcher

<sup>531</sup> Vogel, *How to Determine Individual Criminal Responsibility in Systemic Contexts* (n 95) 153.

<sup>532</sup> W Schabas, ‘The Influence of International Law and International Tribunals on Harmonized or Hybrid Systems of Criminal Procedure’ (2005) 4 Washington University Global Studies Law Review, 651, 653; Elewa Badar (n 304) 3.

<sup>533</sup> *Milutinović et al.*, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction (n 164) para 20.

<sup>534</sup> Reference to *Prosecutor v Milan Milutinović et al.* (Second Amended Indictment) IT-99-37-PT (29 October 2001) para 16.

<sup>535</sup> *Milutinović et al.*, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction (n 164) para 20

<sup>536</sup> *Ibid.*

clarifies, ‘whatever we say about criminal responsibility, we have no choice, but to express it in language, and the particular vocabularies and structures of diverse languages both facilitate and limit our communication. Every language develops its own vocabulary in an effort to capture the depths of guilt and punishment’.<sup>537</sup> While a co-perpetrator in German criminal law is considered a principal, a member of a joint enterprise has sometimes been categorised as a secondary participant under English law, giving rise to debate. However, in *R v Jogee*, the Supreme Court recently clarified that ‘the expression “joint enterprise” is not a legal term of art’.<sup>538</sup> It then observed with reference to *R v A* that the expression joint enterprise ‘is used in practice in a variety of situations to include both principals and accessories’.<sup>539</sup>

These two different terms (co-perpetration and joint enterprise liability) therefore refer to different legal concepts, reflecting varying degrees of culpability and, at least in the case of the former, lead to harsher sanctions. However, despite the fact that JCE has widely been considered to constitute a form of principal liability, as discussed above, the Supreme Court has clarified that “joint criminal enterprise liability” in English law may embrace principals and accessories.<sup>540</sup> These differences relating to legal terminology, which may lead to misconceptions, appear to be clearly linked to a judge’s legal cultural background.<sup>541</sup> The next chapter focuses on the sentencing process in the light of a principal-accessory distinction in international criminal law.

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<sup>537</sup> G Fletcher, *The Grammar of Criminal Law: American, Comparative, and International, Volume 1: Foundations* (OUP 2007) 117.

<sup>538</sup> *R v Jogee* (n 396) para 77.

<sup>539</sup> *Ibid*; *R v A* [2011] QB 841, para 9.

<sup>540</sup> *Ibid*.

<sup>541</sup> Further discussed in Chapter 4.



## CHAPTER 3

### PRINCIPALS, ACCESSORIES AND THE INTERNATIONAL SENTENCING PROCESS

#### PART I

##### 3.1 INTRODUCTION

It was only relatively recently, on the 16<sup>th</sup> of December 2013, that the ICTR Appeals Chamber rendered the *Ndahimana*<sup>542</sup> judgment, which included an exemplary articulation and application of the differentiated approach, thereby corroborating the view that the principal-accessory distinction is to date the prevailing approach followed by the *ad hoc* tribunals. Only a few months later, the ICC Trial Chamber announced in its most recent judgment that Article 25 Rome Statute does not entail a hierarchy of blameworthiness, thereby expressing preference for the unitary approach. With this recent statement it appears safe to say that the ICC has distanced itself from the differentiated approach primarily adopted by the *ad hoc* tribunals:

(...) In effect, Article 25 of the Statute merely identifies various forms of unlawful conduct and, in that sense, the distinction between the liability of a perpetrator of and an accessory to a crime does not under any circumstances constitute a “hierarchy of blameworthiness”, let alone enunciate a tariff, not even implicitly. Hence, it is not precluded that having adjudged guilt, a bench may choose to mete out mitigated penalties to accessories, although to do so is not peremptory. The fact remains that neither the Statute nor the Rules of Procedure and Evidence prescribe[s] a rule for the mitigation of penalty for forms of liability other than commission and the Chamber sees no automatic correlation between mode of liability and penalty. From this it is clear that a perpetrator of a crime is not always viewed as more reprehensible than an accessory.<sup>543</sup>

Ultimately, the distinction between perpetrator of and accessory to a crime inheres in the Statute but does not, nonetheless, entail a hierarchy, whether in respect of guilt or penalty. Each mode of liability has different characteristics and legal ramifications which reflect various forms of involvement in criminality. However, this does not necessarily signify that accused persons will be found less culpable or will incur a lesser penalty.<sup>544</sup>

The debated practice to ascribe specific legal consequences to various labels of individual criminal responsibility stands in direct conflict to a unitary approach. However, it serves primarily to illustrate in the light of the respective discussions in the ICC’s first three judgments, and in relation to the ICTY — the *Krnjelac* Trial Judgment, and Judge Hunt’s Separate Opinion in *Ojdanic*, that international judges are far from pulling together when it comes to the relationship of modes of liability and sentencing, thus contributing to a lack of consistency and unpredictability in international sentencing practice. Considering that the significance of a principal accessory distinction for the purpose of sentencing is rooted in domestic criminal law, it is a central question why judges resort to one or the

<sup>542</sup> *Ndahimana* Appeal Judgment (n 2).

<sup>543</sup> *Katanga* Trial Judgment (n 197) para 1386.

<sup>544</sup> *Ibid* para 1387; see also *Prosecutor v Katanga* (Sentencing Judgment) ICC-01/04-01/07 (23 May 2014) para 61.

other approach, which is examined in the next chapter. The main reason for discrepancies may be due to the fact that the statutes of the tribunals are largely silent in relation to the specific role of modes of liability in the sentencing process. In addition, none of the international judicial bodies has yet approached and discussed the relationship between the mode of individual criminal responsibility and sentence severity ‘systematically’.<sup>545</sup> Nevertheless, judges have attempted to establish rationales and reasons for sentencing decisions, perhaps in some instances intuitively,<sup>546</sup> which particularly differ in relation to the impact of modes of liability on the sentence. Hence, it may be assumed that the judge and his legal cultural background play a significant role. As a result, both approaches can be observed in the practice of the *ad hoc* tribunals and the ICC.

Therefore, this chapter comprises a closer examination of the sentencing process in the light of such distinction and the weight attached to such modes in meting out the final penalty. In an attempt to find a rational underpinning of the sentencing process in international criminal law, it is essential to disentangle the general factors contributing to the sentencing process. Thus, prior to examining those factors in specific cases, a brief overview is given in relation to the statutory prescribed influential and “judge-created” factors in the sentencing process. The sentencing framework is only broadly discussed in order to lay a foundation for analysing the role of modes of liability therein.

Olásolo maintains that the respective case law of the ICTY shows that Article 7(1) ‘does not establish a unitary system and has consistently embraced the distinction between perpetration of a crime giving rise to principal liability and participation in a crime committed by a third person giving rise to accessorial liability’. He goes even further by opining that decisions which employ a differentiated approach such as *Krnojelac* and Judge Hunt in his separate opinion, are merely ‘exceptional instances of disagreement and the approach overwhelmingly adopted by the ICTY case law (...)’.<sup>547</sup> Indeed, when taking a closer look at the sentencing judgments of the *ad hoc* tribunals, it can be noted that the number of judgments in which judges have opted for a differentiated approach (see Table 3) go far beyond the cases already addressed in the previous chapter. Already in the ICTY’s early judgment in *Tadić*, the Appeal Chamber indicated what could be referred to as a preference for a differentiated approach, when it addressed the question as to how JCE could be distinguished from aiding and abetting:

229. 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.<sup>548</sup>

<sup>545</sup> B Holá, ‘Sentencing of International Crimes at the ICTY and ICTR: Consistency of Sentencing Case Law’ Amsterdamlawforum (VU University Amsterdam 2012) 14.

<sup>546</sup> See Chapter 4 below.

<sup>547</sup> Olásolo, *Responsibility of Senior Political and Military Leaders* (n 4) 25.

<sup>548</sup> *Tadić* Appeal Judgment (n 23) para 229.

However, a central question posed is whether a distinction between the direct or principal perpetrator and the secondary/indirect perpetrator is merely terminological or whether it is linked to penological consequences.

### 3.2 GENERAL SENTENCING FACTORS

#### 3.2.1 THE AD HOC TRIBUNALS, THE ICC AND THE SCSL<sup>549</sup>

A central question in the light of a principal-accessory distinction is where exactly the legal relevance of a particular liability label is assessed in relation to its legal consequence. Therefore, sentencing factors, which may “cover” such discussions are examined in this paper in more depth. As is seen below, the “dynamics” of modes of liability are reflected under different headings of the sentencing process, albeit in one more than the other. Statutory provisions in relation to international sentencing are fairly vague. In the sentencing regime of the *ad hoc* tribunals, “penalties” are provided for in Articles 24 ICTY and 23 ICTR respectively. Apart from their reference to the recourse of domestic law, both provisions are identical and provide generally that judges shall consider (i) general practice regarding prison sentences in the courts of Yugoslavia and Rwanda respectively, (ii) the gravity of the offence; (iii) and the individual circumstances. Further, Rule 101 B) of the Rules of Procedure and Evidence (RPE ICTY/ICTR) is only marginally more detailed in that it adds that, in addition to the above factors, the chamber shall take into account (i) aggravating factors; (ii) mitigating factors ‘including the substantial cooperation with the Prosecutor by the convicted person before or after the conviction’; and (iii) ‘the general practice regarding prison sentences in the courts of the former Yugoslavia’ and Rwanda. Thus, according to Article 24 ICTY (23 ICTR) and Rule 101 A), B), the following factors should be considered (i) the practice regarding the prison sentences in the FSRY and Rwanda; (ii) individual circumstances of the convicted person; (iii) mitigating factors (specifically the defendant’s cooperation with the prosecution); (iv) aggravating factors; and (v) the gravity of the offence.

Similarly, Article 19(2) of the Statute of the SCSL provides that the Chamber shall consider the practice regarding prison sentences of the ICTR and national courts of Sierra Leone. Further, Article 101(B) RPE adds, ‘(i) Any aggravating circumstances’; and ‘[a]ny mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction’. Thus, when determining the sentence, the SCSL shall consider: (i) the sentencing practice of the ICTR; (ii) the sentencing practice of the courts of Sierra Leone; (iii) the gravity of the offence; (iv) the individual circumstances of the convicted person; (v) any aggravated circumstances; and (vi) any mitigating circumstances. Hence it can be seen that the SCSL Statute is equally reserved in relation to the factors which have to be considered when determining the sentence. However, similar to the

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<sup>549</sup> Due to the resemblance of the SCSL Statute to the ICTY and ICTR Statutes, consideration of the sentencing practice of the SCSL takes place in this section.

statute of the *ad hoc* tribunals, the wording “such as” indicates that the list provided by Articles 19(1) and (2) is not exhaustive and accordingly only case law provides for a more detailed answer as to which factors have been cited. A distinctive feature of the SCSL sentencing provisions is the explicit reference to the requirement to consider the sentencing practice of the ICTR.

The ICC Statute provides scarce guidance in relation to the factors which have to be taken into consideration when determining the sentence. Article 78(1) of the Rome Statute stipulates that ‘the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person’. However, Article 145 of the RPE is more specific in that it provides that, in addition to the factors listed in Article 78(1), the Court shall take into consideration (i) the circumstances which do not qualify as defences to criminal responsibility and (ii) the individual’s conduct after the commission of the act. Further, Rule 145(2)(b) enumerates a few aggravating circumstances expressly. Thus, the RPE of the ICC expressly articulate that the list is “open”. In addition to the above factors, the Article 145(1) RPE offers more guidance by emphasising that the overall sentence has to reflect the guilt of the perpetrator<sup>550</sup> and further that the Court shall ‘[b]alance all the relevant factors, including any mitigating and aggravating factors and consider the circumstances both of the convicted person and of the crime’.<sup>551</sup>

Olásolo observes that Article 145(1)(c) RPE ‘implicitly recognises the principle of mitigation for accessorial liability insofar as it imposes upon the Chambers of the ICC the duty to “give consideration” to the “degree of participation of the convicted person” in their determination of the sentence pursuant to article 78(1) RS.’<sup>552</sup> Nevertheless, he notes that due to the implicit nature of the principle of mitigation and thus the fact that the principle of mitigation is not expressly provided for in the ICC Statute, it has ample discretion to apply it and to decide how it is operated.<sup>553</sup> In Situation in Kenya, the Pre Trial Chamber summarised the factors embedded in Rule 145(1)(c) and 145(2)(b)(iv) as follows: ‘(i) the scale of the alleged crimes (including assessment of geographical and temporal intensity); (ii) the nature of the unlawful behaviour or of the crimes allegedly committed; (iii) the employed means for the execution of the crimes (ie, the manner of their commission); and (iv) the impact of the crimes and the harm caused to victims and their families (...)’.<sup>554</sup> Rule 145 is comparatively clear in relation to the factors which appear to constitute the abstract and concrete gravity of the offence; although no express reference is made to the latter, it includes that the Court shall give additionally consideration *inter alia* to

<sup>550</sup> Rule 145(1)(a): ‘In its determination of the sentence pursuant to Article 78, paragraph 1, the Court shall: (a) Bear in mind that the totality of any sentence of imprisonment and fine, as the case may be, imposed under article 77 must reflect the culpability of the convicted person’.

<sup>551</sup> Article 145(2)(b) RPE includes *inter alia*, previous criminal offences of a similar nature (i) and the abuse of a position of power in an “official capacity” (ii).

<sup>552</sup> Olásolo, *Responsibility of Senior Political and Military Leaders* (n 4) 27.

<sup>553</sup> *Ibid.*

<sup>554</sup> Situation in the Republic of Kenya (Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya) ICC-01/09 (31 March 2010) para 62.

the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person.<sup>555</sup>

Accordingly, in comparison to the *ad hoc* tribunals, the ICC statutory instruments entail no reference to domestic sentencing practice, but do include comparatively detailed guidance in relation to the factors to be taken into account in the sentencing process.

It is also not difficult to discern the controversial approaches in relation to a principal accessory distinction. On the one hand, recent practice of the ICC<sup>556</sup> has demonstrated that judges are inclined to follow a principal-accessory distinction.<sup>557</sup> On the other hand, this approach was harshly criticised in that it was stressed that the Article 25 Rome Statute embraces a unitary approach.<sup>558</sup> In any case, the ICC, with its most recent judgment in *Katanga*,<sup>559</sup> has clearly demonstrated its stance that it maintains that Article 25 does not create a hierarchy of seriousness. Hence, the ICC clearly develops a preference for the unitary approach

### 3.2.1.1 RECOURSE TO NATIONAL LAW

The factor or heading ‘recourse to national law’ is particularly significant when attempting to assess to the legal relevance attached to modes of liability in the sentencing process, because attribution theories derive from domestic law. Accordingly, the resort to the practice of domestic courts of the former Yugoslavia and Rwanda could provide guidance in that either a differentiated or a unitary approach is embraced. As stipulated by Article 24 ICTY (23 ICTR) and Rule 101 of the RPE, the *ad hoc* tribunals ‘shall have recourse’/ ‘take into account’ the sentencing practice of Rwanda and the SFRY respectively. This inevitably poses the question as to how strictly this statutory requirement is to be interpreted. In the *Tadić* Sentencing Appeal, the Appeals Chamber clarified that it ‘is not bound by any maximum term of imprisonment applied by a national system’.<sup>560</sup> Rather, as the ICTY held in

<sup>555</sup> Rule 145(1)(c) ICC RPE.

<sup>556</sup> *Lubanga* Decision on the Confirmation of Charges (n 46) paras 317-333.

<sup>557</sup> van Sliedregt *Individual Criminal Responsibility* (n 4) 79.

<sup>558</sup> Concurring Opinion of Judge Christine Van den Wyngaert (n 17) Separate Opinion of Judge Adrian Fulford (n 15).

<sup>559</sup> *Katanga* Trial Judgment (197) paras 1386, 1387; see also *Katanga* Sentencing Judgment (n 544) para 61.

<sup>560</sup> *Prosecutor v Tadić* (Judgment in Sentencing Appeals) IT-94-1-A & IT-94-1-A bis (26 January 2000) para 21; This was also confirmed in the *Nikolić* Sentencing Appeal in relation to *lex mitior*: ‘The Appeals Chamber, however, reiterates its finding that the International Tribunal, having primacy, is not bound by the law or sentencing practice of the former Yugoslavia. It has merely to take it into consideration. Allowing the principle of *lex mitior* to be applied to sentences of the International Tribunal on the basis of changes in the laws of the former Yugoslavia would mean that the States of the former Yugoslavia have the power to undermine the sentencing discretion of the International Tribunal’s judges (...).’ *Prosecutor v Nikolić* (Judgment on Sentencing Appeal) IT-94-2-A (4 February 2005) para 84; see also *Blaškić* Appeal Judgment (n 121) para 681; *Akayesu* Trial Judgment (n 108) para 501: ‘Given the presumption of innocence of the accused, and pursuant to the general principles of criminal law, the Chamber holds that the version more favourable to the accused should be upheld and finds that Article 2(2)(a) of the Statute must be interpreted in accordance with the definition of murder given in the Penal Code of Rwanda, according to which “*meurtre*” (killing) is homicide committed with the intent to cause death’.

*Krstić*, it is also ‘not prevented from imposing a greater or lesser sentence than would have been imposed under the legal regime of the Former Yugoslavia’.<sup>561</sup> Similarly, the ICTR Trial Chamber also expressed a rather reserved position in that it specified in *Akayesu* that ‘such reference is but one of the factors that it has to take into account in determining sentences’.<sup>562</sup> In relation to the interpretation, the ICTY Appeals Chamber held in *Nikolić* that ‘these words have to be construed in accordance with the principles of interpretation applicable to the Statute of which they form part’.<sup>563</sup> Moreover, when taking account of respective domestic provisions, the ICTY has provided more specific guidance in that it held that despite the fact that it was ‘not bound to apply the sentencing practice of the former Yugoslavia’, such a requirement ‘certainly goes beyond merely reciting the relevant criminal code provisions of the former Yugoslavia’.<sup>564</sup> It further added that, if ‘they diverge, care should be taken to explain the sentence to be imposed with reference to the sentencing practice of the former Yugoslavia, especially where international law provides no guidance for a particular sentencing practice’.<sup>565</sup> However, the Trial Chamber thereby stressed that, due to the ‘very important underlying differences’ which frequently ‘exist between national prosecutions and prosecutions in this jurisdiction, the nature, scope and the scale of the offences tried before the International Tribunal do not allow for an automatic application of the sentencing practices of the former Yugoslavia’.<sup>566</sup>

In its jurisprudence, the ICTY has frequently made reference to Articles 34,<sup>567</sup> 38,<sup>568</sup> and 142(1) CC SFRY along with Article 41,<sup>569</sup> referring to factors which shall be considered in the sentencing process.<sup>570</sup> Along with the criminalisation of ‘war crimes against the civilian population’, Article 142 incorporates two modes of liability into the CC of the SFRY, namely ordering and committing. Accordingly, order givers and direct perpetrators of war crimes are to be punished with a minimum of five years’ imprisonment or the death penalty. In relation to the latter, it is clear that the ICTY’s range of penalties, which it can impose, is limited to imprisonment<sup>571</sup> ‘for a term up to and including the

<sup>561</sup> *Prosecutor v Banović* (Sentencing Judgment) IT-02-65/1-S (28 October 2003) para 89; among others also reference to *Prosecutor v Delalić et al.* (Appeal Judgment) IT-96-21-A (20 February 2001) paras 813, 820; similarly, the ICTY held in *Nikolić* in a discussion revolving about the applicability of *lex mitior* in cases, where the crime was committed in one jurisdiction, but another country exercises in fact jurisdiction, that: ‘(...) the Tribunal, having primacy vis à vis national jurisdictions in the former Yugoslavia, is not bound to apply the more lenient penalty under these jurisdictions. However, such penalties shall be taken into consideration, but as only one factor among others when determining a sentence’.<sup>561</sup> *Prosecutor v Dragan Nikolić*, Case No. IT-94-2-A, 4 February 2005, Judgment on Sentencing Appeal, para 165.

<sup>562</sup> *Prosecutor v Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Sentencing Judgment, 2 October 1998, 4; see also *Prosecutor v Kambanda* judgment and sentence para 23.

<sup>563</sup> *Nikolić* Judgment on Sentencing Appeal (n 540) para 85.

<sup>564</sup> *Prosecutor v Kunarac et al.* (Trial Judgment) IT-96-23-T & IT-96-23/1-T (22 February 2001) para 829.

<sup>565</sup> *Ibid.*

<sup>566</sup> *Ibid.*; confirmed *inter alia* in *Krstić* Appeal Judgment (n 28) para 260; *Blaškić* Appeal Judgment (n 121) para 682; *Popović et al.* Trial Judgment (n 115) Volume I, para 2142.

<sup>567</sup> Article 34 CC SFRY provides *inter alia* for imprisonment as a form of punishment: ‘The following punishments may be imposed on the perpetrators of criminal acts: 1) capital punishment; 2) imprisonment; 3) fine; 4) confiscation of property’.

<sup>568</sup> Article 38 CC SFRY specifies the particulars, eg limits of the terms of imprisonment.

<sup>569</sup> Sets out the factors relevant for the determination of the sentence.

<sup>570</sup> See *inter alia* *Prosecutor v Sentencing Judgment* (n 561) paras 85, 86.

<sup>571</sup> Article 24 ICTY Statute and Article 23 ICTR Statute.

remainder of the convicted person's life'.<sup>572</sup> Article 41(1) CC SFRY stipulates that the court shall consider 'in particular, the degree of criminal responsibility'. It is striking that much weight seems to be attached to the "degree of participation". However, similarly to the terminology embraced by judges at *ad hoc* tribunals, the "degree of participation" appears to be understood as referring to concrete criminal conduct, such as the degree of involvement and specific acts in the context of the pertinent modes of liability, and is not viewed as comprising specific categories as such, which carry corresponding legal consequences. A suggestion in favour of this assumption is that the Criminal Code of the FSRY does not embrace a principal accessory distinction for the purpose of sentencing. Instead, accomplices, inciters and aiders are to be punished as principals, whereas discretionary mitigation may be invoked in case of the latter. Arguably, judges could adopt the approach opted for in domestic law, when assessing the legal consequences for a particular label. It is questionable whether the *ad hoc* tribunals also explicitly consider the domestic sentencing practice in relation to a principal accessory distinction, as all Criminal Codes of the countries emerging from the former Yugoslavia, including the Criminal Code of the SFRY provide for one or the other approach – with the unitary approach clearly dominating. As elaborated in Chapter 2, the Criminal Code of the FSRY embraces a unitary approach in relation to sentencing, in that aiders, instigators and accomplices are to be punished as principals and only aiders may receive discretionary mitigation.<sup>573</sup> The same holds true for the Criminal Code of Bosnia and Herzegovina, which provides for discretionary mitigation in the case of aiders.<sup>574</sup> Similarly, the Criminal Code of Macedonia punishes joint perpetrators, instigators and aiders as principals, but on a discretionary basis, aiders may be punished more leniently.<sup>575</sup> Equally, the Criminal Codes of Montenegro<sup>576</sup> and Serbia<sup>577</sup> embrace a unitary approach. As elaborated in Chapter 2, the Provisional Criminal Code of Kosovo embraced a differentiated approach in that 'members of criminal associations' and aiders/those who provide assistance, are entitled to mitigated punishment in line with Article 65(2), which stipulates that the punishment should be 'no more than three-quarters of the maximum punishment prescribed for the criminal offence'. The new Criminal Code of Kosovo seems to build only partly on this approach by providing that '[w]hoever intentionally assists another person in the commission of a criminal offence may be punished more leniently'. Thus, it departs from a strict differentiated approach, by choosing a unitary approach with a differentiated element. The mitigation remains discretionary. Although the new code does not provide a provision identical to Article 65(2) PCCK, stipulating that the maximum punishment of an aider shall not exceed three-quarters of the maximum punishment prescribed for the criminal offence, Article 75 sets out mitigating penalties for assistants. Despite this similar provisions relating to the punishment of assistants, the wording of Article 31(1) clearly indicates the discretionary nature of the mitigation and

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<sup>572</sup> Rule 101 (A) ICTY RPE and ICTR RPE.

<sup>573</sup> Articles 22, 22, 23 CC FSRY, discussed in depth in Chapter 2.

<sup>574</sup> Article 31 (1) Criminal Code of Bosnia and Herzegovina.

<sup>575</sup> Article 24 (1) Criminal Code of the Republic of Macedonia.

<sup>576</sup> Article 35 (1) Criminal Code of Montenegro.

<sup>577</sup> Article 35 (1) Criminal Code of Serbia.

thus the new Criminal Code of Kosovo ultimately follows a unitary approach, albeit with a differentiated element in relation to the penalties which may be applicable to assistants.

In theory, the ICTY could consider the applicable provisions, subject to *rationale temporis* and *ratione loci*, relating to the legal consequences for the purpose of sentencing and justify its respective approach based thereon, although this would depend on the time and place where the crime was committed. At first sight, this approach does not seem to contribute to more consistent and predictable sentencing practice in international criminal justice *per se*, but in fact it could foster predictability. However, although the ICTY and ICTR seem to follow their obligation to consider and discuss respective domestic legislation, a few points can be noted. It can be observed that the ICTY clarifies in a number of instances that it is not bound to apply national sentencing practice; moreover, it is noticeable that in a number of cases, reference to national case law can be found, which resembles frequently. In depth discussion or application of such provisions is scarce. In *Serushago* the ICTR clarified its preference for ‘unfettered discretion’ by explaining that the ‘reference to the practice of sentencing in Rwanda and to the Organic law’ was ‘just an indication’ and that it preferred ‘to lean more on its unfettered discretion each time that it has to pass sentence on persons found guilty of crimes falling within its jurisdiction, taking into account the circumstances of the case and the standing of the accused persons’.<sup>578</sup> If one considers the domestic provisions relating to the punishment of principals and accessories, it can be observed that the applicable provision in relation to the punishment of principals and accessories is ultimately not considered, despite the fact that national jurisdictions clearly embody one or the other approach. Having said that, it should be emphasised that the *Krstić* case is one of the scarce instances where the Appeals Chamber referred to the practice of the SFRY in relation to the impact of modes of liability at the sentencing stage. Although the CC SFRY comprises a unitary approach in the stricter sense, in that it does not provide for mandatory mitigation, such mitigation may be invoked at the judges’ discretion if the accused was an aider.<sup>579</sup> Despite the fact that the decision to reduce *Krstić’s* sentence based on the finding that he was an aider and abettor as opposed to co-perpetrator seemed to be mainly based on the premise that aiding and abetting ‘generally warrants lower sentences’ as held in *Vasiljević*,<sup>580</sup> it made reference to the practice of the courts of the former Yugoslavia:

As regards the general sentencing practice of the courts of the former Yugoslavia, the Appeals Chamber has already explained that the Tribunal is not bound by such practice, and may, if the interests of justice so merit, impose a greater or lesser sentence than would have been imposed under the legal regime of the former Yugoslavia. In the above discussion of this factor, the Appeals Chamber has considered the sentencing practice of the courts of the former Yugoslavia applicable in this case, and has taken those practices into account. In particular, the sentence of a person who aided a principal perpetrator to commit a crime can be reduced to a sentence less than the one given to the principal perpetrator.<sup>581</sup>

<sup>578</sup> *Prosecutor v Omar Serushago*, Case No. ICTR 98-39-S, Trial Judgment, 5 February 1999, para 18.

<sup>579</sup> Article 24(1) CC SFRY, see Chapter 2 and Chapter 3 above.

<sup>580</sup> *Vasiljević* Appeal Judgment (n 1) para 182.

<sup>581</sup> *Krstić* Appeal Judgment (n 28) para 270.



To date, it appears that domestic sentencing practice in relation to modes of liability has not had any significantly traceable impact on the sentencing practice of the ad hoc tribunals. This leaves room for the assumption that this “sentencing factor” does not seem to contribute significantly to the process of meting out the penalty or, if it did, it is not immediately obvious, particularly because the consideration of domestic sentencing practice is frequently summarised and does not contain express reference to actual practice, such as is contained in *Čerkez*, where national law was considered in more detail, with reference to specific cases.<sup>582</sup>

When considering domestic sentencing law, the ICTR refers to the Rwandan Organic Law on the Organization of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity, committed since 1 October 1990 (Rwandan Organic Law),<sup>583</sup> in which perpetrators are grouped into four categories<sup>584</sup> ‘according to the acts of participation’.<sup>585</sup> While Category One *inter alia* covers the ‘masterminds of the crimes’<sup>586</sup> and/or those with a certain level of authority, such as planners, instigators and organisers as well as ‘notorious murders who by virtue of the zeal or excessive malice (...) committed atrocities’,<sup>587</sup> Category Two comprises ‘perpetrators, conspirators or accomplices in criminal acts (...) causing death’.<sup>588</sup> Further, Category Three embraces individuals who ‘in addition to committing a main crime, are guilty of other serious assaults’,<sup>589</sup> while Category Four concerns perpetrators guilty of property offences. In addition, Article 14 of Rwanda’s Organic Law enumerates the pertinent penalties to those categories and thus it can be seen that each category attracts corresponding legal consequences, in accordance with the differentiated approach. According to Article 14, which divides them also into three categories ‘[t]he penalties imposed for the offences

<sup>582</sup> *Kordić and Čerkez* Trial Judgment (n 67) para 849: ‘(...) The practice of the former Yugoslavia shows that the death penalty was imposed for such offences: for instance, by the District Court in Zagreb in 1986 on a former member of the so-called independent State of Croatia during the Second World War; by a military Court in Belgrade in 1992 on two members of paramilitary units; and in a similar case on the commander of a paramilitary unit who was sentenced for carrying out “the liquidation of quite a large number” of Serbs (...)’.

<sup>583</sup> Organic Law No. 8/96 of 30 August 1996, published in the Gazette of the Republic of Rwanda, 35<sup>th</sup> year, No 17, 1 September 1996.

<sup>584</sup> Article 2 of Rwanda’s Organic Law: Persons accused of offences set out in Article 1 of this organic law and committed during the period between 1 October 1990 and 1994 shall, on the basis of their acts of participation, be classified into one of the following categories: ‘Category 1 a) persons whose criminal acts or those whose acts place them among planners, organisers, supervisors and leaders of the crime of genocide or of a crime against humanity; b) Persons who acted in positions of authority at the national, prefectural, communal, sector or cell, or in a political party, the army, religious organisations, or militia and who perpetrated or fostered such crimes; c) Notorious murderers who by virtue of the zeal or excessive malice with which they committed atrocities, distinguished themselves in their areas of residence or where they passed; d) Persons who committed acts [sic] sexual torture; Category 2 Persons whose criminal acts or whose acts of criminal participation place them among perpetrators, conspirators or accomplices of intentional homicide or of serious assault against the person causing death; Category 3 Persons whose criminal acts or whose acts of criminal participation make them guilty of other serious assaults against the person; Category 4 Persons who committed offences against property’. *Prosecutor v Kambanda* (Judgment and Sentence) ICTR 97-23-S (4 September 1998) para 18 seq; *Prosecutor v Serushago* (Sentencing Judgment) ICTR 98-39-S (5 February 1999) paras 17, 18.

<sup>585</sup> *Serushago* Sentencing Judgment (n 584) para 17.

<sup>586</sup> *Ibid.*

<sup>587</sup> Article 2 of Rwanda’s Organic Law.

<sup>588</sup> *Ibid.*

<sup>589</sup> *Ibid.*

(...) shall be those provided for under the Penal Code except (a) that persons whose acts place them in Category 1 are liable to the death penalty; (b) that for persons whose acts place them in Category 2, the death penalty is replaced by life imprisonment<sup>590</sup> and finally ‘(c) where a confession and guilty plea have been accepted, in which case Articles 15 and 16 of this organic law apply’.<sup>591</sup>

In relation to the death penalty, the ICTR Trial Chamber clarified that ‘it is logical that in the determination of the sentence, it has recourse only to prison sentences applicable in Rwanda, to the exclusion of other sentences applicable in Rwanda, including the death sentence, since the Statute and the Rules provide that the Tribunal cannot impose this one type of sentence’.<sup>592</sup> It does not appear that the ICTR has substantially drawn on Rwandan sentencing practice in general and particularly in relation to individual criminal responsibility and its legal consequences. Considering that Rwanda’s Organic Law neatly sets out four categories, for which it envisages corresponding penalties, influence on the practice of the ICTR would be immediately obvious. To the contrary, as is seen further below, there have been instances where the ICTR has embraced an approach in relation to modes of liability, which does not build on the structure provided for by Articles 2 and 14 of the Rwandan Organic Law,<sup>593</sup> but on principles deriving from other national jurisdictions opting for a differentiated approach. Ultimately, it can be observed that although the *ad hoc* tribunals do follow their obligation to consider – and in some instances even discuss – the recourse to domestic sentencing practice on a regular basis, it is mostly very brief and to date it does not appear that it has had significant impact on international sentencing decisions so far, if not none at all.

In relation to the SCSL’s requirement to consider the sentencing practice of national Courts in Sierra Leone it must be ascertained in the light of a discussion relating to a differentiated or unitary approach that the Abettors and Accessories Act 1861 applies in Sierra Leone and thus no mandatory mitigation is available for secondary perpetrators in accordance with national criminal law provisions. However, considering the adjacent requirement to consider the practice of the ICTR, there does not appear to be a set course in relation to an approach taken concerning the legal weight attached to modes of liability. Thus, specific examination of the jurisprudence in the light of a principal accessory distinction for sentencing purposes is necessary and is conducted later in this chapter. In the *Taylor* Sentencing Judgment the Trial Chamber considered both sources when addressing the liability of principals and accessories, but it rejected both approaches:

The Trial Chamber notes that although the law of Sierra Leone provides for the sentencing of an accessory to a crime on the same basis as a principal, the jurisprudence of this Court, as well as the ICTY and ICTR, holds that aiding and abetting as a mode of liability generally warrants a lesser sentence than that imposed for more direct forms of participation. While generally, the application

<sup>590</sup> Article 19 Rwanda’s Organic Law.

<sup>591</sup> Ibid; see also *Kambanda* Judgment and Sentence (n 584) para 19.

<sup>592</sup> *Kambanda* Judgment and Sentence (n 584) para 22.

<sup>593</sup> See *Serushago* Sentencing Judgment (n 584) para 18, where the Chamber clarified that ‘the practice of sentencing in Rwanda and to the Organic Law is just an indication’, while expressing its preference for ‘unfettered discretion each time that it has to pass sentence on persons found guilty’.

of this principle would indicate a sentence in this case that is lower than the sentence that have been imposed on the principal perpetrators which have been tried and convicted by this Court, the Trial Chamber considers that the special status of Mr Taylor as a Head of State puts him in a different category of offenders for the purpose of sentencing.

(...) Although Mr Taylor has been convicted of planning as well as aiding and abetting, his conviction for planning is limited in scope. However, Mr Taylor was functioning in his own country at the highest level of leadership, which puts him in a class of his own when compared to the principal perpetrators who have been convicted by this Court.<sup>594</sup>

Thus, the SCSL does not follow the *ad hoc* tribunals in this regard. As indicated above, it provides an example of considering domestic sentencing practice in relation to the role of liability in sentencing, although it did not ultimately follow the path provided for by municipal law.

### 3.2.1.2 ATTRIBUTES OF DIRECT AND INDIRECT PARTICIPATION IN THE CONTEXT OF MITIGATING AND AGGRAVATING FACTORS

A principal-accessory distinction has sometimes been expressed when assessing aggravating and mitigating factors relating to the accused. There is no doubt that the lists of mitigating and aggravating factors as enumerated in Articles 24(2) ICTY Statute and 23(2) ICTR Statute along with those in Rule 101 B) RPE ICTY/ICTR are of a non-exhaustive nature. Hence, judges have ample discretion in relation to the factors they may consider. In addition to the mitigating and aggravating factors, which are frequently cited by the *ad hoc* tribunals,<sup>595</sup> judges have considered physical perpetration as aggravating and vis-à-vis indirect perpetration as mitigating factors.<sup>596</sup> The overlapping character of the gravity of the crime and aggravating and mitigating factors respectively have been addressed in few cases. In *Babić*, the Trial Chamber considered the ‘limited extent of participation’ of the defendant under the heading of mitigating factors. Further, the Appeals Chamber subsequently clarified that addressing this factor under the heading of mitigating factors would not be prejudicial to the accused as long as it is not double-counted:

With regard to whether the alleged limited participation of the Appellant must be considered as a mitigating factor or, as the Prosecution argues, as “diminishing the gravity of the offence”, the Appeals Chamber recalls its previous finding in the *Aleksovski* Appeals Judgment, in which it endorsed the finding of the Trial Chamber in the *Kupreškić et al.* Trial Judgment that “[t]he determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime”. The Trial Chamber did so here, stating in the course of its discussion of the gravity of the Appellant’s offence that his participation was “significant” and that he had “pleaded guilty as a co-

<sup>594</sup> *Prosecutor v Taylor* (Sentencing Judgment) SCSL-03-01-T (30 May 2012) paras 100, 101.

<sup>595</sup> See for instance *Blaškić* Appeal Judgment (n 121) para 728, where it was held: ‘As mitigating circumstances proved on the balance of probabilities: (i) the Appellant’s voluntary surrender to the International Tribunal; (ii) his real and sincere expression of remorse; (iii) his good character with no prior criminal convictions; (iv) his record of good comportment at trial and in detention; (v) his personal and family circumstances, including his health; (vi) his having been detained for over 8 years pending a final outcome in his case; and (vi) his particular circumstances at the outbreak of and during the war’.

<sup>596</sup> See for example *Prosecutor v Ntakirutimana and Ntakirutimana* (Judgment and Sentence) ICTR-96-10 & ICTR-96-17-T (21 February 2003) para 912, where the Chamber considered as aggravating that Ntakirutimana ‘personally shot’ Tutsi refugees and thus ‘directly and personally contributed to the sheer death toll (...)’; see also *Prosecutor v Todorović* (Sentencing Judgment) IT-95-9/1-S (31 July 2001) para 61.

perpetrator”. Although these references are fairly brief, they are sufficient to demonstrate that the Trial Chamber duly considered the issue, particularly given that the Trial Chamber’s conclusions regarding the significance of the Appellant’s participation are further fleshed out in the course of its discussion of mitigating factors. Moreover, even if the Trial Chamber had addressed this factor only in the context of mitigation and not in the context of the gravity of the offence, this erroneous placement would not have been prejudicial; because the Trial Chamber did not commit any error in concluding that the Appellant’s participation was in fact significant, a more extensive discussion in the context of the gravity of the offence could not have been of assistance to the Appellant.<sup>597</sup>

This does not constitute a differentiated approach in the stricter sense, and neither is it based on a rigid normative distinction, but it seems to lead to similar results if a certain pattern in the evaluation process of modes of liability as aggravating/mitigating factors arises. Nonetheless, it seems difficult to draw a line between the impact of a principal-accessory distinction when evaluated under the heading of mitigating/aggravating factors or under the heading ‘gravity of the crime’.

### 3.2.1.3 GRAVITY OF THE OFFENCE AND INDIVIDUAL CIRCUMSTANCES

As clarified in *Aleksovski*, ‘[c]onsideration of the gravity of the conduct of the accused is normally [a] starting point for consideration of an appropriate sentence’,<sup>598</sup> as the gravity of the crime occupies a central if not the most important role in the sentencing process of the *ad hoc* tribunals.<sup>599</sup> In the *Celebici* case, the Trial Chamber stated that the gravity of the offence was ‘by far the most important consideration, which may be regarded as the litmus test for the appropriate sentence’.<sup>600</sup> Due to the fact that there is no statutory definition, it is the responsibility of the tribunals to develop a pattern consisting of relevant factors in order to assess the gravity. Hence, a closer look at the jurisprudence of the *ad hoc* tribunals will reveal the factors considered as a means to ascertain the gravity of the crime. However, it has been argued that the concept of gravity of the crime is ‘too complex to be defined in a few words’, as ‘it is determined by a complex set of factors which need to be defined and are interrelated’.<sup>601</sup> In *Kupreškić*, the Trial Chamber clarified that ‘the determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime’.<sup>602</sup> Accordingly, two elements play a central role in assessing the gravity of the crime, namely (i) the particular circumstances of the case and (ii)

<sup>597</sup> *Prosecutor v Babić* (Judgment on Sentencing Appeal) IT-03-72-A (18 July 2005) para 39.

<sup>598</sup> *Aleksovski* Appeal Judgment (n 138) para 182; <sup>598</sup> *Banović* Sentencing Judgment (n 561) para 36.

<sup>599</sup> See for example *Prosecutor v Delalić et al.* (Trial Judgment) IT-96-21-T (16 November 1998) para 1225.

<sup>600</sup> *Delalić et al.* Trial Judgment (n 599) para 731; see also among others *Simić et al.* Trial Judgment (n 23) para 1062; see also in relation to the importance of the gravity element, Sentencing Judgment (n 561) para 36: ‘The overriding obligation in sentencing remains, however, the consideration of the inherent gravity of the crime. This factor has been described as the “primary consideration” and the “cardinal feature” in sentencing. It has been said that “consideration of the gravity of the conduct of the accused is normally the starting point for consideration of an appropriate sentence.” This Trial Chamber cannot but agree. Indeed, the overriding obligation in determining sentence is that of fitting the penalty to the gravity of the criminal conduct’.

<sup>601</sup> K Ambos, *Treatise on International Criminal Law, Volume II: The Crimes and Sentencing* (OUP 2014) 291.

<sup>602</sup> *Kupreškić et al.* Trial Judgment (n 35) para 852; cf contrary, *Prosecutor v Galić* (Trial Judgment) IT-98-29-T (5 December 2003) para 758: ‘The Tribunal has often reiterated in its Judgments that the primary factor to be taken into account in imposing a sentence is the gravity of the offence, including the impact of the crimes on the victims. This is true irrespective of the form of criminal participation of the individual’.

the form and degree of the accused's participation in the crime. While it is obvious that the latter is the key element in relation to the applicable mode of liability and thus may reveal the particular approach taken by judges in assessing the weight attached to a pertinent mode, the former is discussed briefly as they overlap. The SCSL assesses the gravity of the crime in similar manner.<sup>603</sup>

The Rome Statute entails two different forms of gravity. As discussed above, Article 77(1)(b) of the Rome Statute makes an express reference to the 'extreme gravity of the crime'.<sup>604</sup> In addition, Rule 145(3) RPE explicitly states that '[I]f imprisonment may be imposed when justified by the extreme gravity of the crime and the individual circumstances of the convicted person, as evidenced by the existence of one or more aggravating circumstances'. It seems that "extreme gravity" presupposes that there is also "normal" gravity, leading to 'imprisonment for a specified number of years, which may not exceed a maximum of 30 years', as provided for in Article 77(1)(a). Ambos clarifies that the latter form of gravity can be referred to as "normal" or "simple" gravity. Hence, judges of the ICC not only have to assess what constitutes the "gravity of the crime" in a particular case, they also have to draw a line or come up with a threshold, which enables them to differentiate between the two different concepts of gravity of a crime or two different degrees. In assessing the gravity of the crime the ICC Pre-Trial Chamber clarified that both a 'quantitative perspective, ie by considering the number of victims' and a 'qualitative' position had to be considered.<sup>605</sup>

### 3.2.1.3.1 Particular Circumstances of the Case:

In *Blagojević and Jokić*, the Trial Chamber recalled that 'the Appeals Chamber has stressed that the sentence should be individualised and that the particular circumstances of the case are therefore of primary importance'.<sup>606</sup> Both tribunals have referred in their jurisprudence *inter alia* to the following factors when considering the individual circumstances of the case:<sup>607</sup> (i) 'the scale and cumulative effect' of the crimes committed;<sup>608</sup> (ii) 'the authority (...) exercised over the personnel';<sup>609</sup> (iii) the

<sup>603</sup> *Taylor Sentencing Judgment* (n 594) paras 19, 20; *Prosecutor v Brima, Kamara and Kanu* (Sentencing Judgment) SCSL-04-16-T (19 July 2007) para 19; *Prosecutor v Fofana and Kondewa* (Sentencing Judgment) SCSL-04-14-T (9 October 2007) para 33.

<sup>604</sup> As Ambos notes, the gravity is already assessed in the context of Article 17(1)(d) of the Rome Statute and thus a preliminary consideration 'as an admissibility threshold within the framework of the complementarity test'. Ambos, *Treatise on International Criminal Law*, vol II (n 601) 292.

<sup>605</sup> In relation to the qualitative dimension, see *Situation in the Republic of Kenya* (Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya) ICC-01/09 (31 March 2010) para 62; *Prosecutor v Abu Garda* (Decision on the Confirmation of Charges) ICC-02-/05-02/09 (8 February 2010) para 31.

<sup>606</sup> *Blagojević and Jokić* (Trial Judgment) IT-02-60-T (17 January 2005) para 832.

<sup>607</sup> Cf contrary for factors, which have not been accepted, *Taylor Sentencing Judgment* (n 594) para 79: Following the submission of the Defence that 'Mr Taylor's age, health and family circumstances "constitute the essence of the individual circumstances contemplated in Article 19(2) of the Statute" and that they may be regarded as mitigating factors'. However, the Trial Chamber contended: 'His age and the fact that he is married with children are not, in the Trial Chamber's view, mitigating factors in this case. Further, his social professional and family background, which the Defence submits shows the likelihood of rehabilitation, is not a mitigating factor in the Trial Chamber's view'.

<sup>608</sup> *Simić et al.* Trial Judgment (n 23) para 1063.

‘possibility of rehabilitation’; and (iv) the ‘terrible impact on the victims and their relatives’.<sup>610</sup> Furthermore, the SCSL has summarised the elements constituting the gravity of the offence with reference to the jurisprudence of the *ad hoc* tribunals as constituting

‘(...) *inter alia*, the general nature of the underlying criminal conduct; the form and degree of participation of the [a]ccused or the specific role played by the [a]ccused in the commission of the crime; the degree of suffering, impact or consequences of the crime, for the immediate victim in terms of physical, emotional and psychological effects; the effects of the crimes on the relatives of the immediate victims and/or the broader target group; the vulnerability of the victims; and the number of victims’.<sup>611</sup>

It becomes immediately obvious that the definition of the terminology referring to the elements constituting “gravity” poses a major problem. While some judges have in some cases considered “personal circumstances” in the stricter sense to constitute factors relating to the personal background by listing personal details of the perpetrator,<sup>612</sup> (eg marital status, whether the perpetrator is a parent, or whether he graduated from university) others have focused on the perpetrator’s particular role in the commission of the offence when considering the “personal circumstances”. This in itself does not create a problem as long as all factors are considered and evaluated only once in the sentencing process and not double counted.<sup>613</sup> This has been stressed in a number of cases.<sup>614</sup> In the *Deronjić*, the Appeal Chamber clarified that: ‘factors which a Trial Chamber takes into account as aspects of the

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<sup>609</sup> *Prosecutor v Serugendo* (Judgment and Sentence) ICTR-205-84-I (12 June 2006) para 47.

<sup>610</sup> *Popović et al.* Trial Judgment (n 115) Volume II, para 2151.

<sup>611</sup> *Brima, Kamara and Kanu* Sentencing Judgment (n 603) para 19; see also for example *Brima, Kamara and Kanu* Sentencing Judgment (n 603) paras 53, 55.

<sup>612</sup> See *inter alia* *Prosecutor v Kayishema and Ruzindana* (Sentencing Judgment) ICTR-95-1-T (21 May 1999) para 11 where the Chamber considered the following factors as Kayishema’s individual circumstances: ‘Kayishema was born 1954 in Bwishyura (...) He is married and has two children. He graduated from the national University of Rwanda (...) The Prosecution has not proved that Kayishema has any previous criminal convictions’. See also para 21 respectively for Ruzindana’s individual circumstances.

<sup>613</sup> Harmon and Gaynor, who criticise commensurately short sentences in the sentencing practice of the ICTY opine: ‘It appears that some ICTY Sentencing Chambers apply either a remarkably low formula to calculate the length of time to be spent in prison in relation to the total quantum of human suffering caused, or afford quite extraordinary weight to mitigating factors. It is impossible to know which is correct. (...) Mitigating factors, which need only be proven on the balance of probabilities, may add up quickly. The cumulative effect of a Trial Chamber recognising multiple factors of mitigation may result in a significant sentence reduction. (...) Contributing to the high proportion of low sentences at the ICTY may be other factors, ranging from undue emphasis on mitigating factors, particularly those mitigating factors of particular importance to the Tribunal, (...) and the practice of using global sentences to reflect the overall criminality of the accused, rather than allocating a separate sentence to each conviction’. M B Harmon and F Gaynor, ‘Ordinary Sentences for Extraordinary Crimes’, (2007) 5 *Journal of International Criminal Justice* 683, 689. See also *Prosecutor v Kaing Guek Eav alias Duch* (Appeal Judgment) File/Dossier No. 001/18-07-2007-ECCC-SC (3 February 2012) para 373 where the Supreme Court Chamber criticised that in determining the sentence the Trial Chamber ‘attached undue weight to mitigating circumstances and insufficient weight to the gravity of crimes and aggravating circumstances’.

<sup>614</sup> *Prosecutor v Deronjić* (Judgment on Sentencing Appeal) IT-02-61-A (20 July 2005) para 106; *Krnojelac* Trial Judgment (n 3) para 517: ‘The Trial Chamber has already taken into account other matters put forward by the Prosecution as aggravating circumstances when it considered the gravity of the offences proved (...). The Trial Chamber considers that it would be impermissible double counting to take these matters into account again as matters of aggravation as well’. *Prosecutor v Plavšić* (Sentencing Judgment) IT-00-39&40/1-S (27 February 2003) para 58: ‘While the Trial Chamber further accepts that the other factors identified by the Prosecutor, ie the vulnerability of the victims and the depravity of the crimes, are capable of amounting to aggravating factors, it considers that in the circumstances of this case, these factors are essentially subsumed in the overall gravity of the offence. Accordingly, the Trial Chamber will not treat them as aggravating factors separately’.

gravity of the crime cannot additionally be taken into account as separate aggravating circumstances, and *vice versa*'.<sup>615</sup> Pruitt observes in his empirical study of aggravating and mitigating factors at the ICTR that the 'judgments of the ICTR tended to interchange gravity as an aggravating factor and as a statutory sentencing factor'.<sup>616</sup>

In *Kordić and Čerkez*, the Trial Chamber clarified that the 'categories of mitigating circumstance cannot be considered as closed' and that '[s]uch factors will vary with the circumstances of each case, as must be contemplated by the reference to 'individual circumstances' in Article 24 of the Statute'.<sup>617</sup> Accordingly, "individual circumstances" appear to compose the individualised part of general aggravating or mitigating factors, constituting the gravity of the crime. However, in a more technical context, the gravity of the crime can be divided into 'abstract gravity', which refers to the seriousness of the crimes, and 'concrete gravity', which comprises the underlying personal circumstance.<sup>618</sup> As Ambos notes, abstract gravity is only the starting point, which should be followed by consideration of concrete gravity.<sup>619</sup> The *ad hoc* tribunals have largely rejected the idea that crimes constituting abstract gravity can be ranked in relation to their inherent gravity.<sup>620</sup> Thus, concrete gravity is the key factor in that its weight will be the main determinant in relation to the length of the final sentence.<sup>621</sup> Moreover, Harmon and Gaynor articulate three 'principal elements', for the assessment of the gravity of the crime, namely: (i) the abstract gravity of the crime; (ii) the concrete gravity of the crime; and (iii) the level of intent and the level of participation of the convicted person in the commission of the crime. It is suggested to measure concrete gravity by assessing the 'total quantum of suffering inflicted on, and social and economic harm caused to, direct and indirect victims of the crime, taking into account the number of victims, and the nature and duration of their suffering at the time of the crime, since the crime, and that which they are likely to continue to experience'. Similarly, Boas and others observe four 'sub-components' constituting the gravity of the crime: (i) the inherent gravity of the crime; (ii) the gravity of the crime committed; (iii) the role of the accused; and (iv) the impact on the victims.<sup>622</sup> Holá and others identified that the factors which are frequently weighted as aggravating factors at the

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<sup>615</sup> *Deronjić* Judgment on Sentence Appeal (n 614) para 106; the Appeal Chamber referred *inter alia* to the *Krnjelac* Trial Judgment (n 614) para 517.

<sup>616</sup> W R Pruitt, 'Aggravating and Mitigating Sentencing Factors at the ICTR – An Explanatory Analysis', (2014) 14 International Criminal Law Review, 148, 158, with reference to R D Sloane, 'Sentencing for the "Crime of the Crimes"', (2007) 5 Journal of International Criminal Justice, 713.

<sup>617</sup> *Kordić and Čerkez* Trial Judgment (n 67) para 848.

<sup>618</sup> Ambos, *Treatise on International Criminal Law*, vol II (n 601) 293, 294.

<sup>619</sup> See *Kajelijeli* Judgment and Sentence (n 31) para 953; Ambos, *Treatise on International Criminal Law*, vol II (n 601) 294; J P Book, *Appeal and Sentencing in International Criminal Law* (BWV 2011) 123.

<sup>620</sup> Cf *Kambanda* Judgment and Sentence (n 584) para 14, where the Trial Chamber held that war crimes are less serious than crimes against humanity; cf *Tadić* Judgment in Sentencing Appeals (n 540) para 69, where this idea was rejected. The Appeals Chamber later followed the latter proposition in *Prosecutor v Furundžija* (Appeal Judgment) IT-95-17/1-A (21 July 2000) para 243; *Prosecutor v Stakić* (Appeal Judgment) IT-97-24-A (22 March 2006) para 375; see for a more detailed discussion Schabas, *The UN International Criminal Tribunals* (n 34) 561 seq.

<sup>621</sup> Ambos, *Treatise on International Criminal Law*, vol II (n 601) 294.

<sup>622</sup> G Boas and others, *International Criminal Procedure, International Criminal Law Practitioner Library*, Volume III (CUP 2011) 396, 397.

ICTY, include the following five: (i) abuse of superior position/position of authority or trust (accepted in 35 cases); (ii) special vulnerability of victims (accepted in 31 cases); (iii) extreme suffering or harm inflicted on victims (accepted in 25 cases); (iv) large number of victims (accepted in 15 cases); and (v) cruelty of the attack (accepted in 14 cases).<sup>623</sup> Moreover, despite the express reference to the consideration to the “form and degree of liability” element, the form of participation has also been addressed under the gravity of the offence heading. Thus, in *Banović*, the Trial Chamber indicated when discussing the gravity of the crimes, direct participation renders a crime more serious:

The offence for which the Accused has been convicted [persecution] is made all the more serious by considering the underlying criminal offences. The Accused has acknowledged his direct, personal involvement in inflicting severe pain and bodily harm through violent beatings of detainees at the Keraterm camp. More significantly, Predrag Banović has been convicted for participating in the beatings that caused the death of five detainees. His crimes are particularly serious in terms of the protected interests which he violated (...).<sup>624</sup>

Such emphasis on “direct, personal involvement” throughout the discussion concerning the gravity of the crime corroborates the apparent predominant proposition that physical perpetration is considered as more blameworthy.

### 3.2.1.3.2 Form and Degree of Liability

The relevance of assessing the form and degree of liability as part of the gravity of the crime has *inter alia*<sup>625</sup> been expressed in *Strugar*, where the Trial Chamber stated that the ‘Accused’s participation in the commission of the crimes’ is ‘of relevance to the gravity of the offence’.<sup>626</sup> Meernik and King opine that ‘[k]ey to any assessment of the appropriate punishment for the accused is the degree of responsibility the accused exercised in the commission of criminal offences’.<sup>627</sup> This poses the question as to how the *ad hoc* tribunals have interpreted the element of “form and degree of liability”. Contrary to what the wording of this element suggests, it does not appear to denote a specific label which leads to different legal results. Instead, the individual’s “concrete role” in the commission of the crime and the “underlying criminal conduct” play a significant role in assessing the gravity of the crime.<sup>628</sup> In *Milutinović et al.*,<sup>629</sup> the Trial Chamber held in relation to the assessment of the gravity of

<sup>623</sup> Holá, Smeulers and Bijleveld ‘Is ICTY Sentencing Predictable?’ (n 33) 85, 86.

<sup>624</sup> *Banović* Sentencing Judgment (n 561) para 91.

<sup>625</sup> See also *Prosecutor v Milan Milutinović et al.* (Trial Judgment) IT-05-87-T (26 February 2009) Volume 3, para 1147.

<sup>626</sup> *Prosecutor v Strugar* (Trial Judgment) IT-01-42-T (31 January 2005) para 462; see also *Prosecutor v Miroslav Deronjić* (Sentencing Judgment) IT-02-61-S (30 March 2004) para 154: ‘It is necessary to consider the nature of the crime and “the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime” in order to determine the gravity of the crime’. *Prosecutor v Nikolić* (Sentencing Judgment) IT-94-2-S (18 December 2013) para 144.

<sup>627</sup> Meernik and King, *The Sentencing Determinants* (n 70) 736.

<sup>628</sup> See *Blagojević and Jokić* Trial Judgment (n 606) para 833: ‘By “gravity of the offence” the Trial Chamber understands that it must consider the crimes for which each Accused has been convicted, the underlying criminal conduct generally, and the specific role played by Vidoje Blagojević and Dragan Jokić in the commission of the crime. Additionally, the Trial Chamber will take into account the impact of the crimes on the victims’. See similarly *Prosecutor v Mrđa* (Sentencing Judgment) IT-02-59-S (31 March 2004) paras 20, 21.

<sup>629</sup> *Milutinović et al.* Trial Judgment (n 625) vol III.



the offence that ‘the gravity of the offence is the primary consideration in determining the sentence’,<sup>630</sup> which includes *inter alia* the ‘form and degree of participation’.<sup>631</sup> Furthermore, in *Deronjić*, the Trial Chamber stated that ‘[i]t is necessary to consider the nature of the crime and “the particular circumstances of the case, as well as the form and degree of participation of the accused in the crime” in order to determine the gravity of the crime’.<sup>632</sup> One could discern that these statements do not in themselves exclude the idea of ascribing a lower or higher degree of responsibility corresponding with accessory or principal liability, while different facets of culpability within one mode of liability are considered in the light of the individual’s specific conduct. Although it seems safe to note that a preference for the differentiated approach is reflected in the jurisprudence of the *ad hoc* tribunals, there is clearly the view that no classification of modes of liability is necessary for the purpose of sentencing. In *Krnjelac*, the Trial Chamber stressed that ‘[c]ategorising offenders may be of some assistance, but the particular category selected cannot affect the maximum sentence which may be imposed (...)’.<sup>633</sup> However, despite this statement, the Appeals Chamber subsequently made it clear in *Mrkšić*, that the above considerations include the categorisation of modes of liability for the purpose of sentencing:

The Appeals Chamber agrees with Šljivančanin that the fact that an accused did not physically commit a crime is relevant to the determination of the appropriate sentence. Indeed, the determination of the gravity of the crime requires not only a consideration of the particular circumstances of the case, but also of the form and degree of the participation of the accused in the crime. However, while the practice of the International Tribunal indicates that aiding and abetting is a lower form of liability than ordering, committing, or participating in a joint criminal enterprise and may as such attract a lesser sentence, the gravity of the underlying crimes remains an important consideration in order to reflect the totality of the criminal conduct.<sup>634</sup>

It is not difficult to discern the controversial positions. Despite the position that no principal accessory distinction for the purpose of sentencing is present in international criminal justice, there seems to be a controversial stance that accessories, and particularly aiders and abettors, attract lower sentences than principal perpetrators. A number of cases at the *ad hoc* tribunals have been decided based on this premise. In *Vasiljević*, the ICTY Appeals Chamber reduced Mitar Vasiljević’s sentence from 20 years

<sup>630</sup> Ibid para 1147.

<sup>631</sup> Ibid.

<sup>632</sup> *Deronjić* Sentencing Judgment (n 626) para 154 (check again), See also *Mrđa* Sentencing Judgment (n 628) para 21.

<sup>633</sup> *Krnjelac* Trial Judgment (n 3) para 77: ‘This Trial Chamber does not hold the same view as Trial Chamber I as to the need to fit the facts of the particular case into specific categories for the purposes of sentencing. There are, for example, circumstances in which a participant in a joint criminal enterprise will deserve greater punishment than the principal offender deserves. The participant who plans a mass destruction of life, and who orders others to carry out that plan, could well receive a greater sentence than the many functionaries who between them carry out the actual killing. Categorising offenders may be of some assistance, but the particular category selected cannot affect the maximum sentence which may be imposed and it does not compel the length of sentences which will be appropriate in the particular case. This Trial Chamber, moreover, does not, with respect, accept the validity of the distinction which Trial Chamber I has sought to draw between a co-perpetrator and an accomplice. This Trial Chamber prefers to follow the opinion of the Appeals Chamber in *Tadić*, that the liability of the participant in a joint criminal enterprise who was not the principal offender is that of an accomplice. For convenience, however, the Trial Chamber will adopt the expression “co-perpetrator” (as meaning a type of accomplice) when referring to a participant in a joint criminal enterprise who was not the principal offender’.

<sup>634</sup> *Mrkšić and Šljivančanin*, Appeal Judgment (n 30) para 407.

imprisonment to 15 years because of its opinion that

the sentence needs to be adjusted due to the Appeals Chamber's finding that the Appellant was responsible as an aider and abettor with respect to murder as a violation of the laws or customs of war under Article 3 of the Statute (Count 5) and persecution by way of murder and inhumane acts as a crime against humanity pursuant to Article 5(h) of the Statute (Count 3), instead of being responsible as a co-perpetrator as was found by the Trial Chamber.<sup>635</sup>

It further clarified that it is 'of the view that aiding and abetting is a form of responsibility which generally warrants a lower sentence' and therefore, 'taking into account the particular circumstances of this case as well as the form and degree of the participation of the Appellant in the crimes, the Appeal Chamber finds that a sentence of 15 years appropriate'.<sup>636</sup> This reasoning is probably the most frequently cited "principle" at the ICTY when following a differentiated approach. Due to the fact that the above examples serve as a basis for the same reasoning in a number of subsequent cases, the sources upon which the Appeals Chamber based its reasoning are examined in more detail further below. In support of its view that aiding and abetting liability attracts milder sentences, the Appeals Chamber cited *inter alia* pertinent provisions of domestic penal codes/sentencing guidelines, some of which are listed below:<sup>637</sup>

- 2003 United States Sentencing Guidelines sections 2X2.1, 3B1.2
- 1997 Chinese Penal Code, Article 27(2)
- Article 32(2) and 55 of the 1988 Penal Code of South Korea
- Sections 27(2), 49 of the German Penal Code
- Section 34(1) no. 6 of the Austrian Penal Code

As addressed in Chapter 2, Article 27(2) of the 1997 Chinese Penal Code adopts a differentiated approach in that it establishes that accessories are to be punished less severely than principals.<sup>638</sup> Article 32(2) of the South Korean Criminal Code reads as follows: '[t]he punishment of accessories shall be mitigated to less than that of the principals'. Further, Article 32(1) stipulates that '[t]hose who aid and abet the commission of a crime by another person shall be punished as accessories', while Article 55 specifies the statutory mitigation available.<sup>639</sup> Equally Article 27(2) of the German Criminal

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<sup>635</sup> *Vasiljević* Appeal Judgment (n 1) para 181, see Chapter 1.

<sup>636</sup> *Ibid* para 182.

<sup>637</sup> *Ibid* 182, fn 291.

<sup>638</sup> See Article 27 of the Criminal Law of the People's Republic of China: 'A person who plays a secondary or auxiliary role in a joint crime is the accomplice. An accomplice shall be given a lighter or mitigated punishment or be exempt from punishment'.

<sup>639</sup> Article 55 of the Criminal Code [Republic of Korea], 3 October 1953, amended 1 January 1998, Article 55 (Statutory Mitigation) unofficial translation:

(1) Statutory mitigation is as follows: when a death penalty is to be mitigated, it shall be reduced to imprisonment or imprisonment without prison labour, either for life or not less than ten years; when imprisonment for life or imprisonment without prison labour for life is to be mitigated, it shall be reduced to limited imprisonment or limited imprisonment without prison labour for not less than seven years; when limited imprisonment or limited imprisonment without prison labour is to be mitigated, it shall be reduced by one half of the term of the punishment; when deprivation of qualifications is to be reduced, suspension of qualifications for not less than seven years shall be imposed; when suspension of qualifications is to be mitigated, it shall be

Code<sup>640</sup> establishes that secondary participants are entitled to mitigation while Article 49(1) provides for the particulars of mitigation available. The above three legal systems, relied upon by the Appeals Chamber, clearly embrace a differentiated system in the stricter sense and thus serve as an adequate basis. However, given the fact that Austria is a system generally viewed as belonging to the group opting for a unitary approach, it is questionable why the Appeals Chamber made reference to section 34(1) No.6 of the Austrian Criminal Code,<sup>641</sup> which provides that: ‘A reason for mitigated punishment is present, if the perpetrator (...) merely acted as a subordinate in one of several committed criminal acts’.<sup>642</sup> When reading this provision in the light of Article 12,<sup>643</sup> it becomes clear that secondary participants are not statutorily entitled to mitigation, but it is at the judge’s discretion to invoke such mitigation, which is a typical characteristic for the largest part of countries following a rather unitary approach, despite the minor differences. The Austrian Penal Code embraces a unitary system in the wider sense, because it does distinguish between principals and accessories, despite the fact that it does not recognise the ‘derivative nature of participation’.<sup>644</sup> Thus, technically every contribution leads to the fulfilment of the *actus reus*, although it is at the judge’s discretion to mitigate the punishment at the sentencing stage. In the light of the foregoing it appears contradictory, to quote Article 34(1) No.6 of the Austrian Penal Code together with the Penal Codes of three countries embracing a differentiated approach. Similarly, reference to the US sentencing guidelines in support of a differentiated approach appears inadequate, considering that the “Background Application Note” of the cited provision section 2X2.1 reads ‘A defendant convicted of aiding and abetting is punishable as a principal.’ However, reference<sup>645</sup> was also made to section 3B1.2, which reads:

Based on the defendant's role in the offense, decrease the offense level as follows:

- (a) If the defendant was a minimal participant in any criminal activity, decrease by **4** levels.
- (b) If the defendant was a minor participant in any criminal activity, decrease by **2** levels.
- (c) In cases falling between (a) and (b), decrease by **3** levels.<sup>646</sup>

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reduced by one half of the term thereof; when a fine is to be mitigated, it shall be reduced by one half of the maximum amount thereof; when detention is to be mitigated, it shall be reduced by one half of the maximum term thereof; and when a minor fine is to be mitigated, it shall be reduced by one half of the maximum amount thereof. (2) When there are several reasons for which the punishment is to be reduced by Acts, it may be repeatedly mitigated’.

<sup>640</sup> For a detailed discussion see Chapter 2 above. M Bohlander, *The German Criminal Code* (n 323) 43: section 27(1) Any person who intentionally assists another in the intentional commission of an unlawful act shall be convicted and sentenced as an aider. (2) The sentence for the aider shall be based on the penalty for a principal. It shall be mitigated pursuant to section 49(1).

<sup>641</sup> Section 34(1) StGB: (1) Ein Milderungsgrund ist es insbesondere, wenn der Täter (...) an einer von mehreren begangenen strafbaren Handlung nur in untergeordneter Weise beteiligt war.

<sup>642</sup> Unofficial translation of the author.

<sup>643</sup> Austrian Penal Code.

<sup>644</sup> Olásolo, ‘Developments in the Distinction between Principal and Accessorial Liability’ (n 166) 340, fn 5.

<sup>645</sup> It appears that this reference is based on the 2011 Federal Sentencing Guidelines Manual, although not specified explicitly. Accessed at: <http://www.uscourts.gov/guidelines-manual/2011/2011-3b12>.

<sup>646</sup> Federal Sentencing Guidelines Manual, although not specified explicitly.

Although mitigation may be applied at the sentencing stage, this approach must clearly be distinguished from a differentiated approach, in which mitigation is automatically triggered if the convicted is found to be guilty as an aider and abettor.

While the ICTY Appeals Chamber based its approach taken in *Vasiljević* mainly on domestic law, the ICTR Trial Chamber justified its stance that secondary forms of liability attract lower sentences on the practice of the ICTR and specifically on two judgments rendered by the ICTR namely *Ruggiu*<sup>647</sup> and *Ntakirutimana*.<sup>648</sup> In the *Kajelijeli* Trial Judgment, which was rendered before the *Vasiljević* judgment, the Chamber stated that it had considered the ‘sentencing practice of the ICTR and the ICTY’<sup>649</sup> and stressed that ‘the penalty must first and foremost be commensurate to the gravity of the offence’.<sup>650</sup> It further recalled that primary perpetrators ‘convicted of either genocide or extermination (...) or both have been punished with sentences ranging from fifteen years to life imprisonment’ whereas ‘[s]econdary or indirect forms of participation have generally resulted in a lower sentence’.<sup>651</sup> It then referred to *Ruggiu*<sup>652</sup> and *Ntakirutimana*,<sup>653</sup> stating that the former ‘received a 12-year sentence for incitement to commit genocide after a plea of guilty’<sup>654</sup> while *Ntakirutimana* ‘received a ten-year sentence for aiding and abetting genocide, with special emphasis on his advanced age’.<sup>655</sup> In a similar vein, in *Krstić*, when discussing the gravity of the offence, the Appeals Chamber reduced Radislav Krstić’s sentence *inter alia* based on the premise that aiding and abetting results in lower sentences, with reference to the *Vasiljević* Appeal. It thereby held in the context of the gravity of the alleged offences that ‘as the Appeals Chamber recently acknowledged in the *Vasiljević* case, aiding and abetting is a form of responsibility, which generally warrants lower sentences than responsibility as a co-perpetrator [member in a JCE]’.<sup>656</sup> It further emphasised that ‘[t]his principle has also been recognized in the ICTR and in many national jurisdictions’<sup>657</sup> while stressing that the finding that *Krstić* did not fulfil the *mens rea* of genocide, in that ‘he lacked genocidal intent significantly diminishes his responsibility’.<sup>658</sup> It thus concluded that ‘the revision of *Krstić*’s conviction to aiding and abetting these two crimes merits a considerable reduction of his sentence’.<sup>659</sup> In support of this

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<sup>647</sup> *Prosecutor v Ruggiu* (Judgment and Sentence) ICTR-97-32-I (1 June 2000).

<sup>648</sup> *Ntakirutimana et al.* Judgment and Sentence (n 596) see particularly para 897, where the Trial Chamber also emphasised in the context

<sup>649</sup> *Kajelijeli* Judgment and Sentence (n 31) para 963.

<sup>650</sup> *Ibid.*

<sup>651</sup> *Ibid.*

<sup>652</sup> *Ruggiu* Judgment and Sentence (n 647).

<sup>653</sup> *Ntakirutimana et al.* Judgment and Sentence (n 596) see particularly para 897, where the Trial Chamber also emphasised in the context of mitigating circumstances that Elizaphan Ntakirutimana ‘did not personally participate in these killings, nor was he found to have fired on refugees or even to have carried a weapon’.

<sup>654</sup> *Kajelijeli* Judgment and Sentence (n 31) para 963, the identical reference was made only a few months before by the ICTR Appeals Chamber in the *Semanza* Judgment and Sentence (n 149) para 563, see fn 653 below.

<sup>655</sup> *Ibid.*

<sup>656</sup> *Krstić* Appeal Judgment (n 28) para 268.

<sup>657</sup> *Ibid.*

<sup>658</sup> *Ibid.*

<sup>659</sup> *Ibid.*

finding, the Appeals Chamber relied on the above addressed, flawed<sup>660</sup> *Vasiljević* Appeal Judgment,<sup>661</sup> including its references to ‘seven common law and civil law jurisdictions’<sup>662</sup> and on the *Kajelijeli* Trial Judgment.<sup>663</sup>

In *Simić*, the Appeals Chamber applied the same reasoning based on *Vasiljević* and *Krstić* when addressing the gravity of the crime. Thus, when assessing the gravity of the crime it took into consideration that ‘aiding and abetting is a form of responsibility which generally warrants a lower sentence than is appropriate to responsibility as a participant in a joint criminal enterprise’.<sup>664</sup>

In relation to the ICTR it is striking that although the *Semanza* judgment<sup>665</sup> was rendered before the *Kajelijeli* Judgment,<sup>666</sup> most subsequent judgments have made reference to *Kajelijeli*, which seemed to have drawn on *Semanza*, despite the lack of a direct reference. Accordingly, the ICTR referred to its previous case law for guidance and first observed that ‘[p]rincipal perpetrators convicted of either genocide or extermination as a crime against humanity, or both, have been punished with sentences ranging from fifteen years’ imprisonment to life imprisonment. Secondary or indirect forms of participation have generally resulted in a lower sentence’.<sup>667</sup> It then continued to draw on *Ruggiu*<sup>668</sup> and *Ntakirutimana*<sup>669</sup> by stating that ‘Georges Ruggiu received a 12-year sentence for incitement to commit genocide after a plea of guilty, and Elizaphan Ntakirutimana received a ten-year sentence for aiding and abetting genocide, with a special emphasis on his advanced age’.<sup>670</sup> In a similar vein the ICTR Trial Chamber observed in *Gacumbitsi* with reference to the sentencing practice of the *ad hoc* tribunals that ‘[s]econdary or indirect forms of participation are generally punished with a less severe sentence’.<sup>671</sup> Again, it then drew on *Ruggiu*<sup>672</sup> and *Ntakirutimana*<sup>673</sup> and recalled that ‘Georges Ruggiu, for example, received a sentence of 12 years’ imprisonment for incitement to commit genocide after having pleaded guilty, whereas Elizaphan Ntakirutimana received a sentence of ten years’ imprisonment for aiding and abetting the commission of genocide, on account of his advanced age’.<sup>674</sup>

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<sup>660</sup> In relation to some of the sources used to legitimise the differentiated approach.

<sup>661</sup> *Vasiljević* Appeal Judgment (n 1).

<sup>662</sup> *Krstić* Appeal Judgment (n 28) para 268, fn 435.

<sup>663</sup> Reference to para 963 of the *Kajelijeli* Judgment and Sentence (n 31). See also *Babić* Judgment on Sentencing Appeal (n 597) para 40, where the Appeals Chamber relied again on the pertinent part of the *Kajelijeli* Judgment and on the above quoted paragraph of the *Krstić* Appeal.

<sup>664</sup> *Simić* Appeal Judgment (n 125) para 265.

<sup>665</sup> *Semanza* Judgment and Sentence (n 149).

<sup>666</sup> *Kajelijeli* Judgment and Sentence (n 31).

<sup>667</sup> *Ibid* paras 562, 563.

<sup>668</sup> *Ruggiu* Judgment and Sentence (n 647).

<sup>669</sup> *Ntakirutimana et al.* Judgment and Sentence (n 596).

<sup>670</sup> *Semanza* Judgment and Sentence (n 149) para 563.

<sup>671</sup> *Gacumbitsi* Trial Judgment (n 119) para 354.

<sup>672</sup> *Ruggiu* Judgment and Sentence (n 647).

<sup>673</sup> *Ntakirutimana et al.* Judgment and Sentence (n 596).

<sup>674</sup> *Ibid*.

However, two years later, the Appeals Chamber established that a ‘higher sentence is likely to be imposed on a principal perpetrator vis-à-vis an accomplice in genocide’<sup>675</sup> when it held that Semanza was liable as a direct perpetrator ‘in the form of ordering’ (and not as an aider and abettor), which entailed ‘a higher degree of culpability’ than the mode of aiding and abetting.<sup>676</sup>

Despite the Trial Chamber’s conscientious treatment of the Appellant’s sentence, the Appeals Chamber is not satisfied that the 15-year sentences for complicity in genocide and aiding and abetting extermination that the Trial Chamber imposed are commensurate with the gravity of the Appellant’s offences, as determined by the Appeals Chamber. The Appeals Chamber has concluded above that the Appellant’s actions at Musha Church amounted to perpetration in the form of ordering rather than mere complicity in genocide and aiding and abetting extermination. This form of direct perpetration entails a higher level of culpability than complicity in genocide and aiding and abetting extermination convictions entered by the Trial Chamber. The Appeals Chamber recently held in *Krstić* that “aiding and abetting is a form of responsibility which generally warrants lower sentences than responsibility as a co-perpetrator”. The Appeals Chamber endorses this reasoning to the extent that a higher sentence is likely to be imposed on a principal perpetrator vis-à-vis an accomplice in genocide and on one who orders rather than merely aids and abets exterminations.<sup>677</sup>

It then concluded:

On balance, the Appeals Chamber concludes, Judge Pocar dissenting, that the 15-year sentences for complicity in genocide and for aiding and abetting extermination should be increased by 10 years to reflect the Appellant’s responsibility for ordering genocide and extermination at Musha Church. Thus, the Appeals Chamber determines that the Appellant’s sentence for these offences should be 25 years’ imprisonment.<sup>678</sup>

A few months later, this reasoning in *Semanza*, according to which principal perpetration attracts higher sentences, was relied upon by the ICTR Trial Chamber in *Simba*<sup>679</sup> with an unambiguous statement, confirming the proposition that in accordance with the jurisprudence of the ICTR ‘principal perpetration generally warrants a higher sentence than aiding and abetting’.<sup>680</sup> This sentence was also quoted in *Nchamihigo*.<sup>681</sup> However, the Trial Chamber also introduced an additional categorisation for the purpose of sentencing by stating, ‘[a]t this Tribunal, a sentence of life imprisonment is generally reserved for those who planned or ordered atrocities and those who participated in the crimes with special zeal or sadism’.<sup>682</sup> In *Muhimana*,<sup>683</sup> the Trial Chamber repeated the premise that ‘lesser or secondary forms of participation generally receive a lower sentence’.<sup>684</sup> Thus no reference was made to specific case law, except that it added, ‘[t]he *Ntakirutimana* Trial Chamber Judgment, recently upheld on appeal, found Elizaphan Ntakirutimana guilty of aiding and abetting genocide. That Chamber also took into account the convicted pastor’s good work, his age, and his frail health, in

<sup>675</sup> *Semanza* Appeal Judgment (n 118) para 388.

<sup>676</sup> *Ibid.*

<sup>677</sup> *Ibid.*

<sup>678</sup> *Ibid* para 389.

<sup>679</sup> *Simba* Judgment and Sentence (n 181).

<sup>680</sup> *Ibid* para 434.

<sup>681</sup> *Prosecutor v Nchamihigo* (Judgment and Sentence) ICTR-01-63-T (12 November 2008) para 388.

<sup>682</sup> *Ibid.*

<sup>683</sup> *Prosecutor v Muhimana* (Judgment and Sentence) ICTR-95-1B-T (25 April 2005).

<sup>684</sup> *Ibid* para 593.

sentencing him to ten years' imprisonment.<sup>685</sup> Again, it becomes clear that it is doubtful whether the said case serves as an adequate basis for the assumption that '[l]esser or secondary forms of participation generally receive a lower sentence'.<sup>686</sup> Furthermore, in *Bisengimana*<sup>687</sup> the Trial Chamber stated as well that in accordance with the sentencing practice of the ICTY 'principal perpetrators convicted of crimes against humanity such as murder and extermination have received sentences ranging from ten years' to life imprisonment. Persons convicted of secondary forms of participation have generally received lower sentences.'<sup>688</sup> In *Ndindabahizi*<sup>689</sup> the Appeal Chamber addressed the issue of 'alternative convictions for several modes of liability'<sup>690</sup> and held that it was incompatible because 'a judgment has to express unambiguously the scope of the convicted person's criminal responsibility'.<sup>691</sup> The Appeals Chamber clarified that according to the principle it is essential to ensure that the totality of the perpetrator's culpability is reflected in the sentence. It added that '[t]his totality of guilt is determined by the *actus reus* and *mens rea* of the convicted person'<sup>692</sup> and that due to the fact that 'modes of liability may either augment (eg commission of the crime with direct intent) or lessen (eg aiding and abetting a crime with awareness that a crime will probably be committed) the gravity of the crime',<sup>693</sup> it is required that 'the criminal liability of a convicted person has to be established unequivocally'.<sup>694</sup> The Appeals Chamber made *inter alia* reference to *Krstić*,<sup>695</sup> where the court referred to the practice of the courts of the former Yugoslavia when stating that the sentence of an aider and abettor can be reduced. In *Ntawukulilyayo*,<sup>696</sup> the Appeals Chamber reduced Ntawukulilyayo's sentence from 25 to 20 years after reversing his conviction for ordering genocide, which established the only form of primary perpetration with which he was charged<sup>697</sup> and reasoned

<sup>685</sup> Ibid.

<sup>686</sup> Ibid.

<sup>687</sup> *Prosecutor v Bisengimana* (Trial Judgment) ICTR 00-60-T (13 April 2006).

<sup>688</sup> Ibid para 199; see also similarly, *Prosecutor v Bagaragaza* (Sentencing Judgment) ICTR-2005-86-S (17 November 2009) para 42 (*inter alia* with reference to the *Semanza* Appeal Judgment (n 118) para 388): 'The Chamber recognizes that a higher sentence is more likely to be imposed on the principal perpetrators of an offence than on their accomplices. After examining the sentencing practice of this Tribunal and that of ICTY, the Chamber is mindful that principal perpetrators convicted of genocide have been punished with sentences ranging from fifteen years' imprisonment to life imprisonment, and that a principal perpetrator in relation to the Kesho Hill massacre and another event, with a social background similar to that of Michel Bagaragaza, was sentenced to 20 years' imprisonment by the Trial Chamber. Secondary or indirect forms of participation have generally resulted in a lower sentence. The Chamber is aware that the sentence should reflect the totality of the criminal conduct of the accused. In this case, the Chamber finds that extraordinary mitigating circumstances exist, which warrant a substantial reduction of the sentence that the Accused's actions would otherwise carry'.

<sup>689</sup> *Prosecutor v Ndindabahizi* (Appeal Judgment) ICTR-01-71-A (16 January 2007).

<sup>690</sup> Ibid para 122.

<sup>691</sup> Ibid.

<sup>692</sup> Ibid.

<sup>693</sup> Ibid.

<sup>694</sup> Ibid.

<sup>695</sup> *Krstić* Appeal Judgment (n 28) para 270.

<sup>696</sup> *Prosecutor v Ntawukulilyayo* (Appeal Judgment) ICTR-05-82-A (14 December 2011).

<sup>697</sup> Ibid para 244, the Appeals Chamber made *inter alia* references to some of the above addressed judgments, such as to the *Vasiljević* Appeal Judgment (n 1), the *Semanza* Appeal Judgment (n 118), the *Krstić* Appeal Judgment (n 28) the *Gacumbitsi* Appeal Judgment (n 119), and to the *Simić* Appeal Judgment (n 125). However, additionally reference was made to para 334 of the Appeal Judgment (n 125), although this paragraph merely

that ‘aiding and abetting is a mode of responsibility which has generally warranted lower sentences than forms of direct participation such as committing or ordering’.<sup>698</sup> The Appeals Chamber subsequently reduced Ntawukulilyayo’s sentence based on ‘the reversal of his conviction for ordering’.<sup>699</sup> The most recent judgment where the Appeals Chamber opted once again for a differentiated approach is *Ndahimana*.<sup>700</sup>

Consequently it can be said that the factor “form and degree of participation” involves assessment of the specific conduct of the convicted in a relatively large number of cases over a long period of time. However, it may be safe to say that there is enough proof to conclude that the *ad hoc* tribunals seem to interpret Articles 6(1) and 7(1) as entailing a differentiated approach. Ultimately, it has to be added that there is an even larger number of cases where it has not been expressly articulated that modes of liability carry specific legal consequences, as the above analysis has shown. This calls for a quantitative analysis, conducted in the next chapter.

### 3.2.2 PRELIMINARY CONCLUSIONS RELATING TO SENTENCING PRACTICE OF THE AD HOC TRIBUNALS

The above discussion looked at the reference of the tribunals to previous jurisprudence, whereby particularly early cases, such as *Semanza* and *Vasiljević* have been placed under close scrutiny in the light of the question how the application of the differentiated theory was initially justified in the early case law of the tribunals, before it was “transferred” to subsequent case law. Interestingly, it can be observed that reliance of both tribunals has been heavily based on rather questionable, fragmented explanatory statements, supported by contradictory sources as can be concluded in relation to *Vasiljević* – or specifically in the case of the ICTR, alleged principles construed based on single cases such as *Ruggiu*.<sup>701</sup> It thus appears particularly problematic that the tribunals have based their

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reflects the Prosecution’s reliance on the principle established in the *Vasiljević* Appeal Judgment (n 1) that aiders and abettors are generally punished less severely.

<sup>698</sup> Ibid para 244.

<sup>699</sup> *Ntawukulilyayo* Appeal Judgment (n 696) para 244.

<sup>700</sup> *Ndahimana* Appeal Judgment (n 2).

<sup>701</sup> It is not entirely clear where the Trial Chamber deduced this statement from. In a number of cases reference can be found to *Ruggiu*; see for instance the *Semanza* Judgment and Sentence (n 149) para 563: ‘Principal perpetrators convicted of either genocide or extermination as a crime against humanity, or both, have been punished with sentences ranging from fifteen years’ imprisonment to life imprisonment. Secondary or indirect forms of participation have generally resulted in lower sentences. For example, Georges Ruggiu received a twelve-year sentence for incitement to commit genocide after a plea of guilty, and Elizaphan Ntakirutimana received a ten-year sentence for aiding and abetting genocide, with a special emphasis on his advanced age’. It is difficult to deduce from this the principle that secondary participation attracts less severe punishment. Additionally, there does not seem to be an express statement in this regard in *Ruggiu*. However, reference is made to page 19 – thus, it is likely that the Trial Chamber refers to paras 77 and 78 of *Ruggiu* Judgment and Sentence (n 647): ‘77. The accused did not personally commit any acts of violence. He did not strike a blow or fire a shot. In the *Prosecutor v Omar Serushago*, the ICTR in imposing a penalty of 15 years’ imprisonment considered as aggravating circumstances Serushago’s high political and military role and the fact that he killed Tutsi and ordered the killing of several others who were killed as a consequence of his order. 78. The accused did not personally participate in the massacres and did not use his pistol. The Chamber takes due account of this’. Similarly, in *Ntakirutimana and Ntakirutimana* Judgment and Sentence (n 596) no express statement in this regard can be found. The Trial Chamber in *Semanza* made reference to paragraphs 898, 906 and 921 of the Trial Chamber’s Judgment in *Ntakirutimana*, which reads: ‘898. Finally, 78 years of age at the time of



subsequent justifications to legitimise the principle of mitigation on insufficiently substantiated sources, and even worse, frequently the origin or validity of such an “allegedly established principle” does not seem to have been questioned or examined systematically. However, considering the “natural” resort to the differentiated approach without adequate scrutiny, it almost appears as if the milder punishment of aiders and abettors is a solidly established international principle, which does not require extensive and adequate proof of existence – would it not otherwise be discussed systematically? It must be noted that the phrasing of the “principle”<sup>702</sup> is, in a number of instances, identical, as referenced above, this is particularly true in relation to the ICTR. Would this suggest that it has sometimes just been taken over from previous cases – and thus precedent after all prevails? It appears as if the question whether a differentiated or a unitary approach should be taken depends on the specific judge and related factors. Is the answer pre-determined by the legal cultural background, or do judges, in the absence of any statutory guidance, merely follow previous decided cases of the *ad hoc* tribunals? Chapter 4 considers these factors from various angles, which may contribute to a better understanding of the decision-making process in international criminal law.

### 3.2.3 EXPRESS REFERENCE TO A DIFFERENTIATED APPROACH IN JURISPRUDENCE

While the above discussion is based on a wide range of judgments, which broach the issue of a principal accessory distinction, Table 3 below is based on a compilation of judgments rendered by the *ad hoc* tribunals (each perpetrator listed separately), in which a differentiated approach has been articulated at the sentencing stage and actually taken into consideration when meting out the punishment. Only cases where the consideration of the principal-accessory distinction has been clearly demonstrated at the sentencing stage – as opposed to mere reference thereto<sup>703</sup> – have been included. Judgments where the alleged principle that “secondary participation warrants lower sentences” has been merely quoted without clear implications for the respective sentence and as such has not been applied more or less expressly, have been excluded. The table includes the composition of the bench

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sentencing, the Accused has spent more than four years in detention. His wife, among other witnesses, has testified about his frail health, due to a condition from which he has suffered for years. His poor health was evident throughout the trial proceedings. Considered together, the Chamber finds that these are important mitigating circumstances in Elizaphan Ntakirutimana’s case. (...) 906. Having reviewed all circumstances in the Accused’s case, individual, mitigating and aggravating, the Chamber declared itself sympathetic to the individual and mitigating circumstances of Elizaphan Ntakirutimana. Special weight has been given, in reaching its decision on the sentence, to his age, his state of health, his past good character and public service. (...) 921. For the crime upon which conviction was entered against the Accused, the Chamber sentences Elizaphan Ntakirutimana to: imprisonment for 10 years’. When reading these paragraphs in the light of the principle they are alleged to establish, it appears doubtful whether such principle would objectively be deduced from such paragraphs.

<sup>702</sup> If one was to suppose that the differentiated approach can be subsumed under Article 38 ICJ statute, then as a general principle of law. Given the result of the comparative study in Chapter 2, which revealed that jurisdictions go both ways, it appears impossible to establish the existence of a rule of customary international law.

<sup>703</sup> Cases where this issue has been addressed at the stage where individual criminal responsibility is attributed are not included in the absence of any additional reference at the sentencing stage. However, these cases are *inter alia* discussed in the previous chapter.

for each of the cases (the jurisdiction the judge represents, the legal system and the sentencing approach of the respective jurisdiction), which is particularly relevant for the next chapter.

TABLE 3: THE DIFFERENTIATED APPROACH IN THE JURISPRUDENCE OF THE *AD HOC* TRIBUNALS

Case / Perpetrator	Tribunal / Instance	Mode of Responsibility	Judges / Nationality / Legal System / Sentencing Approach	Quote/Extract
1999 (25.06.) Aleksovski	ICTY Trial IT-95-14/1-T	Aiding and Abetting  Superior Responsibility	Almiro Rodrigues (Portugal / Civil Law / Unitary)  Lal Chand Vohrah (Malaysia / Common Law / Unitary)  Rafael Nieto-Navia (Colombia / Civil Law / Differentiated)	Para 236: ‘The Trial Chamber has taken into consideration (...) the good character (...) the Trial Chamber has found that the accused’s direct participation in the commission of acts of violence was relatively limited (...). It is obvious (...) that the accused had a secondary role in the totality of the crimes (...)’.
2000 (01.06.) Georges Ruggiu	ICTR Trial ICTR-97-32-1	Committing	Navanethem Pillay (South Africa / Civil Law / Unitary)  Erik Møse (Norway / Civil Law / Unitary)  Pavel Dolenc (Slovenia / Civil Law / Unitary)	Para 77: ‘The accused did not personally commit any acts of violence. He did not strike a blow or fire a shot’.  Para 78: ‘The accused did not personally participate in the massacres and did not use his pistol. The Chamber takes due account of this’.
2001 (31.07.) Stevan Todorović	ICTY Trial IT-95-9/1-S	Superior Responsibility  Committing  Ordering	Patrick Robinson (Jamaica / Common Law / Unitary)  Richard May (UK / Common Law / Unitary)  Mohamed Fassi Fihri (Morocco / Civil Law / Unitary)	Para 61: ‘(...) His direct participation in the crimes, as well as his abuse of his position of authority and of people’s trust in the institution, clearly constitute an aggravating factor’.

2001 (02.11.) Miroslav Kvočka	ICTY Trial IT-98-30/1-T	JCE	Almiro Rodrigues (Portugal / Civil Law / Unitary) Fouad Riad (Egypt / Civil Law / Unitary) Patricia Wald (USA / Common Law / Unitary)	Para 717: 'The Trial Chamber takes note of the fact that Kvočka was not convicted of physically perpetrating crimes'.
2001 (02.11.) Dragoljub Prcać	ICTY Trial IT-98-30/1-T	JCE	Almiro Rodrigues (Portugal / Civil Law / Unitary) Fouad Riad (Egypt / Civil Law / Unitary) Patricia Wald (USA / Common Law / Unitary)	Para 722: 'The Trial Chamber takes note that Prcać voluntarily gave a statement to the Prosecution and has not been convicted of physically perpetrating crimes'.
2001 (13.11) Duško Sikirica	ICTY Trial IT-95-8-S	Superior Responsibility Committing	Patrick Robinson (Jamaica / Common Law / Unitary) Richard May (UK / Common Law / Unitary) Mohamed Fassi Fihri (Morocco / Civil Law / Unitary)	Para 233: 'The gravity of Duško Sikirica's crime is distinguished from that of his co-accused on account of the breadth or the underlying criminal conduct and, more significantly, on the basis of the extent of his direct personal involvement in the crimes. He alone has been convicted for committing a murder in the camp by shooting one of the detainees at close range within view of other detainees and camp guards. (...)'
2001 (13.11) Dragan Kolunžija	ICTY Trial IT-95-8-S	Superior Responsibility	Patrick Robinson (Jamaica / Common Law / Unitary) Richard May (UK / Common Law / Unitary) Mohamed Fassi Fihri (Morocco / Civil Law / Unitary)	Para 241: 'Although Dragan Kolunžija has been convicted of the crimes of persecution, in the Chamber's view, the gravity of his crime is considerably diminished by the fact, as set forth in the Plea Agreement, that there was no evidence of his direct, personal involvement in any of the underlying criminal conduct'.

2001 (13.11) Damir Došen	ICTY Trial IT-95-8-S	Superior Responsibility	Patrick Robinson (Jamaica / Common Law / Unitary)  Richard May (UK / Common Law / Unitary)  Mohamed Fassi Fihri (Morocco / Civil Law / Unitary)	Para 237: ‘(...) [t]he Chamber, in assessing the gravity of the offence, has borne in mind that, while Damir Došen has admitted to being aware of beatings occurring on his shift, the Plea Agreement does not suggest his direct involvement on any of those beatings’.
2002 (17.10.) Milan Simić	ICTY Trial IT-95-9/2-S	JCE	Florence Ndepele Mwachande Mumba (Zambia / Common Law / Unitary)  Sharon A Williams (Canada / Common Law / Unitary)  Per-Johan Viktor Lindholm (Finland / Civil Law / Differentiated)	Para 55: ‘The Trial Chamber finds that the direct and intentional participation of Milan Simić in the perpetration of the offences, as well as his presence when others joined in the attack on these victims are factors that must be considered in determining his sentence’.
2003 (15.05.) Laurent Semanza	ICTR Trial ICTR-97-20-T	Committing  Aiding and Abetting  Instigating	Yakov Ostrovsky (Russia / Civil Law / Unitary)  Lloyd G Williams (Saint Kitts and Nevis / Common Law / Unitary)  Pavel Dolenc (Slovenia / Civil Law / Unitary)	Para 557: ‘With the exception of his personal participation in the torture and murder of Rusanganwa, the Accused was not a principal perpetrator of the other crimes for which he has been found guilty (...). The accused has been convicted of complicity in genocide, of aiding and abetting (...) and of instigation (...). The Accused’s acts of complicity, aiding and abetting, and instigating are crimes of indirect participation’.  Para 563: ‘(...) Secondary or indirect forms of participation have generally resulted a [sic] lower sentences’.

2003 (01.12.) Juvenal Kajelijeli	ICTR Trial ICTR-98-44A-T	Superior Responsibility  Ordering  Aiding & Abetting  Committing	William H Sekule (Tanzania / Common Law / Unitary)  Winston C. Mananzima Maqutu (Lesotho / Common Law / Unitary)  Arlette Ramarason (Madagascar / Civil Law / Unitary)	Para 963: 'The Trial Chamber has taken into consideration the sentencing practice in the ICTR and the ICTY, and notes particularly that the penalty must first and foremost be commensurate to the gravity of the offence. Principal perpetrators convicted of either genocide or extermination as a crime against humanity or both have been punished with sentences ranging from fifteen years to life imprisonment. Secondary or indirect forms of participation have generally resulted in a lower sentence. For example, Georges Ruggiu received a twelve-year sentence for incitement to commit genocide after a plea of guilty and Elizaphan Ntakirutimana received a ten-year sentence for aiding and abetting genocide, with special emphasis on his advance age'.
2003 (21.02.) Gerard Ntakirutimana	ICTR Trial ICTR-96-17-T	Committing	Erik Møse (Norway / Civil Law / Unitary)  Navanethem Pillay (South Africa / Civil Law / Unitary)  Andrésia Vaz (Senegal / Civil Law / Unitary)	Para 912: 'Other aggravating circumstances taken into consideration are: (...) that he personally shot at Tutsi refugees and that he thus directly and personally contributed to the sheer death toll among (...) [the] Tutsi population (...)'
2004 (25.02.) Mitar Vasiljević	ICTY Appeal IT-98-32-A	Aiding and Abetting	Theodor Meron (USA / Common Law / Unitary)  Mohamed Shahabuddeen (Guyana / Common Law / Unitary)  Mehmet Güney (Turkey / Civil Law / Differentiated)  Wolfgang Schomburg (Germany / Civil	Para 181: '(...) [T]he Appeals Chamber is of the view that the sentence needs to be adjusted due to the Appeals Chamber's finding that the Appellant was responsible as an aider and abettor (...), instead of being responsible as a co-perpetrator as was found by the Trial Chamber. The Appeals Chamber considers that it has the mandate to revise the sentence by itself without remitting it to the Trial Chamber'.

			Law / Differentiated)  Inés Mónica Weinberg de Roca (Argentina / Civil Law / Differentiated)	Para 182: ‘The Appeals Chamber is of the view that aiding and abetting is a form of responsibility which generally warrants a lower sentence than is appropriate to responsibility as a co-perpetrator. (...) Therefore, taking into account the particular circumstances of this case as well as the form and degree of participation (...) a sentence of 15 years is appropriate’.
2004 (31.03.)  Darko Mrda	ICTY  Trial  IT-02-59	Committing	Alphons Orié (The Netherlands / Civil Law / Differentiated)  Amin El Mahdi (Egypt / Civil Law / Unitary)  Joaquín M. Carnival (Spain / Civil Law / Differentiated)	Para 31: ‘The Trial Chamber accepts that Darko Mrda was not the “architect” of the massacre and that he was acting pursuant to orders (...). Nevertheless, the fact that he personally participated in the selection of the civilians who were going to be killed (...) makes the crimes charged especially serious’.
2004 (19.04.)  Radislav Krstić	ICTY  Appeal  IT-98-33-A	Aiding and Abetting	Theodor Meron (USA / Common Law / Unitary)  Fausto Pocar (Italy / Civil Law / Unitary)  Mohamed Shahabuddeen (Guyana / Common Law / Unitary)  Mehmet Güney (Turkey / Civil Law / Differentiated)  Wolfgang Schomburg (Germany / Civil Law / Differentiated)	Para 268: ‘Regarding the gravity of the crimes alleged, as the Appeals Chamber recently acknowledged in the <i>Vasiljević</i> case, aiding and abetting is a form of responsibility which generally warrants lower sentences than responsibility as a co-perpetrator. This principle has also been recognised in the ICTR and in many national jurisdictions. (...) As such, the revision of Krstić’s conviction of aiding and abetting these two crimes merits a considerable reduction of his sentence’.
2004 (17.06.)  Sylvestre Gacumbitsi	ICTR  Trial  ICTR-2001-64-T	Committing Planning Instigating Ordering Aiding and Abetting	Andrésia Vaz (Senegal / Civil Law / Unitary)  Jai Ram Reddy (Fiji Islands / Common Law / Unitary)	Para 354: ‘The Chamber has also taken into consideration the sentencing practice of ICTR and ICTY [sic], and notes that the penalty should, first and foremost, be commensurate with the gravity of the offence. (...) Secondary or indirect forms

			Sergei Alekseevich Egorov (Russia / Civil Law / Unitary)	of participation are generally punished with a lighter sentence. Georges Ruggiu (...) received a 12-year sentence for incitement to commit genocide (...), whereas Elizaphan Ntakirutimana received a ten-year sentence for aiding and abetting (...), with special emphasis on his advanced age’.
2004 (15.07.)  Emmanuel Ndindabahizi	ICTR  Trial  ICTR-2001-71-I	Committing  Instigating  Aiding & Abetting	Erik Møse (Norway / Civil Law / Unitary)  Khalida Rachid Khan (Pakistan / Common Law / Unitary)  Solomy Balungi Bossa (Uganda / Common Law / Unitary)	Para 500: ‘The Chamber has also considered the principle of gradation in sentencing, according to which the highest penalties are to be imposed upon those who planned or ordered atrocities, or those who committed crimes with particular zeal or sadism’.  Para 510: ‘The Chamber has taken into consideration the sentencing practice of the ICTR and the ICTY, and notes particularly that the penalty must first and foremost be commensurate to the gravity of the offence. Principal perpetrators convicted of either genocide or extermination as a crime against humanity, for both which the Accused has been found guilty, have been punished with sentences ranging from fifteen years to imprisonment for the remainder of the convicted person’s life. (...)’.
2005 (28.02.)  Zoran Žigić	ICTY  Appeal  IT-98-30/1-A	JCE	Mohamed Shahabuddeen (Guyana / Common Law / Unitary)  Fausto Pocar (Italy / Civil Law / Unitary)  Florence Ndepele Mwachande Mumba (Zambia / Common Law / Unitary)  Mehmet Güney (Turkey / Civil	Para 716: ‘(...) The Appeals Chamber notes that Žigić, of all the Applicants, was the one who physically committed the highest number of crimes. (...) The Appeals Chamber especially wishes to emphasize the seriousness and gravity of the crimes committed by Žigić, and thus affirms the sentence imposed by the Trial Chamber’.

			Law / Differentiated)  Inés Mónica Weinberg de Roca (Argentina / Civil Law / Differentiated)	
2005 (18.04.)  Mikaeli Muhimana	ICTR  Trial  ICTR-95-1B-T	Committing  Instigating  Aiding and Abetting	Khalida Rachid Khan (Pakistan / Common Law / Unitary)  Lee Gacuiga Muthoga (Kenya / Common Law / Unitary)  Emile Francis Short (Ghana / Common Law / Unitary)	Para 593: ‘On examination of the sentencing practice of the ICTR and ICTY, the Chamber notes that principal perpetrators convicted of genocide have received sentences ranging from fifteen years’ imprisonment to imprisonment for life. Lesser or secondary forms of participation generally receive [a] lower sentence. (...)’.  Para 603: ‘Genocide, and murder and rape as crimes against humanity rank amongst the gravest of crimes. The Trial Chamber has no doubt that principal perpetrators of such crimes deserve a heavy sentence’.  Para 614: ‘The Chamber finds that Mika Muhimana’s active participation in the decapitation of Assiel Kabanda, and the subsequent public display of his severed head, constitute an aggravating factor’.
2005 (28.07.)  Milan Babić	ICTY  Appeal  IT-03-72-A	JCE	Florence Ndepele Mwachande Mumba (Zambia / Common Law / Unitary)  Fausto Pocar (Italy / Civil Law / Unitary)  Mohamed Shahabuddeen (Guyana / Common Law / Unitary)  Mehmet Güney (Turkey / Civil Law / Differentiated)	Para 40: ‘(...) While generally it may be said that a finding of secondary or indirect forms of participation in a joint criminal enterprise relative to others may result in the imposition of a lower sentence, the Appeals Chamber finds that the Trial Chamber’s conclusion in this case that, nevertheless, the Appellant’s participation in the joint criminal enterprise was not as limited as the parties suggest, was the correct one in the light of the totality of his acts demonstrating significant support for the joint criminal



			Wolfgang Schomburg (Germany / Civil Law / Differentiated)	enterprise’.
2005 (20.05.) Laurent Semanza	ICTR ICTR-97-20-A Appeal	Committing Aiding and Abetting Ordering Instigating	Theodor Meron (USA / Common Law / Unitary) Mohamed Shahabuddeen (Guyana / Common Law / Unitary) Mehmet Güney (Turkey / Civil Law / Differentiated) Fausto Pocar (Italy / Civil Law / Unitary) Ines Monica Weinberg de Roca (Argentina / Civil Law / Differentiated)	Para 388: ‘(...) The Appeals Chamber has concluded above that the Appellant’s actions at Musha Church amounted to perpetration in the form of ordering rather than mere complicity in genocide and aiding and abetting extermination. This form of direct perpetration entails a higher level of culpability than complicity in genocide and aiding and abetting extermination convictions entered by the Trial Chamber. The Appeals Chamber recently held in Krstić that “aiding and abetting is a form of responsibility which generally warrants lower sentences than responsibility as a co-perpetrator”. The Appeals Chamber endorses this reasoning to the extent that a higher sentence is likely to be imposed on a principal perpetrator vis-à-vis an accomplice in genocide and on one who orders rather than merely aids and abets exterminations’.
2005 (13.12.) Aloys Simba	ICTR Trial ICTR-01-76-T	JCE	Erik Møse (Norway / Civil Law / Unitary) Sergei Alekseevich Egorov (Russia / Civil Law / Unitary) Dennis C M Byron (Saint Kitts and Nevis / Common Law / Unitary)	Para 434: ‘In the Tribunal’s jurisprudence, principal perpetration generally warrants a higher sentence than aiding and abetting. However, this does not mean that a life sentence is the only appropriate sentence for a principal perpetrator of genocide and extermination. In this Tribunal, a sentence of life imprisonment is generally reserved those [sic] who planned, or ordered atrocities and those who participate in the crimes with particular zeal or sadism’.  Para 435: ‘(...) In addition, the manner in which Simba

				<p>participated in the joint criminal enterprise did not evidence any particular zeal or sadism on his part. In particular, he did not physically participate in killings and did not remain at the sites of the massacres for more than a brief period’.</p> <p>Para 436: ‘Although Simba’s crimes are grave, the Chamber is not satisfied that he is deserving of the most serious sanction available under the Statute. The Chamber finds some guidance from cases that include convictions for direct participation in genocide and extermination that did not result in life sentences’.</p> <p>Para 437: ‘In <i>Semanza</i>, the Appeals Chamber determined twenty-five years’ imprisonment to be the appropriate sentence for direct perpetration of genocide and extermination at a massacre site’.</p>
2006 (02.06.) Joseph Serugendo	ICTR Trial ICTR-2005-84-I	Committing	<p>Erik Møse (Norway / Civil Law / Unitary)</p> <p>Jai Ram Reddy (Fiji Islands / Common Law / Unitary)</p> <p>Sergei Alekseevich Egorov (Russia / Civil Law / Unitary)</p>	<p>Para 83: ‘(...) In the Tribunal’s jurisprudence, principal perpetration generally warrants a higher sentence than aiding and abetting. However, this alone does not mean that a life sentence is the only appropriate sentence for a principal perpetrator of genocide and crimes against humanity. In this Tribunal, a sentence of life imprisonment is generally reserved those [sic] who planned or ordered atrocities and those who participate in the crimes with particular zeal or sadism (...)’.</p>
2006 (28.11.) Blagoje Simić	ICTY Appeal IT-95-9-A	Aiding and Abetting	<p>Mehmet Güney (Turkey / Civil Law / Differentiated)</p> <p>Mohamed Shahabuddeen (Guyana / Common</p>	<p>Para 265: ‘Regarding the gravity of the offence, the Appeals Chamber recalls that aiding and abetting is a form of responsibility which generally warrants a lower sentence than is appropriate to responsibility as a</p>

			<p>Law / Unitary)</p> <p>Liu Daqun (China / Civil Law / Differentiated)</p> <p>Andrésia Vaz (Senegal / Civil Law / Unitary)</p> <p>Wolfgang Schomburg (Germany / Civil Law / Differentiated)</p>	<p>participant in a joint criminal enterprise. Thus in assessing the gravity of the offence, the Appeals Chamber takes into consideration that it has set aside the Appellant's conviction under Article 7(1) of the Statute for his participation in a joint criminal enterprise, and has found him responsible for aiding and abetting (...)'.</p> <p>Para 300: 'In imposing the appropriate sentence, the Appeals Chamber recalls that, in addition to having re-qualified the Appellant's individual criminal responsibility as that of an aider and abettor, it has set aside his conviction for persecution (...). The Appeals Chamber finds that this warrants an adjustment of the Appellant's sentence (...). Taking into account the particular circumstances of the case (...) the form and degree of participation (...) a sentence of fifteen years is appropriate'.</p>
2007 (23.02.)  Joseph Nzabirinda	ICTR  Trial  ICTR-2001-77-T	Mode of liability not specified	<p>Arlette Ramaroson (Madagascar / Civil Law / Unitary)</p> <p>William Hussein Sekule (Tanzania / Common Law / Unitary)</p> <p>Solomy Balungy Bossa (Uganda / Common Law / Unitary)</p>	<p>Para 109: 'The Chamber is mindful of the reasoning in the <i>Semanza</i> Judgment that a higher sentence is likely to be imposed on "one who orders rather than merely aids and abets exterminations". The Chamber further recalls that "modes of liability may either augment (eg commission of the crime with direct intent) or lessen (eg aiding and abetting a crime with awareness that a crime will probably be committed) the gravity of the crime"'.  Para 110: 'On examination of the sentencing practice of this Tribunal and that of the ICTY, the Chamber notes that principal perpetrators convicted of crimes against humanity, such as murder, have received sentences ranging from ten years' to</p>

				life imprisonment. Persons convicted of secondary forms of participation have generally received lower sentences. The Chamber is mindful that the sentence should reflect the totality of the criminal conduct of the accused’.
2007 (12.06.) Milan Martić	ICTY Trial IT-95.11-T	JCE	Bakone Justice Moloto (South Africa / Civil Law / Unitary)  Janet Nosworthy (Jamaica / Common Law / Unitary)  Frank Höpfel (Austria / Civil Law / Unitary)	Para 491: ‘(...) The impact and long-lasting effects of these crimes, for which Milan Martić is individually criminally responsible, including as a direct perpetrator, render them especially grave’.
2008 (03.04.) Lahi Brahimaj	ICTY Trial IT-04-84-T	Committing	Alphons Orié (The Netherlands / Civil Law / Differentiated)  Frank Höpfel (Austria / Civil Law / Unitary)  Ole Bjorn Stole (Norway / Civil Law / Unitary)	Para 493: ‘(...) The Trial Chamber has considered the inherent seriousness of these crimes and that Lahi Brahimaj, who held high-ranking positions in the KLA, participated directly in the commission of them. (...) All these factors make up the gravity of these offence and the totality of the conduct in this case’.
2009 (05.05.) Veselin Šljivančanin	ICTY Appeal IT-95-13/1-A	Aiding & Abetting	Theodor Meron (USA / Common Law / Unitary)  Mehmet Güney (Turkey / Civil Law / Differentiated)  Fausto Pocar (Italy / Civil Law / Unitary)  Liu Daqun (China / Civil Law / Differentiated)  Andrésia Vaz (Senegal / Civil Law / Unitary)	Para 407: ‘The Appeals Chamber agrees with Šljivančanin that the fact that an accused did not physically commit a crime is relevant to the determination of the gravity of the crime requires not only a consideration of the particular circumstances of the case, but also of the form and degree of the participation of the accused in the crime. However, while the practice of the International Tribunal indicates that aiding and abetting is a lower form of liability than ordering, committing, or participating in a joint criminal enterprise and may as such attract a lesser sentence’.

2009 (20.07.) Milan Lukić	ICTY Trial IT-98-32/1-T	Committing	Patrick Robinson (Jamaica / Common Law / Unitary)  Christine van den Wyngaert (Belgium / Civil Law / Differentiated)  Pedro David (Argentina / Civil Law / Differentiated)	Para 1084: 'Having considered all the evidence relating to sentencing, including matters of mitigation, the Trial Chamber maintains the position that on the basis alone of Milan Lukić's guilt for personally, physically and in cold blood killing the five people at Drina River (...), the maximum penalty is warranted'.
2009 (17.11.) Michel Bagaragaza	ICTR Trial ICTR-05-86-S	Aiding and Abetting	Vagn Joensen (Denmark / Civil Law / Unitary)  Bakhtiyar Tuzmukhamedov (Russia / Civil Law / Unitary)  Gberdao Gustave Kam (Burkina Faso / Civil Law / Unitary)	Para 42: 'The Chamber recognizes that a higher sentence is more likely to be imposed on the principal perpetrators of an offence than on their accomplices (...). Secondary or indirect forms of participation have generally resulted in a lower sentence. The Chamber is aware that the sentence should reflect the totality of the criminal conduct of the accused. In this case, the Chamber finds that extraordinary mitigating circumstances exist, which warrant a substantial reduction of the sentence that the Accused's actions would otherwise carry'.
2010 (03.08.) Dominique Ntawukulily-ayo	ICTR Trial ICTR-05-82-T	Aiding and Abetting  Ordering	Khalida Rachid Khan (Pakistan / Common Law / Unitary)  Lee Gacuiga Muthoga (Kenya / Common Law / Unitary)  Aydin Sefa Akay (Turkey / Civil Law / Differentiated)	Para 473: 'He did not physically participate in killings (...)'.
2010 (20.10.) Emmanuel Rukundo	ICTR Appeal ICTR-2001-70-A	Aiding and Abetting	Fausto Pocar (Italy / Civil Law / Unitary)  Mehmet Güney (Turkey / Civil Law /	Para 262: 'The Appeals Chamber also dismisses the Prosecution's assertion that the Trial Chamber erred in stating that secondary or indirect forms of authority have usually entailed a lower

			<p>Differentiated)</p> <p>Liu Daqun (China / Civil Law / Differentiated)</p> <p>Theodor Meron (USA / Common Law / Unitary)</p> <p>Carmel Agius (Malta / Common Law / Unitary)</p>	<p>sentence. The Prosecution itself concedes that this statement is generally correct, and only challenges the cases the Trial Chamber cited in support of this statement. (...)'.</p> <p>Para 269: 'The Appeals Chamber recalls that it has set aside Rukundo's conviction for <i>committing</i> genocide and murder and extermination as crimes against humanity (...) and instead found him responsible for <i>aiding and abetting</i> these crimes. (...) In the circumstances of this case, the Appeals Chamber, Judge Pocar dissenting, reduces Rukundo's sentence of 25 years of imprisonment to 23 years of imprisonment'.</p>
2010 (1.11.) Gaspard Kanyarukiga	ICTR Trial ICTR-2002-78-T	Planning	<p>Taghrid Hikmet (Jordan / Civil Law / Differentiated)</p> <p>Seon Ki Park (Korea / Civil Law / Differentiated)</p> <p>Joseph Masanche (Tanzania / Common Law / Unitary)</p>	<p>Para 676: 'Although Kanyarukiga's crimes are grave, the Chamber is not satisfied that he is deserving of the most serious sanction available under the Statute, given that it has not been established that he directly participated in, or was present during the destruction of Nyange Church itself'.</p>
2011 (14.12.) Dominique Ntawukulily-ayo	ICTR Appeal ICTR-05-82-A	Aiding and Abetting	<p>Carmel Agius (Malta / Common Law / Unitary)</p> <p>Mehmet Güney (Turkey / Civil Law / Differentiated)</p> <p>Liu Daqun (China / Civil Law / Differentiated)</p> <p>Arlette Ramarason (Madagascar / Civil Law / Unitary)</p> <p>Andrésia Vaz (Senegal / Civil Law / Unitary)</p>	<p>Para 244: 'The reversal of Ntawukulilyayo's conviction for ordering genocide removes the only direct form of responsibility by which he was found to have participated in the Kabuye Hill killings. The Appeals Chamber therefore considers that a reversal of Ntawukulyayo's conviction for ordering genocide calls for a reduction of his sentence. It notes, nonetheless, that Ntawukulilyayo remains convicted of an extremely serious crime'.</p>

2011 (30.12.) Gregoire Ndahimana	ICTR Trial ICTR-01-68-T	Superior Responsibility  Aiding and Abetting	Florence Rita Arrey (Cameroon / Common and Civil Law / Unitary)  Bakhtiyar Tuzmukhamedov (Russia / Civil Law / Unitary)  Aydin Sefa Akay (Turkey / Civil Law / Differentiated)	Para 861: 'The Majority considers that (...) [h]e did not physically participate in the killings. Accordingly, these are not found to be aggravating factors, as suggested by the Prosecution'.  Para 865: 'The Majority has considered that he did not personally participate in these killings. (...) His criminal responsibility is derived from his tacit approval combined with his presence at the crime scene'.
2013 (27.03.) Stojan Župljanin	ICTY Trial IT-08-91-T	JCE	Burton Hall (The Bahamas / Common Law / Unitary)  Guy Delvoie (Belgium / Civil Law / Differentiated)  Frederik Harhoff (Denmark / Civil Law / Unitary)	Para 948: 'Župljanin's active and direct participation in the JCE was undertaken in his official capacity (...). This constitutes an abuse of his superior position and thus aggravates his culpability'.
2013 (16.12.) Gregoire Ndahimana	ICTY Appeal ICTR-01-68-A	Superior Responsibility  JCE	Theodor Meron (USA / Common Law / Unitary)  William H. Sekule (Tanzania / Common Law / Unitary)  Arlette Ramarosan (Madagascar / Civil Law / Unitary)  Carmel Agius (Malta / Common Law / Unitary)  Khalida Rachid Khan (Pakistan / Common Law / Unitary)	Para 250: 'The Appeals Chamber is of the opinion that its findings of errors relating to the mitigating factors together with its re-characterisation of Ndahimana's criminal responsibility for the killings of 16 April 1994 as that of a participant in a joint criminal enterprise call for a reconsideration of the sentence imposed on Ndahimana by the Trial Chamber. This part of the Prosecution's sentencing appeal has therefore become moot (...)'.  Para 252: 'The Appeals Chamber considers that, in the circumstances of this case, the elevation of Ndahimana's responsibility from that of an aider and abettor to that of a participant in a joint criminal enterprise results in an increase of his overall

				<p>culpability which calls for a higher sentence’.</p> <p>253: ‘(...) Having considered the extraordinary gravity of the crimes for which Ndahimana is being convicted, the form and degree of his participation in these crimes, as well as the appropriate mitigating and aggravating circumstances, the Appeals Chamber sets aside Ndahimana’s sentence of 15 years of imprisonment and sentences him to a term of 25 years of imprisonment’.</p>
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The table reveals that, although all of the judgments have in common that a differentiated approach is embraced terminologically, they differ in relation to their implication on the sentence, in that the phrasing of the respective parts differs and may only reflect certain nuances of the principle. While the *Vasiljević*<sup>704</sup> and *Krstić*<sup>705</sup> Appeal Judgments or the *Bagaragaza* Sentencing Judgment,<sup>706</sup> among others, are examples of probably the most concretely manifest form of such distinction and the legal consequences thereto, other judgments such as the *Simić et al.*<sup>707</sup> and *Ntawukulilyayo*<sup>708</sup> Trial Judgments and the *Sikirica et al.*<sup>709</sup> Sentencing Judgment are instances where the differentiated approach has been considered in a rather crude form. Interestingly, these judgments extend over a period of 14 years and thus it does not appear that such distinction emerged or disappeared at a specific point. Rather, the principle is embraced as a recurring theme from the very beginning until now. As indicated above, there are, however, different nuances in its appearance. While it seems generally established that JCE is a form of commission liability,<sup>710</sup> the principle may part the concept in some instances, where it is applied within the doctrine of JCE, which does not necessarily require physical contribution to the *actus reus*. This can be seen for instance in the *Kvočka et al.* Trial Judgment,<sup>711</sup> where Miroslav Kvočka was convicted based on his membership in a JCE, but the Trial Chamber took into consideration that he was not convicted of ‘physically perpetrating crimes’.<sup>712</sup> Moreover, the cases differ in relation to the stage at which they address the principle within the broader sentencing stage. While it may in some instances be referred to when addressing the gravity of

<sup>704</sup> *Vasiljević* Appeal Judgment (n 1).

<sup>705</sup> *Krstić* Appeal Judgment (n 28).

<sup>706</sup> *Bagaragaza* Sentencing Judgment (n 689).

<sup>707</sup> *Simić et al.* Trial Judgment (n 23).

<sup>708</sup> *Ntawukulilyayo* Trial Judgment.

<sup>709</sup> *Sikirica et al.* (Sentencing Judgment) IT-95-8-S (13 November 2001).

<sup>710</sup> See for instance (n 176) above.

<sup>711</sup> *Kvočka et al.* Trial Judgment (n 22).

<sup>712</sup> *Ibid* para 717.



the crime, as for instance in relation to Dragan Kolundzija in *Sikirica et al.*,<sup>713</sup> the *Kanyarukiga*<sup>714</sup> Trial Judgments and the *Simić* Appeal Judgment,<sup>715</sup> it may also be considered when discussing mitigating and aggravating factors,<sup>716</sup> which are discussed in depth later in this chapter. A closer look at the judicial bench in pertinent cases reveals that it is of similar composition in some instances. In fact, the Appeals judicial bench in *Krstić*<sup>717</sup> and *Vasiljević*<sup>718</sup> was composed of almost the same judges, except one. Again, in *Kvočka et al.*,<sup>719</sup> four of the five judges were Appeals judges in *Vasiljević*. In a similar vein, the composition of the Trial Chamber bench in *Todorović*<sup>720</sup> conforms with the judges who composed the bench in *Sikirica et al.*<sup>721</sup> Akin to that distribution, in the *Mrkšić and Šljivančanin* Appeal,<sup>722</sup> the judicial bench was composed of three of the judges who were part of the judicial bench in the *Simić*<sup>723</sup> and *Krstić*<sup>724</sup> Appeals cases. Moreover, four of the judges which composed the bench in the *Krstić* Appeal were also part of the judicial bench in the *Babić* Appeal<sup>725</sup> and, except one, the judges in the former appeal also composed the bench in the *Semanza* Appeal.<sup>726</sup> Of course, it can be argued that this could be down to mere coincidence but, conversely, it may be a factor contributing to the explanation why a principal accessory distinction is endorsed. In this context it seems crucial to scrutinise the sources upon which judges relied when embracing a principal accessory distinction, which has been done in the context of the sentencing framework later in this chapter.

Judgments in this table may be divided horizontally into two groups, which vertically reflect varying degrees of the differentiated approach. The horizontal layer accommodates on the one hand those judgments, including statements, which clearly articulate a solid principle, inherently leading to mitigation and on the other hand, those cases which address a principal-accessory distinction primarily in the context of mitigating and aggravating factors (secondary horizontal layer). The latter emphasises first and foremost attributes such as “physical” and “direct”, which is meant to raise the degree of culpability and a concrete effect on the sentence is not expressly mentioned in most of the cases belonging to this secondary horizontal layer; however, it could be inferred, when read in context, considering that the intention of such discussion under a given heading is to address the gravity of the

<sup>713</sup> *Sikirica et al.* Sentencing Judgment (n 709) para 241.

<sup>714</sup> *Prosecutor v Kanyarukiga* (Judgment and Sentence) ICTR-2002-78-T (1 November 2001).

<sup>715</sup> *Simić* Appeal Judgment (n 125).

<sup>716</sup> See *inter alia* *Muhimana* Judgment and Sentence (n 683) Para 614; *Ntakirutimana et al.* Judgment and Sentence (n 596) para 897 where the Trial Chamber considered as a mitigating factor that Elizaphan Ntakirutimana did not ‘personally participate in these killings, nor was he found to have fired on refugees’; cf *Ntakirutimana et al.* Judgment and Sentence (n 596) para 912 where the Trial Chamber considered in relation to Gerard Ntakirutimana that the fact that he ‘he personally shot at Tutsi refugees and that he thus directly and personally contributed to the sheer death toll’ as aggravating factors.

<sup>717</sup> *Krstić* Appeal Judgment (n 28).

<sup>718</sup> *Vasiljević* Appeal Judgment (n 1).

<sup>719</sup> *Kvočka et al.* Appeal Judgment (n 155).

<sup>720</sup> *Todorović* Sentencing Judgment (n 596).

<sup>721</sup> *Sikirica et al.* Sentencing Judgment (n 709).

<sup>722</sup> *Mrkšić and Šljivančanin* Appeal Judgment (n 30).

<sup>723</sup> *Krstić* Appeal Judgment (n 28).

<sup>724</sup> *Simić* Appeal Judgment (n 125).

<sup>725</sup> *Babić* Judgment on Sentencing Appeal (n 597).

<sup>726</sup> *Semanza* Appeal Judgment (n 118).

offence and as such the culpability of the accused. Nevertheless, both “groups” can occur together. In some cases, for instance, it is emphasised that the accused was not a principal perpetrator when assessing the gravity of the offence, thus implying contextually a lesser degree of responsibility. In addition, the chamber may note at some other point in the judgment that ‘secondary or indirect forms of participation generally resulted in lower sentences’.<sup>727</sup>

In the light of this discussion it is essential to clarify the relevant terminology. When interpreting the literal meaning of the wording “direct” and “indirect”, one could assume that the term “direct perpetrator” embraces only the physical perpetrator, whereas the term “indirect perpetrator” denotes all other forms of participation. However, while there is ample evidence in the jurisprudence of the *ad hoc* tribunals that indirect perpetration refers only to aiding and abetting, whereas direct perpetration denotes all other forms, such as instigating, ordering, planning, participation in a JCE and commission, as noted by the Appeals Chamber in *Mrkšić and Šljivančanin*,<sup>728</sup> the ICTR Trial Chamber in *Semanza* pointed out that ‘the accused’s acts of complicity, aiding and abetting and instigating are crimes of indirect participation’.<sup>729</sup> This subsumes instigation under the heading of indirect perpetration. This gradation of culpability, created by modes of liability, is expressed differently. Both tribunals generally tend to emphasise the “physical”, “active”, or “direct” involvement (or indirect and “non-physical”<sup>730</sup> nature respectively) when describing the specific criminal conduct, thereby mostly implying the high degree of culpability resulting from “hands-on” perpetration/commission. Indeed, Meernik and King observed in their empirical enquiry concerning the ICTY that those accused, where non-active participation (“not active participant”) was cited in mitigation, received an average sentence of 16.9 years, which was lower compared to those where it was not expressly cited as a mitigating circumstance.<sup>731</sup> In addition to emphasising the “active participation” of a perpetrator in some instances, the ICTR articulates the “principle of gradation” in relation to modes of participation whereby it stresses in particular the high culpability of order givers and planners. In *Ndindabahizi*, the Trial Chamber asserted that:

The Chamber has also considered the principle of gradation in sentencing, according to which the highest penalties are to be imposed upon those who planned or ordered atrocities, or those who committed crimes with particular zeal or sadism. Whether an accused is found guilty of genocide, of crimes against humanity or of violations of the Geneva Conventions or Additional Protocol II thereto, the principle of gradation enables the Chamber to punish, deter, and consequently

<sup>727</sup> One of many instances is *Semanza* Judgment and Sentence (n 149) para 563.

<sup>728</sup> *Mrkšić and Šljivančanin*, Appeal Judgment (n 30) para 407: ‘[T]he practice of the International Tribunal indicates that aiding and abetting is a lower form of liability than ordering, committing, or participating in a joint criminal enterprise and may as such attract a lesser sentence’. See also *inter alia* the *Orić* Trial Judgment (n 67) para 281: ‘[A]iding and abetting is commonly considered as a less grave mode of participation (...)’. See also van Sliedregt, *Individual Criminal Responsibility* (n 4) 78.

<sup>729</sup> *Semanza* Judgment and Sentence (n 149) para 557.

<sup>730</sup> See for example *Prosecutor v Ntawukulilyayo* (Judgment and Sentence) ICTR-05-82-T (3 August 2010) para 473.

<sup>731</sup> Meernik and King, ‘The Sentencing Determinants’ (n 70) 745. However, it should be noted that this empirical analysis was conducted in 2003 when only 27 judgments had been rendered. The mitigating circumstance “not active participant” was stated in the case of two convicted persons.

stigmatise the crimes considered at a level that corresponds to their overall magnitude and reflects the extent of suffering inflicted upon the victims.<sup>732</sup>

Likewise, the Trial Chamber held *inter alia* in *Simba, Serugendo and Karamera* that ‘a sentence of life imprisonment is generally reserved for those who planned or ordered atrocities’.<sup>733</sup> It is noticeable that this “principle” is almost in all of the pertinent cases phrased identically, corroborating the view that, in relation to the differentiated approach, judges rely overwhelmingly on precedent. Although the high culpability of order givers and planners has not been pointed out as extensively in the jurisprudence of the ICTY, it has been insinuated differently. In the *Stakić* Trial Judgment, the Trial Chamber noted that ‘the perpetrator behind the direct perpetrator, the perpetrator with white gloves – might deserve a higher penalty than the one who physically participated depending on the particular circumstance’.<sup>734</sup> First, it should be recognised that this statement represents one of the few instances where a differentiated approach has been dismissed expressly and secondly, the terminological discrepancies can be noticed. While, as addressed above, the term “direct perpetration” has been held to embrace the modes participation in a JCE, commission, planning, ordering and instigating – the term “direct perpetrator” can and has also been held to be confined to the physical perpetrator.

Thus, this Trial Chamber statement rather illustrates the discrepancy in relation to the hierarchal order of culpability reflected by the respective modes of individual criminal responsibility but at the same time it underlines the common approach i) to distinguish between different modes of liability; ii) to ascribe varying degrees of responsibility to such modes; and iii) which ultimately affects the sentence severity. It can therefore be observed that the jurisprudence of the *ad hoc* tribunals bears different facets of the differentiated approach: i) the classic differentiated approach in form of a principal accessory distinction, whereby the latter is punished less severely; and ii) a modified differentiated approach where direct participation is again divided and embraces those, which are considered to be more blameworthy than others, as for instance in the case of JCE, those who physically commit a crime, and particularly in relation to the ICTR, those who order or plan or commit an offence with specific zeal.

Although the number of judgments expressly opposing a differentiated approach is rather scarce,<sup>735</sup> there are also cases in which a “modified” differentiated approach attracts attention. In the *Tolimir*<sup>736</sup>

<sup>732</sup> *Prosecutor v Nindabahizi* (Judgment and Sentence) ICTR-2001-71-I (15 July 2004) para 500.

<sup>733</sup> *Simba* Judgment and Sentence (n 181) para 434; *Serugendo* Judgment and Sentence (n 609) para 83; *Prosecutor v Karamera et al.* (Judgment and Sentence) ICTR-98-44-T (2 February 2012) para 1720. The latter is not included in Table 3 above, as it does not seem that the differentiated approach was embraced at the sentencing stage, it rather seems like a general remark under the heading “Introduction and applicable law”. In addition to the above quotation, the Trial Chamber affirmed in all three of the above stated judgments that principal perpetrators attract more severe penalties with reference to the *Semanza* Appeal Judgment (n 118) para 388. Notably, the principle is articulated identically.

<sup>734</sup> *Prosecutor v Stakić* Trial Judgment (n 23) para 918.

<sup>735</sup> See for instance, *Gotovina et al.* Case No. IT-06-90-T, Trial Judgment, 15 April 2011, para 2602: ‘(...) the Trial Chamber considers that Ante Gotovina and Mladen Markač participated to a significant degree in the crimes, which constitutes an important factor when assessing the totality of their conduct. The fact that neither of them acted as principal perpetrator does not reduce their responsibility in any way’. However, it must be noted

Trial Judgment, when addressing the aggravating factors previously considered by the ICTY, the Chamber identified ‘the active and direct participation under Article 7(1) of the Statute if linked to a high-ranking position of command’.<sup>737</sup> Accordingly, such direct perpetration merely seems to be a cumulative factor leading to a higher degree of culpability, albeit it is not entirely clear whether this quote is meant to differentiate between principal and secondary participation, or whether it is meant to distinguish between superior responsibility, entailing omission liability, as provided for in Article 7(3) on the one hand and all other forms of active wrongdoing established by Article 7(1), as aiding and abetting as a form of indirect participation is enumerated in Article 7(1). In any case, the *sui generis* nature of superior responsibility has been emphasised in the past. In the *Orić* Trial Judgment the Chamber noted that this ‘allows for an even greater flexibility in the determination of the sentence’.<sup>738</sup> Moreover, the Trial Chamber clarified in *Hadžihasanović and Kubura*<sup>739</sup> that:

(...) [T]he *sui generis* the nature of command responsibility under Article 7(3) of the Statute may justify the fact that the sentencing scale applied to those Accused convicted solely on the basis of Article 7(1) of the Statute, or cumulatively under Articles 7(1) and 7(3), is not applied to those convicted solely under Article 7(3), in cases where nothing would allow that responsibility to be assimilated or linked to individual responsibility under Article 7(1).<sup>740</sup>

Hence, it appears that superior responsibility, which is *sui generis*, is viewed as a mode of liability, incurring a lesser degree of responsibility. As already indicated in other judgments, the Trial Chamber clarified in the *Setako* that ‘not every conviction for direct participation in genocide requires life imprisonment’.<sup>741</sup> It may be argued that this statement denotes an implication towards the need of judicial discretion in this regard and – albeit very far-fetched – a statement against the differentiated approach in a wider sense approach. However, a closer look suggests that such “observation” does not run counter to a differentiated approach. Contrarily, it may as well show that direct perpetration indicates a high degree of culpability, although not every conviction based on direct perpetration must attract the severest penalty. In the light of the foregoing, it should be recalled that a differentiated approach does not require fixed penalties, corresponding with principal or accessorial liability respectively. Rather, it presupposes the distinction between principals and accessories, whereby the latter is regarded as less blameworthy, which is reflected in the final penalty in that the convicted person is entitled to mandatory mitigation. Accordingly, even such a statement as that rendered by the Trial Chamber in *Setako* opposes the view that Article 6(1) embraces a unitary system.

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that this is not an intrinsic dismissal of the differentiated approach, as both of them were members of a JCE, which, as a form of commission, liability attracts in line with the differentiated approach harsher punishment.

<sup>736</sup> *Prosecutor v Tolimir* (Trial Judgment) IT-05-88/2-T (12 December 2012).

<sup>737</sup> *Ibid* para 1221.

<sup>738</sup> *Orić* Trial Judgment (n 67) para 724.

<sup>739</sup> *Prosecutor v Hadžihasanović and Kubura* (Trial Judgment) IT-01-47-T (15 March 2006).

<sup>740</sup> *Ibid* para 2076.

<sup>741</sup> *Prosecutor v Setako* (Judgment and Sentence) ICTR-04-81-T (25 February 2010) para 503.

### 3.2.4 CONCLUSION

As the above analysis reveals, the appreciation of modes of liability and potential penological consequences attached thereto takes place under different headings throughout the sentencing process. While it can be observed that the *ad hoc* tribunals and the ICC generally follow the requirement to take recourse to national law, although rather briefly, one cannot deduce from sentencing judgments explicit references to a differentiated approach justified by reference to domestic law. Conversely, the SCSL on the other side provides an example of considering domestic law in relation to the relevance of modes of liability for punishment, but it did not ultimately follow it.<sup>742</sup> Moreover, in accordance with the analyses in Chapter 1 and the above, it can be concluded that the SCSL clarified its stance in this regard, clearly expressing that ‘there is no hierarchy or distinction for sentencing purposes between forms of criminal participation’.<sup>743</sup> Moreover, the Appeals Chamber negated the applicability of the frequently recited alleged “principle” that ‘aiding and abetting generally warrants a lesser sentence than other forms of criminal participation’ at the SCSL.<sup>744</sup> Accordingly, it is obvious that in general there is a potential impact of international criminal law decisions on points of law on the practice of the SCSL. However, the Appeals Chamber has evaluated the principle and chosen to opt against it. Thus there is a conditional impact, but in terms of the legal weight attached to modes of liability in sentencing, the SCSL has clearly positioned itself by not following the frequently cited “principle”, according to which aiders and abettors are less blameworthy. Moreover, in the light of the above, it is not difficult to understand the criticisms levelled at the reasoning of judges in certain instances. It could be argued that the reliance on a not sufficiently scrutinised principle deriving from one precedent is particularly worrying. One may go as far as to criticise that some sources have been “blindly” cited in the absence of adequate and required scrutiny. For instance, the *Vasiljević* case – where a seemingly established principle was based on partially inadequate sources to justify a principal accessory distinction for the purpose of sentencing, was subsequently cited in numerous cases. It seems problematic that such reasoning is “transferred” to justify a principal-accessory distinction in subsequent cases. This approach could imply that a degree of “implicitness” is involved, which might be caused by the fact that a differentiated approach is firmly established in a large number of national legal systems – which is, after all, the origin of all judges’ education, practising at international courts and tribunals. Despite the above findings in relation to the analysis of jurisprudence, it should be recalled that the process of weighting modes of liability in a certain way, must not necessarily be obvious and expressly mentioned. Moreover, due to the fact that in the practice of international tribunals a single sentence is pronounced, it is difficult to extract the impact of modes of liability on the sentence, unless it is a) expressly mentioned, or b) can be deduced from a wording. The process of decision-making may include subconscious determinants, which will not be

<sup>742</sup> *Taylor Sentencing Judgment* (n 594) paras 100, 101.

<sup>743</sup> *Taylor Appeal Judgment* (n 204) para 670.

<sup>744</sup> *Ibid* para 666.

traceable in a jurisprudential analysis, limiting the efficiency of this approach as these barriers remain in place. Thus it is helpful to conduct an empirical enquiry, which may allow an assessment and perhaps verification of such findings.

### 3.3 THE INTERPRETATION OF DEGREE OF RESPONSIBILITY BY HYBRID TRIBUNALS

The main characteristic and common feature of internationalised tribunals is their application of domestic law, whereby the degree of application can vary amongst them. This naturally results in more stability and foreseeability in relation to issues, which are not yet sufficiently established in international criminal justice. However, the fact that such tribunals also apply international criminal law and are generally heavily influenced by it, can result in the automatic transfer of issues influencing the criminal justice process in hybrid tribunals. It is therefore important to identify and examine whether such an impact is present and – if so – to what extent. The international criminal law term “gravity of the crime”, which is generally understood to comprise also the “form and degree of responsibility”, is found in a large number of judgments rendered by hybrid tribunals. Thus, although the same terminology is used, it is questionable if the term refers to categories of modes of liabilities, which lead to different legal results, or if they only refer to the specific conduct in relation to the responsibility of the accused.

#### 3.3.1 SPECIAL TRIBUNAL FOR LEBANON & SUPREME IRAQI CRIMINAL TRIBUNAL

Due to the lack of a sufficient number of judgments necessary for a jurisprudential analysis, the analysis of these three tribunals does not go beyond Chapter 2. The focus of the empirical analysis below mainly lies on the *ad hoc* tribunals and to a limited extent on the SCSL, ECCC and the ICC. In relation to the quantitative empirical enquiry it must be noted that only the WCCBiH, the East Timor Panels and the *ad hoc* tribunals are included, as they have rendered a number of judgments which may serve as the basis for potentially significant results.

#### 3.3.2 KOSOVO PANELS

Access to judgments of the Kosovo Panels has been very limited. Therefore it has not been possible to analyse the practice of the Panels in relation to their approach to individual criminal responsibility in depth. However, in the Appeals case *Krasniqi, Zyberaj and Kransiqi*,<sup>745</sup> the degree of liability was discussed in the context of different contributions of different members of a JCE. The appellants claimed that the judgment was unfair as each of the defendants received the same punishment of seven years and that the first judge had not taken ‘into consideration the different conducts, ages and the degree of the criminal responsibility’.<sup>746</sup> Moreover, the appellants argued that the punishment was unfair, as the first judge had compared their case with ICTY judgments, which were, according to the

<sup>745</sup> *Selim Krasniqi, Bedri Zyberaj and Agron Krasniqi Appeal Verdict* (n 290).

<sup>746</sup> *Ibid* 85.

appellants, ‘pronounced for more serious crimes’.<sup>747</sup> The Panel agreed with the first judge and held that the suffering inflicted upon the victims was grave; however, it also stated that, while reference to ICTY may provide a useful point of reference, it shall not be treated as ‘leading precedent’.<sup>748</sup> The Panel then held in relation to the appellants *inter alia* that ‘the limits imposed by article 65 PCCK’ for the participation in the criminal association, which provides for mitigated punishment for attempt, aiders and members of criminal associations, had to be taken into consideration.<sup>749</sup> Although it is difficult to deduce a certain approach, it becomes clear that the differentiated approach, embodied in the PCCK, may have influenced the approach of the panels, as the Panels expressly referred to Article 65 PCCK, which stipulates that those who aid or are members in a criminal association shall receive ‘no more than three-quarters of the maximum punishment prescribed for the criminal offence’.

This may only be an indication as no systematic application of the principle can be inferred from the above discussion of jurisprudence.

### 3.3.3 EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

Sentencing at the ECCC is governed<sup>750</sup> by the ECCC Agreement,<sup>751</sup> the Internal Rules<sup>752</sup> and the ECCC Law,<sup>753</sup> which provide rather scarce guidance. Rule 98(5) provides: ‘5. If the Accused is found guilty, the Chamber shall sentence him or her in accordance with the Agreement, the ECCC Law and these IRs. However, these instruments do not clarify whether ‘sentencing before the ECCC is governed by international or Cambodian legal rules, or some combination of each’,<sup>754</sup> comparable to Article 24 of the ICTY Statute<sup>755</sup> or Article 23 of the ICTR Statute respectively. Hence, the Trial Chamber acknowledged in *Duch* that due to the diverse sentencing practice of the *ad hoc* tribunals and the SCSL, which are different from that of the ICC, no uniform guideline can be deduced from current practice.<sup>756</sup> It thus concluded that ‘there is no single international sentencing regime directly applicable before the ECCC’.<sup>757</sup>

In relation to the direct application of Cambodian law, the Trial Chamber stated that it ‘considers that the international nature of the crimes for which the Accused has been convicted, and the uncertainties

<sup>747</sup> Ibid.

<sup>748</sup> Ibid.

<sup>749</sup> Ibid 62 (Selim Krasniqi), 71 (Bedri Zyberaj), 86 (Agron Krasniqi).

<sup>750</sup> See *inter alia* Article 10 of the ECCC Agreement for applicable penalties: ‘The maximum penalty for conviction for crimes falling within the jurisdiction of the Extraordinary Chambers shall be life imprisonment’. Article 39 (new) of the ECCC Law: ‘Those who have committed any crime as provided in Articles 3 new, 4, 5, 6, 7 and 8 shall be sentenced to a prison term from five years to life imprisonment (...)’.

<sup>751</sup> Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes committed during the Period of Democratic Kampuchea.

<sup>752</sup> ECCC Internal Rules (Rev 9).

<sup>753</sup> Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006).

<sup>754</sup> *Duch* Trial Judgment (n 211) para 575.

<sup>755</sup> Ibid fn 996.

<sup>756</sup> Ibid para 576.

<sup>757</sup> Ibid.

and the complexities evident in the evolution of Cambodian criminal law from the 1956 Penal Code onwards, rules out direct application of Cambodian sentencing provisions'.<sup>758</sup> As regards the gravity of the crime committed, the ECCC seems to be influenced by both the *ad hoc* tribunals and the ICC. In the *Duch* Trial Judgment, the Trial Chamber stated that “[i]nternational jurisprudence” has established that the gravity of the crime committed is the “litmus test for the appropriate sentence”, and requires “consideration of the particular circumstances of the case, as well as the form and degree of participation of the [a]ccused in the crime”.<sup>759</sup> Moreover, it quoted Rule 45(1)(c) of the ICC’s RPE and Article 96 of the 2009 Cambodian Penal Code.<sup>760</sup> According to the latter, ‘[t]he court pronounces penalties based on seriousness [sic] of the penalty and circumstances of the offence, of personality [sic] of the accused, of his/her mental state of mind, resources and burdens, motives as well as his/her conduct after committing the offence, in particular towards the victim’.<sup>761</sup>

It is notable that no reference is made to the degree of individual responsibility. In relation to the mitigating factors, the Trial Chamber made reference to Rule 145(2)(a) of the ICC RPEs. In sum, it can be said that, from the limited judgments available, no approach in either direction can be deduced.

### 3.3.4 SPECIAL PANELS FOR SERIOUS CRIMES<sup>762</sup>

As described in the previous chapter, the principle of individual criminal responsibility is provided for in section 14.3 of Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences (Regulation 2000/15). This mirrors Article 25 of the Rome Statute. Section 10.1(a) of Regulation 2000/15, which is the only sentencing provision of Reg 2000/15, does not provide much information in relation to the sentencing process. It lays down the applicable penalties as well as the factors which have to be taken into account when meting out the sentence.<sup>763</sup> According to section 10.2, when imposing a sentence the panel shall consider the ‘gravity of the

<sup>758</sup> Ibid para 577.

<sup>759</sup> Ibid para 582.

<sup>760</sup> Ibid.

<sup>761</sup> 2009 Criminal Code.

<sup>762</sup> Hereinafter referred to as Special Panels.

<sup>763</sup> 10.1 Reg 2000/15: ‘A panel may impose one of the following penalties on a person convicted of a crime specified under sections 4 to 7 of the present regulation:

(a) Imprisonment for a specified number of years, which may not exceed a maximum of 25 years. In determining the terms of imprisonment for the crimes referred to in sections 4 to 7 of the present regulation, the panel shall have recourse to the general practice regarding prison sentences in the courts of East Timor and under international tribunals; for the crimes referred to in sections 8 and 9 of the present regulation, the penalties prescribed in the respective provisions of the applicable Penal Code in East Timor, shall apply.

(b) A fine up to a maximum of US\$ 500,000.

(c) A forfeiture of proceeds, property and assets derived directly or indirectly from the crime, without prejudice to the rights of *bona fide* third parties.

10.2 In imposing the sentences, the panel shall take into account such factors as the gravity of the offence and the individual circumstances of the convicted person. 10.3 In imposing a sentence of imprisonment, the panel shall deduct the time, if any, previously spent in detention due to an order of the panel or any other court in East Timor (for the same criminal conduct). The panel may deduct any time otherwise spent in detention in connection with the conduct (underlying the crime)’.



offence and the individual circumstances of the convicted person'. However, more information regarding the sentencing process can be extracted from the jurisprudence of the Special Panels. In *Umbertus Ena and Carlos Ena*, the Panel stated:

105. According to Sec 10.1 (a) UR 200/15, for the crimes referred to in section 5, in determining the terms of imprisonment for those crimes, the Panel shall have recourse to the general practice regarding prison sentences in the courts of East Timor and under international tribunals. "In imposing the sentences, the panel shall take into account such factors as the gravity of the offence and the individual circumstances of the convicted person" (Sec 10.2).

108. The Panel considered all the aggravating and mitigating circumstances upheld both by the practices of East Timorese courts in applying the Indonesian Penal Code (IPC) and the standards derived from the International Tribunal for Yugoslavia and the International Tribunals for Rwanda, apart from those provided for under UR-200/15 as well as under general principles of law.<sup>764</sup>

Similarly it was held that:

The Panel considered all the aggravating and mitigating circumstances upheld both by the practices of East Timorese courts in applying the Penal Code of Indonesia (KUHP) and the standards derived from the ICTY and the International Tribunal for Rwanda, apart from those provided for under UR-2000/15 as well as under general principles of law.<sup>765</sup>

Accordingly, the following sources for assessment of mitigating and aggravating features are consulted by the tribunal: (i) jurisprudence of the East Timorese courts, (ii) the Indonesian Penal Code, (iii) UNTAET Regulation No.2000 and (iv) general principles of law.

First, it can be said that section 10.2 is not exhaustive and thus a list of specific mitigating circumstances can be found in the jurisprudence, and secondly, due to the fact that the Panel can apply the Indonesian Penal Code, the 'standards derived from the *ad hoc* tribunals' and general principles of law, it is possible that both approaches in relation to a principle accessory distinction are applied. As described in Chapter 2, Indonesian criminal law provides for a differentiated approach by virtue of Article 57 of the Indonesian Penal Code. According to Article 57(1), 'The maximum of the basic punishments [sic] imposed upon the crime in complicity shall be mitigated by one third'. Furthermore, according to section 2, accessories are entitled to receive a maximum of 15 years, if the crime in question gives rise to life imprisonment or capital punishment. Due to the fact that the law on individual criminal responsibility is not discussed in detail in most judgments, it is frequently not even clear based on which mode the defendant was convicted, because the legal provision (section 14.3) related to individual criminal responsibility is merely quoted and not subsumed at all.<sup>766</sup> Nevertheless,

<sup>764</sup> *Prosecutor v Umbertus Ena and Carlos Ena* (Judgment) Case No. 5/2002, SPSC (23 March 2003) paras 105, 108.

<sup>765</sup> *Joni Marques et al.* Trial Judgment (n 221) para 981.

<sup>766</sup> See for instance *Prosecutor v Alarico Mesquita et al.* (Judgment) Case No. 28/2003, SPSC (6 December 2004), see also the indictment of this case, which does not specify the specific mode of responsibility with which the accused are charged. Despite the fact that the modes of responsibility are not discussed in appropriate depth in the majority of cases, the panels discussed in the *Anton Lelan Sufa* Verdict the situation when an individual is charged with superior and individual responsibility, where it held that: '(...) when certain facts of the case support both types of liability, one of them cannot simply be "characterized" as another or "subsumed" under the provision of the other, because this would imply that the Court has some sort of discretion to choose one or the other, although this would violate one of the basic principles of criminal law (...). Rather, in a first stage, it has to

one can observe that the Panels resort to domestic law in relation to certain areas of law – for instance in relation to maximum penalties.<sup>767</sup> Despite the fact that Indonesian criminal law opts for a differentiated approach, one cannot assume that this approach is invoked by the Special Panels, at least not expressly. In the *Anton Lela* judgment, the Panels held that there was a specific hierarchy of modes of liability established in section 14.3 when discussing the circumstance where an individual is charged with both, individual and superior responsibility:

(...) Since a superior, who orders a crime (Sec14.3 (b) Reg 2000/15) must also be regarded as committing it “through another person” in the sense of Sec 14.3 (a) Reg 2000/15, and since the various forms of individual responsibility enumerated in Sec 14.3 have a distinct ranking – from the most direct form of commission in *lit.* (a) to the most indirect form of participation in *lit.* (d) – the more indirect form of responsibility incurred for the same conduct must be subsidiary to a more direct one, if violation of the principle *ne bis in idem* is to be avoided (...).<sup>768</sup>

The approach to distinguish modes of liability based on a hierarchy may suggest that the respective mode(s) of liability an individual is convicted for has implications on the sentence. However, in none of the accessible cases have the Special Panels resorted to the Indonesian Penal Code in relation to the punishment of principals and accessories. Considering that a differentiated approach is followed in Indonesian law, it is striking that no relevance seems to be paid to a principal-accessory distinction or its relevance for sentencing purposes. Thus, a quantitative study may reveal more.

### 3.3.5 THE WAR CRIMES CHAMBER OF BOSNIA AND HERZEGOVINA

The CC BiH provides for general sentencing principles in Article 48. According to the sentencing determinants enumerated in Article 48(1) are (i) extenuating circumstances; (ii) aggravating circumstances; (iii) the degree of criminal liability; (iv) the motive of perpetrating the offence; (v) the degree of danger or injury of the protected object; (vi) circumstances in which the offences was committed; (vii) past conduct of the perpetrator; (viii) personal situation and conduct after the commission of the offence; and (ix) other circumstances related to the personality of the perpetrator. In a large number of judgments, those statutory considerations are discussed under different sections, but not exactly as listed above. Instead, most factors are addressed slightly intertwined in that aggravating and mitigating circumstances are discussed in the context of the other remaining headings. Thus, many of the sentencing parts of judgments rendered by the WCCBiH comprise a specific structure, which includes the discussion of statutory considerations, which are then ‘used in terms of

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be acknowledged that both types of responsibility exist, and in a second stage it must be decided whether they continue to co-exist or whether one is displaced by the other’. *Prosecutor v Anton Lelan Sufa* (Judgment) Case No 4a/2003, SPSC (25 November 2004) para 21.

<sup>767</sup> *Alarico Mesquita et al.* Judgment (n 766) 30, where the panel made reference to Article 65 of the Indonesian Criminal Code in relation to maximum penalties, which reads: ‘The maximum of this punishment shall be the collective total of the maximum punishments imposed of the acts, but not exceeding one third beyond the most severe maximum punishment’.

<sup>768</sup> See *Anton Lelan Sufa* Judgment (n 766) para 22. In *Januario da Costa Mateus Punef aka Neno Ulan* (Judgment) Case No 22/2003, SPSC (25 April 2005) where the panel discussed the situation when the mode of liability is not specified.

aggravating and mitigating circumstances'.<sup>769</sup> These considerations are in rather detailed sentencing judgments expressed in the following order: i) the degree of liability; ii) the conduct of the perpetrator prior to the offence, at or around the time of the offence; and since the offence iii) the motive; and iv) the personality of the perpetrator.<sup>770</sup> In the *Nenad Tanasković* First Instance Verdict,<sup>771</sup> the Panel explained:

These considerations can be used in terms of aggravating or mitigating circumstances of the sentence, as the facts warrant. The point of these considerations is to assist the Panel in determining the sentence that is not only necessary and proportionate for the purposes and considerations already calculated in connection with the act itself and the effect on the community (...).<sup>772</sup>

More specifically, the Panel addressed “double counting”, *inter alia* in the first Instance Verdict of *Željko Lelek*,<sup>773</sup> where it stated under the heading “motive” that ‘motive in this case is synonymous with the intent to discriminate on ethnic and religious grounds and has already been calculated as an element of the offence, and therefore will not be calculated again as an additional factor of aggravation’.<sup>774</sup> In the context of a principal-accessory distinction for sentencing purposes, the “degree of liability” appears on first sight particularly significant.<sup>775</sup> Although – under this heading – the specific mode of liability may be addressed, it goes beyond or rather omits a discussion relating to specific *actus reus* and *mens rea* requirements of a pertinent mode, by addressing individual nuances of behaviour throughout the commission/participation in the offence.<sup>776</sup> One may therefore draw a

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<sup>769</sup> *Prosecutor v Nenad Tanasković* (First Instance Verdict) Case No. X-KR/06/165 (24 August 2007) 81.

<sup>770</sup> See for example, *Nenad Tanasković* First Instance Verdict (n 769) 81 specifically regarding “degree of liability”: ‘The degree of liability in this case is a mitigating factor. The evidence establishes that the Accused was not a decision-maker, but rather a soldier of low rank, carrying out orders given to him, and who did not devise any of the crimes in which he willingly participated. That having been said, it is clear that the Accused was permitted some degree of autonomy regarding the manner in which he executed his orders, choosing to be violent and aggressive in his actions. However, as the Prosecutor pointed out in his closing argument, given the sentencing limitations within which we are constrained by law, our sentence must recognize that there are others whose responsibility was greater and for whom greater sentences should be reserved’.

<sup>771</sup> *Ibid.*

<sup>772</sup> *Ibid.*

<sup>773</sup> *Prosecutor v Željko Lelek* (First Instance Verdict) Case No. X-KR/06/202 (23 May 2008).

<sup>774</sup> *Ibid* 55; see also *Prosecutor v Petar Mitrović* (First Instance Verdict) Case No. X-KR-05/24-1 (4 February 2009) 137 under the heading of “Degree of Liability” in relation to the gravity of the crime and aggravating circumstances. See also *Prosecutor v Momir Savić* (Second Instance Verdict) Case No. X-KRZ-07/478 (19 February 2010) 32: ‘The fact that victims of the actions of the Accused were civilians, who mainly belonged to one ethnicity, does not represent an aggravating circumstance, and contrary to the appeal averments of the Prosecutor, the fact which is decisive for establishing the important elements of the criminal offence cannot at the same time be considered as an aggravating circumstance (discriminatory intent)’.

<sup>775</sup> It is striking, however, that the pertinent mode of liability is not always precisely articulated. In some judgments Article 180(1), which is similar to 6(1) / 7(1), is merely cited along with the word “committed”. In contrast, in other cases, 180(1) is the only reference to individual criminal responsibility, despite the fact that the court found that the accused aided and abetted. Thus it is not always clear, which mode of liability the accused is found guilty of due to the lack of specification. However, discussion of this issue would go beyond the scope of this work. See for instance *Prosecutor v Gordan Đurić* (First Instance Verdict) X-KR-08/549-2 (10 September 2009).

<sup>776</sup> See for instance, *Milorad Trbić* First Instance Verdict (n 260) para 858: ‘The Accused (...) is directly responsible for the crimes he committed as part of a joint criminal enterprise to destroy all the Muslim men brought into this area of responsibility during the period following the fall of Srebrenica. The Trial Panel has found some significant mitigating factors as well as aggravating factors. First, it is clear from the evidence that he was not involved in the planning of these crimes at the initial stage. Secondly, he did agree to cooperate to a

comparison to the discussion of “individual circumstances” in the sentencing practice of the *ad hoc* tribunals.

The jurisprudence of the War Crimes Chamber does not allow for a clear general answer as to whether this “heading” embraces the legal classification with implications on the sentence or whether it merely addresses the perpetrator’s specific conduct (although of course both are possible). Some cases include a discussion, which is primarily focused on the rank or in the wider sense the influence<sup>777</sup> of the perpetrator, his specific role and related factors, while others address the pertinent mode of liability expressly and then specific circumstances.<sup>778</sup> Although the specific content of the discussion under this heading cannot be confined to one or the other, it can be said that, generally, a discussion restricted to the pertinent mode of liability and its role in the sentencing framework is mostly not present. For the purpose of modes of liability, the heading “degree of liability” should not be overemphasised for two reasons: first, some judgments are not structured accordingly and thus this heading may be absent; secondly, even if it is present, it may not contain information as to the impact of a pertinent mode of liability on the sentencing process. Irrespectively, one can observe that the Panel refers in a number of cases to the importance of the ‘degree of liability’ in the sentencing process, although one cannot deduce that a mandatory principal accessory distinction is in place. Nevertheless, as observed in the previous chapter, the absence of an express distinction between principals and accessories in relation to sentencing must not necessarily imply that a categorisation into either direct perpetrator or accessory cannot augment or lessen the penalty. Instead, more culpability may be allotted to a direct perpetrator by counting physical perpetration as an aggravating circumstance. Similarly, in the *Andrun Nikola*,<sup>779</sup> where the degree of liability was also addressed as an aggravating factor, the War Crimes Chamber held that ‘the high degree of criminal responsibility’ was an aggravating factor.<sup>780</sup> In *Pedrag Bastah and Goran Višković*, the Panel ‘took into account as an aggravating circumstance the fact that the accused, in the majority of situations, were direct perpetrators of the actions of which they were

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certain level with the ICTY investigators. To the extent that he cooperated honestly he assisted in adding to the understanding of what took place as well as to the understanding of his role and his level of accountability’.

<sup>777</sup> See for instance for a discussion of the rank, *Prosecutor v Petar Mitrović* (First Instance Verdict) Case No. X-KR-05/24-1 (20 July 2008) 137: ‘The Accused was a Special Police officer, trained in both combat and police work. He had no role in the command structure. As a Special Police officer at the time of the offense he had an obligation to obey the law and protect civilians in his custody. However, that dereliction of duty is subsumed in the greater crime of genocide, the gravity of which has already been calculated’. See also *Prosecutor v Marko Radić et al.* (Second Instance Verdict) Case No. X-KR-05/139 (9 March 2011) 301: ‘(...) the Panel concluded that Marko Radić participated in the establishment of the Vojno camp, and although he is not convicted under the command responsibility it should be noted that he was *de facto* superior to the personnel of the Bojno camp (...); *Nenad Tanasković* First Instance (n 769) 81: ‘The degree of liability in this case is a mitigating factor. The evidence establishes that the Accused was not a decision maker, but rather a soldier of a low rank, carrying out orders given to him, and who did not devise any of the crimes in which he willingly participated (...)’.

<sup>778</sup> See *inter alia* *Milorad Trbić* First Instance Verdict (n 260) para 858: ‘The Accused, Milorad, is directly responsible for the crimes he committed as part of a joint criminal enterprise to destroy all the Muslim men brought into his area of responsibility during the period following the fall of Srebrenica. The Trial Panel has found some significant mitigating as well as aggravating factors’.

<sup>779</sup> *Prosecutor v Andrun Nikola* (First Instance Verdict) Case No. X-KR-05/42 (14 December 2006).

<sup>780</sup> *Ibid.*

found guilty'.<sup>781</sup> Conversely, indirect perpetration may count as a mitigating circumstance. In *Marko Samardžija*, the Panel stated: 'In meting out the penalty the Court considered all the circumstances referred to in Article 48 of CC BiH influencing [sic] type and length of penalty. So, the Court considered, as mitigating circumstances, the age of the Accused, he is 70, the fact that he is a family man, the fact that he has not violated the law so far, and the fact that his individual criminal responsibility in the perpetration of the said criminal offense consisted of accessory'.<sup>782</sup> However, there are some instances, such as the *Maktouf* case and *Pelek and Savić*, where the Panel expressed that mitigation is available for accessories with direct or indirect reference to Article 31(1):

In individualizing the sentences, the Panel also took into account Article 31(1) of the CC BiH which prescribes that the person who intentionally helps another to perpetrate a criminal offence may be punished by a reduced punishment. Therefore, the Panel imposed on the accused Pekez a more lenient punishment in relation to the accused Savić, having found that the imposed sentences are appropriate to the extent of criminal liability of each Accused individually.<sup>783</sup>

As discussed in the previous chapter, the Appeals Panel held in the *Petar Mitrović*, Second Instance Verdict that the accused was liable as an accessory as opposed to a co-perpetrator and reduced the sentence from 38 years to 28.<sup>784</sup> Moreover, in the *Todorović (Vaso)* First Instance Verdict, where the Panel determined that the accused was liable as an accessory under Article 31 CC BiH,<sup>785</sup> it

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<sup>781</sup> *Prosecutor v Predrag Bastah and Goran Višković* (First Instance Verdict) Case No. X-KR-05/122 (4 February 2010) 102.

<sup>782</sup> *Prosecutor v Marko Samardžija* (First Instance Verdict) Case No. X-KR-05/07 (3 November 2006) 39; see also *Abduladhim Maktouf* Second Instance Verdict (n 252) 25.

<sup>783</sup> See Chapter 2, *Mirko Pekez and Milorad Savić* Second Instance Verdict (n 250) 177, where the panel considered Article 31(1) CC BiH when meting out the sentence. Article 31(1): 'Whoever intentionally helps another to perpetrate a criminal offence shall be punished as if he himself perpetrated such offence, but the punishment may be reduced'. See *Abduladhim Maktouf* Second Instance Verdict (n 252) 18: 'Deciding on type and duration of punishment the Panel was guided by general rules for meting out the penalty referred to in Article 48(1) of the Criminal Code of BiH, considering the circumstances influencing to impose heavier or lenient punishment. The Panel took into consideration the degree of criminal responsibility of the Accused and the fact that he assisted in commission of the criminal offence and that the Criminal Code of BiH includes possibility of more lenient punishment for accessory in commission of criminal offenses. The Panel also considered concrete contribution of the Accused to the commission of the criminal offense (...). Considering the degree of criminal responsibility of the Accused and consequences of the criminal offense, and considering the mitigating circumstances in favour of the Accused, the Panel applied the provision on reduction of punishment and reduced the sentence to the maximum extent possible (...)'. See also *Prosecutor v Abduladhim Maktouf* (First Instance Verdict) Case No. K-127/04 (1 July 2005) 25, 26, where the panel considered the accessory role when addressing mitigating circumstances, expressly referring to Article 31(1) CC BiH. See also on Article 31, *Prosecutor v Veiz Bjelić* (First Instance Verdict) Case No. X-KR-07/430-1 (28 March 2008) 19: 'Assessing all the circumstances on the part of the accused (both aggravating and extenuating) as well as the general range of punishment from the concluded guilty plea agreement, and applying Article 49(1)(b) of the CC BiH, the Court has imposed a 5 (five)-year prison sentence on the accused for the criminal offense of War Crimes against Civilians referred to in Article 173(1)(c) and (e) in conjunction with Article 180(1) of the CC BiH, and the same sentence for the criminal offense of War Crimes against Prisoner of War referred to in Article 175(1)(a) and (b) in conjunction with Article 31 of the CC BiH, all in conjunction with Article 31 of the CC BiH, all in conjunction with Article 180(1) of the sentence for the criminal offenses at issue (the legal minimum is 10 years), pursuant to Article 150(1)(a) of the CC BiH. The Court assesses that the individually established punishments are criminal sanctions adequate and proportionate to the gravity of the criminal offenses and the degree of criminal liability of the accused, who is perpetrator of these offenses'.

<sup>784</sup> *Prosecutor v Predrag Kujundžić* (Second Instance Verdict) Case No. X-KRZ-07/442 (4 October 2010) paras 232-236.

<sup>785</sup> However, beforehand the panel acknowledged the mitigation available to accessories: 'An accessory to a crime, who intentionally helps another to perpetrate a criminal offence, may have the punishment reduced

emphasised that '[a]s an aider and abettor in deportation and murder, because he undertook those actions with direct intent the Accused bears a high degree of criminal liability'.<sup>786</sup>

It is not difficult to discern from the above discussion that a variety of approaches exists. While some judgments reveal an approach which closely resembles a differentiated approach, other judgments comprise a unitary approach. This once again demonstrates that a sentencing framework which provides for discretionary mitigation, by virtue of pertinent criminal law provisions, always leaves room for one or the other approach, thus allowing for discrepancies. What can be discerned is that no noticeable references are made to the law of the *ad hoc* tribunals when it comes to the role of modes of liability in the sentencing framework. This indicates that the law of the *ad hoc* tribunals has not heavily influenced, if at all, the practice of the War Crimes Chambers in relation to role of modes of liability in the sentencing process.<sup>787</sup>

In conclusion, in view of the above discussion, it appears that there is a preference for a differentiated approach at the *ad hoc* tribunals, while the SCSL and lately also the ICC opt more for a unitary approach. Although such tendencies can be observed, controversial approaches are still present.

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(Article 31(1) CC BiH). Article 31(2) CC BiH provides examples of accessorial conduct in helping the perpetrators of a criminal offence. Relevantly to the facts of this case, accessorial conduct includes, in particular, "removing obstacles to the perpetration of a criminal offence" and "supplying the perpetrator with the means of committing the offence". The Court is satisfied beyond reasonable doubt, from the statement and testimony of Vaso Todorović himself, that his conduct amounted to an accessory to the crime of a Crime against Humanity'.

<sup>786</sup> *Prosecutor v Vaso Todorović* (First Instance Verdict) Case No. X-KR-06/180-1 (22 October 2008) 27.

<sup>787</sup> Although in 2002, the consultants Peter Bach, Kjell Björnberg, John Ralston and Almiro Rodriguez, who were appointed to identify the issues relating to the future of domestic war crimes prosecutions in Bosnia and Herzegovina (Consultants' Report to the Office of the High Representative, *The Future of Domestic War Crimes Prosecutions in Bosnia and Herzegovina* (May 2002) addressed in M Bohlander, see below), had initially opined that 'the jurisprudence of the ICTY should be persuasive authority in procedural, as well as criminal matters, in the interpretation of legislation of Bosnia and Herzegovina courts on all levels', later realised that 'an obligation for local courts to follow the jurisprudence of the Tribunal' was 'completely impossible'. Hence the recommendation was instead that 'the courts should take into account the jurisprudence of the Tribunal'. M Bohlander, 'Last Exit Bosnia – Transferring War Crimes Prosecution from the International Tribunals to Domestic Courts' (2003) 14 *Criminal Law Forum*, 59, 78. The report was also cited by M Bohlander, see 66 (fn 25).

## PART II

### 3.4 QUANTITATIVE STUDIES AND THE MODES OF LIABILITY IN INTERNATIONAL CRIMINAL JUSTICE

As described further above, a ‘jurisprudential’ analysis alone may not accurately reflect the impact of liability labels on the sentencing process if no express reference is made in this regard. A differentiated approach may not be visible when examining the chain of reasoning of judges during the evaluation of sentencing factors throughout the sentencing process, if it is not expressly articulated that this approach is taken. Moreover, a certain approach may be opted for subconsciously by ascribing more (or less) culpability to a certain mode of liability, which will inevitably be reflected in the sentence. The latter may only be verified by means of quantitative studies. To date there are a few quantitative studies which have taken different positions in relation to the impact of modes of liability on the sentence.<sup>788</sup>

As mentioned in Chapter 1, King and Meernik, Ewald, and D’Ascoli distinguish between individuals found guilty under Articles 7(1) or/and 7(3) respectively. To the knowledge of the author, only Holá and others distinguish between each mode of liability in pertinent studies. Moreover, these findings are confined to the sentencing practice of both *ad hoc* tribunals, or only to the ICTY. Meernik and King found that only a marginal difference exists in relation to the punishment of those convicted under a mode enumerated in 7(1) and those held liable as superiors.<sup>789</sup>

In contrast, Ewald observes almost seven years later that the average sentence of those whose conviction is based on superior responsibility under 7(3) is lower.<sup>790</sup> According to D’Ascoli, the modes of liability under 7(1)/6(1) and/or 7(3)/6(3) as well as the form – be it direct or indirect participation – do not appear to be significant for sentencing purposes.<sup>791</sup> Holá and others, who *inter alia* statistically examined the ICTY sentencing practice by conducting multiple regression based on data collected up to August 2008, observe that, at the ICTY, superiors receive the lowest sentences, followed by aiders and abettors and then members in a JCE (first instance).<sup>792</sup> Moreover, their findings

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<sup>788</sup> See for instance: Meernik and King, ‘The Sentencing Determinants’ (n 70); Meernik and King, ‘The Effectiveness of International Law and the ICTY’ (n 70); Holá, Smeulers and Bijleveld ‘Is ICTY Sentencing Predictable?’ (n 33); Ewald (n 70); D’Ascoli (n 70); Jodoin (n 70); Meernik ‘Sentencing Rationales and Judicial Decision Making’ (n 70); Holá, Smeulers and Bijleveld ‘International Sentencing Facts and Figures’ (n 70); Holá and others ‘Consistency of International Sentencing’ (n 70).

<sup>789</sup> Meernik and King, ‘The Sentencing Determinants’ (n 70) 738.

<sup>790</sup> Ewald (n 70).

<sup>791</sup> D’Ascoli (n 70) 260.

<sup>792</sup> Holá and others, ‘Is ICTY Sentencing Predictable?’ (n 33) 91. See also for numerical analysis of ICTR and ICTY sentencing practice by Holá and others: Holá and others, ‘International Sentencing Facts and Figures’ (n 70) 429. This analysis (comparative and analytical) was conducted on sentences rendered by the ICTY and ICTR. The authors compared the median sentences for each tribunal separately. The findings revealed that while at the ICTY the lowest and second lowest sentences are received by superiors and aiders and abettors

reveal that on appeal the lowest sentences are also received by superiors followed by those convicted based on JCE.<sup>793</sup> Aiders and abettors only receive the third lowest sentences.<sup>794</sup>

### 3.4.1 METHODOLOGY

Due to the fact that the sentencing process is influenced by a number of factors cumulatively, it is impossible to determine the specific value of each separate sentencing factor for the purpose of imposing a sentence. Regression analysis is a statistical tool which allows the examination of the impact of one or more factors on a specific outcome.<sup>795</sup> Thus, regression allows a determination of the impact of individual sentencing factors (independent variables) on the sentence (dependent variable). The assessment of the relationship of modes of liability and sentence severity was carried out in two steps. Dichotomous data were coded with 0 and 1 while all other categorical data were coded consecutively starting with 1 as value.

First, multiple regression was used in order to analyse data extracted from judgments rendered by the *ad hoc* tribunals, the WCCBiH and the Special Panels of East Timor. In a second step, a mixed model analysis was used for a more in-depth analysis of the sentencing predictors of the *ad hoc* tribunals. All data, subject to this study, are based on written versions of judgments (Trial and Appeal),<sup>796</sup> published on the websites of the tribunals, with a few exceptions where cases were not accessible for various reasons.

### 3.4.2 MULTIPLE REGRESSION ANALYSIS

Multiple regression analysis predicts one dependent variable from a number of independent or explanatory variables. This method seems particularly adequate 'to the analysis of data about competing theories for which there are several possible explanations for the relationships among a number of explanatory variables'.<sup>797</sup> Due to the intention to examine how modes of liability correlate with the sentence length, a number of factors, which are widely considered as sentencing determinants, have been included.

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respectively, at the ICTR those convicted based on JCE receive the shortest sentences, followed by planners. Aiders and abettors receive the third lowest sentences according to their findings.

<sup>793</sup> Holá and others, 'Is ICTY Sentencing Predictable?' (n 33) 91.

<sup>794</sup> Ibid.

<sup>795</sup> Demographic Differences in Federal Sentencing Practices: An Update of the *Booker Report's* Multivariate Regression Analysis, United States Sentencing Commission (March 2010) 4.

<sup>796</sup> Up to January 2014.

<sup>797</sup> D L Rubinfield, 'Reference Guide on Multiple Regression' in *Reference Manual on Scientific Evidence* (3<sup>rd</sup> edn Federal Judicial Center, 2011) 303, 305.



#### 3.4.2.1 INDEPENDENT VARIABLES AND THE DEPENDANT VARIABLE IN REGRESSION ANALYSIS

The independent variables in this analysis are those which are widely accepted to constitute determinants within the international sentencing process.<sup>798</sup> In the first analysis the dependent variable is the length of the sentence, while the independent variables are: (i) number of counts; (ii) category of crimes; (iii) mode of liability; (iv) number of mitigating factors; (v) number of aggravating factors; (vi) guilty plea; and (vii) the political/military/social rank/influence of an individual. Accordingly these factors were extracted for all individual cases.

#### 3.4.3 MULTILEVEL ANALYSIS

A second analysis (multilevel analysis) subsequently allows for a more in-depth statistical analysis, as it provides the advantage that each mode can be analysed separately at a different level. Statistically speaking, a comparison from regression to mixed model is not possible, because in mixed models additional variables were added therefore creating a new model without any connection to the regression. However, as is seen below, when evaluating the findings of each analysis, technical considerations may allow for comparison in the wider sense.

##### 3.4.3.1 INDEPENDENT VARIABLES AND THE DEPENDENT VARIABLE IN MULTILEVEL ANALYSIS

New sets of data were created by collecting and coding additional information relating to the composition of the bench and the type of opinion. Due to the increase of observations per convicted perpetrator (three per trial case and five per appeal case respectively), as each judge's decision was coded separately, the N for multilevel analysis substantially increased to 579.<sup>799</sup> Moreover, the instance was coded as an additional independent variable (trial/appeal). Finally, the information was coded and included in the sets of data. Akin to the first analysis, mixed model analysis is therefore based on dependent and independent variables, whereby the latter additionally contains the individual judges' decisions and the instance. The dependent variable is again the sentence.

#### 3.4.4 REPRESENTATION OF THE INDEPENDENT VARIABLES

The analyses were carried out specifying the length of the sentence in months and accordingly each diagram and each table reflects the respective length of the sentence (independent variable) in months. However, for ease of understanding and to avoid confusion, the months have been converted into years throughout the evaluation of the findings of these studies.

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<sup>798</sup> Ibid.

<sup>799</sup> Akin to multilevel analysis, decisions which were phrased ambiguously in relation to the modes of liability charged, have been left out.

### 3.4.5 LIMITATIONS OF THIS STUDY

This work bears problems of statistical nature, which induced specific tactical considerations. It has not been possible to code each mode of liability separately (eg planning, ordering, committing etc), as, in cases where a perpetrator is convicted based on several counts, each of them is normally charged with a specific mode of liability, leading to the result that perpetrators are frequently convicted based on a combination of various liability modes. Thus, a high number of “mixed liability groups” required codification. However, because some “combinations” of modes of liability charged only appear in a small number of cases, the overall appearance of this specific mode (or combination of modes) is too scarce to allow for significant results against the backdrop of the number of data sets (individuals sentenced by the tribunals). In any case, the number of mixed groups would have been above 20, rendering such results more or less confusing. Therefore, this study has attempted to circumvent the problem by creating groups, subsuming either one or more modes of liability under those groups.<sup>800</sup>

Initially, the categorisation of modes of liability was undertaken as follows: (i) aiding and abetting (A&A) as a mode of indirect perpetration; (ii) commission as a form of “hands-on” perpetration; (iii) JCE, which covers the concept of co-perpetration; (iv) all combinations of direct perpetration, namely commission planning/instigating/ordering/commission/JCE; (v) a combination of forms of direct and indirect perpetration, save for commission and JCE alone, as the combination of those two is covered by categories 2 and 3; (vi) superior responsibility; (vii) superior responsibility combined with indirect perpetration; (viii) superior responsibility combined with direct perpetration; and (ix) superior responsibility combined with direct and indirect forms of participation.

However, as is seen below, this categorisation did not lead to significant results and thus further narrower groups had to be created (see Table 5). Moreover, it has been taken into consideration that the number of cases included from each tribunal varies. In relation to the ICTR, the WCCBiH and the SPSC, it can be said at the outset that the number of cases may be statistically too small to allow for separate analyses of each tribunal. *A fortiori*, a distinction between trial and appeal judgments of each institution was impossible. Moreover, due to the imbalance of judgments rendered, the findings may be influenced to a greater extent by one or the other.<sup>801</sup>

All judgments rendered up to January 2014 by the *ad hoc* tribunals have been included for regression analysis. While the ICTY (N=109) has rendered more judgments than the ICTR (N=57) and thus may play a more dominant role, the lengthier sentences, and the high number of life sentences (considering the high number of genocide convictions, particularly compared to the ICTY) imposed by the ICTR may also increase the average sentence. Moreover, judgments rendered by the WCCBiH (N=92) and

<sup>800</sup> Judgments where the modes of liability charged were not specified have been left out.

<sup>801</sup> Or in relation to the hybrid tribunals.

SPSC (N=32) have been included to the extent accessible.<sup>802</sup> Hence, the dataset is inevitably imbalanced. Other disparities, such as jurisdictional and procedural peculiarities characterising different hybrid tribunals apply particularly to the regression analysis involving them. The main differences in this regard derive from their hybrid nature, denoting a strong national element, but they also concern the nature of the crimes tried and characteristics of the perpetrators (usually lower ranked) and must be recalled when considering the findings of regression analysis. Nonetheless, to a certain degree, all of the tribunals are part of the international criminal justice system and therefore form part of this study, which seeks to assess the impact of modes of liability on sentence severity. Since the concept of individual criminal responsibility is rooted in domestic law and as such led the *ad hoc* tribunals to apply domestic law to a certain (modified) extent, the hybrid nature of internationalised tribunals should not pose difficulties when looking at the role of modes of liability in sentencing. Nevertheless, due to the limitations set out above, the findings of this study serve rather as an indicator and should be treated with caution.

#### 3.4.6 TERMINOLOGICAL CONSIDERATIONS

As previously addressed, terminological misunderstandings lead to different categorisation of modes of liability. While some may categorise aiding and abetting as the only mode of indirect perpetration, and all others, save for superior responsibility, as direct forms, others regard only modes of liability, which imply physical perpetration (or at least allowing for the possibility in case of JCE) as direct forms, whilst categorising all other modes as indirect. For tactical considerations restricted to this quantitative enquiry, as set out under limitations of this study below, only aiding and abetting is regarded as an indirect form of liability, while all other forms, except for superior responsibility, are considered forms of direct perpetration.<sup>803</sup>

#### 3.4.7 PRE-ANALYSIS, EVALUATION AND PREPARATION OF DATA

After pre-analysing the data sets for the purpose of creating categories of modes of liability, the sets were labelled, recoded, and so on. Thereafter, the complete set of data was created in Stata 13.1,<sup>804</sup>

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<sup>802</sup> Despite the fact that a large number of judgments from different jurisdictions were incorporated in the research and every attempt at completeness was made, some jurisdictions did not provide their decisions in a language the author could understand, and the financial costs of sifting through the case law and obtaining translations of relevant decisions would have been prohibitive. The base for the empirical research is thus not exhaustive and the conclusions reached should be viewed under this proviso.

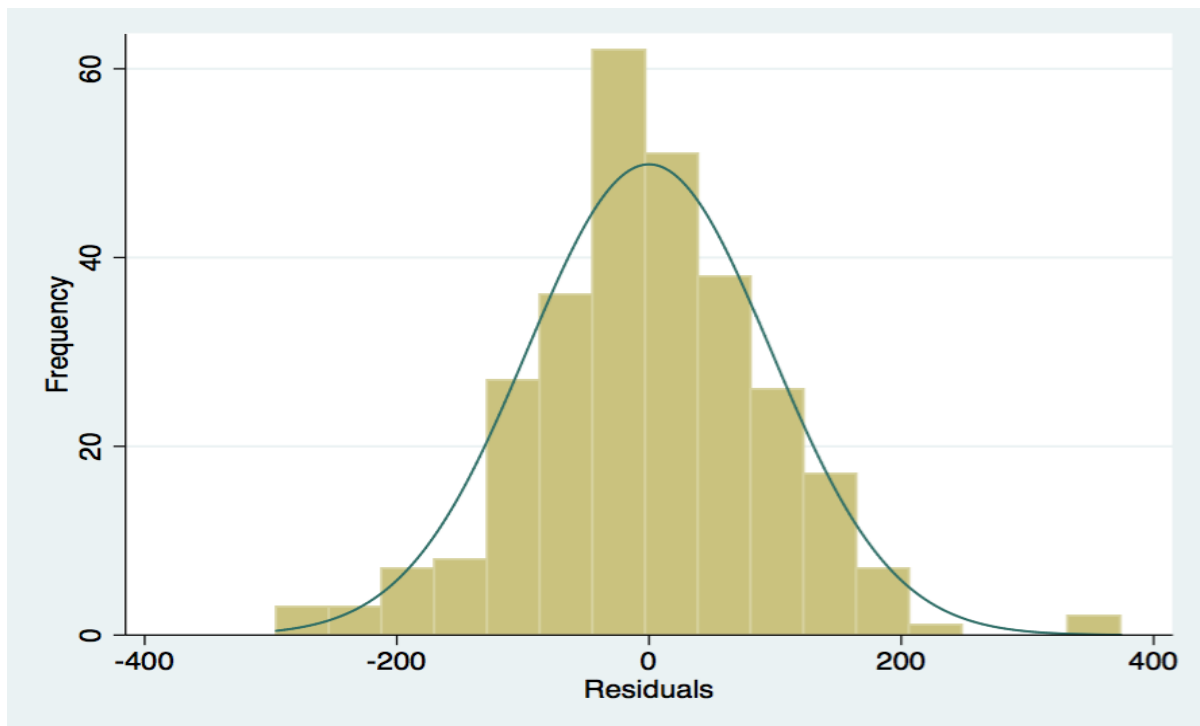
<sup>803</sup> As previous chapters have demonstrated, the case law of international(ised) tribunals and courts is rather controversial. Due to the fact that it is argued that only the mode of aiding and abetting is in a sentencing context inferior to other modes of liability, it is the only mode referred to as “indirect perpetration”. See also *Semanza* Appeal Judgment (n 118) para 388, where the Appeal Chamber considered ordering to be a direct form of perpetration. See also *Ntawukulyayo* Appeal Judgment (n 696) para 244: ‘The reversal of Ntawukulyayo’s conviction for ordering genocide removes the only direct form of responsibility by which he was found to have participated in the Kabuye Hill killings. The Appeals Chamber notes that aiding and abetting is a mode of responsibility which has generally warranted lower sentences than forms of direct participation such as committing and ordering’.

<sup>804</sup> Stata is a statistical software programme.

which was used for regression analysis as well as for the mixed models. After conducting regression, the residuals were analysed with the Shapiro-Wilk Test, in order to examine whether they were distributed normally, which is a main requirement for regression.<sup>805</sup>

As Figure 1 below reveals, the residuals were distributed normally, at least it can be seen that there was no strong evidence for a violation of this assumption.

FIGURE 1: HISTOGRAM OF RESIDUALS (OF THE DEPENDENT VARIABLE)



After looking at the residual distribution (regression diagnosis), problematic cases in the regression analysis were looked at in detail by Cook's Distance. Cook's Distance indicates how much the residuals of all cases change or adjust, once a case is excluded from the estimate of the regression equation – it shall not be greater than  $4/N$ , while  $N$  denotes the number of cases left in the regression.

Thus, in order to filter the problematic cases, Cook's Distance and leverage values were calculated (see Table 1). Accordingly, the cases enlisted in Table 4 were excluded. Following the exclusion of pertinent cases, the adjusted  $R^2$  for the regression based on such values changed from 60.22% to 72.08%, which is an improvement and can be referred to as a decent value, providing the basis for carrying out regression analysis.

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TABLE 4: PROBLEMATIC CASES IN THE DATASETS ON P &lt; .01 (RESIDUALS) AND COOK'S DISTANCE

id	Name	sentence	sente-re	residual	rstandard	cook
47	Novak Dukic	300	99.59418	200.4058	2.335831	.0171713
134	Sylvestre Gacumbitsi	360	552.4528	-192.4528	-2.260118	.0202027
137	Samuel Imanishimwe	324	462.827	-138.827	-1.706471	.0265314
140	Jean de Dieu Kamuhanda	600	413.6241	186.376	2.217933	.0265798
142	Francois Karera	600	414.5721	185.428	2.28142	.0479957
146	Yussuf Munyaiazi	300	433.938	-133.938	-1.624627	.0199531
149	Siméon Nchamihigo	600	490.0758	109.9242	1.373608	.0209212
150	Grégoire Ndahimana	180	375.8734	-195.8734	-2.343853	.0330611
158	Emmanuel Rukundo	300	493.0882	-193.0882	-2.276979	.0228292
162	Ephrem Setako	300	462.9911	-162.9911	-1.932353	.0186228
163	Sylvain Nsabimana	300	468.9293	-168.9293	-2.008584	.0214147
164	Arsene Shalom Ntahobali	600	450.675	149.325	1.770063	.0155735
163	Anatole Nsengiyumva	180	442.7067	-262.7067	-3.165164	.0680193
163	Dominique Ntawukulilyayo	240	390.8762	-150.8762	-1.864912	.033984
163	Emmanuel Rukundo	276	532.0431	-256.0431	-3.012428	.0376906
210	Milomir Stakic	600	378.6727	221.3273	2.574769	.0195235
215	Momir Nikolic	324	117.449	206.551	2.406149	.0178868
239	Lahi Brahimaj	72	241.4513	-169.4513	-2.006671	.0195826
269	Tihomir Blaskic	108	301.9117	-193.9117	-2.301728	.0271312
289	Dragomir Milosevic	348	162.9709	185.0291	2.182678	.0211522

### 3.4.8 LIFE SENTENCE

Due to the fact that a life sentence in international criminal law does not constitute a numerical<sup>806</sup> value as it is indeterminate, a symbolic value had to be chosen in order ascribe a numerical value to the data-sets constituting life sentences. As such, the number 50 was chosen, which equals 600 months of sentence length in the respective sets of data. Initially, it was considered to ascribe either the symbolic value of 55, and thus 660 months to sets constituting life sentence, or 50 years and 600 months respectively. However, to date, the highest sentence handed down, not referred to as a life sentence, is 45 years<sup>807</sup> (552 months); therefore, the gap between<sup>807</sup> the chosen symbolic value for a life sentence, 552 months and 50 years (600) and 55 years (660 months) varies. Due to the fact that linear regression is based on continuous variables (in this study), which should include neither larger gaps nor fractions, as this could lead to distortion of the data, the symbolic value of 50 years has been chosen.<sup>808</sup> This seems to be a compromise between the objective of closing or minimising the gap, without reducing the importance/meaning of the content of those persons sentenced to life imprisonment.

### 3.4.9 REGRESSION ANALYSIS

At the outset, it was envisaged to analyse how different forms of individual criminal responsibility influence the sentencing process of each tribunal. Moreover, the objective of this analysis was to

<sup>806</sup> Apart from the fact that the duration of life sentence is to be determined by the international tribunals, decisions on early release are also within their discretion. See *Prosecutor v Galić* (Reasons for the President's Decision to deny the early release of Stanislav Galić and Decision on Prosecution Motion) MICT-14-83-ES (23 June 2015).

<sup>807</sup> *Kajelijeli* (Appeal Judgment) ICTR-98-44A-A (23 May 2005).

<sup>808</sup> Statistical data are distorted.

distinguish between trial and appeal separately. However, as mentioned in the context of the limitations of this study further below, it has not been possible to code each mode of liability and thus all pertinent combinations thereof separately. Therefore, throughout the course of this analysis, several narrower categories of modes of liability neither lead to significant results. As set out above, the same is true for distinctions between all of the different judicial bodies analysed, as well as the differentiation between trial and appeal. Thus, regression was conducted several times, each time with different categories of modes of liability – most did not lead to significant results. Accordingly, a distinction was neither made between the different international(ised) courts, nor between trial and appeal when carrying out the regression.<sup>809</sup>

Table 5 below displays the different categories of liability modes, used for regression. As Table 5 shows, multiple regression was conducted on the basis of 290 data sets.

TABLE 5: MODES OF LIABILITY

<b>Modes of Liability</b>	<b>Frequency</b>	<b>Percent</b>
<b>A&amp;A</b>	30	10.34
<b>Commission</b>	21	7.24
<b>JCE</b>	92	31.72
<b>Direct Perpetration / Indirect (Mix)</b>	50	17.24
<b>Direct Perpetration Superior Responsibility</b>	38	13.10
<b>SR and Indirect (A&amp;A)</b>	16	5.52
<b>SR and Direct Superior Direct / Indirect (Mix)</b>	10	3.45
<b>SR and Direct Superior Direct / Indirect (Mix)</b>	23	7.93
<b>Superior Direct / Indirect (Mix)</b>	10	3.45
<b>Total</b>	290	100.00

#### 3.4.9.1 REGRESSION OF ALL COURTS AND TRIBUNALS TOGETHER

First, all of the courts and tribunals were analysed together, and regression was conducted with the modes of liability categorised as shown in Table 5 above. For the sake of completeness, the other sentencing factors (for example the findings relating to the counts and the category of the crime), although not the main subject of this study, are also briefly considered.

<sup>809</sup> It may be argued that this does not produce reliable results, as the characteristics of the courts and tribunals are too different. This is particularly true for the characteristics of international courts, and internationalised tribunals respectively. Accordingly these results should be treated with caution.

### 3.4.9.2 FINDINGS OF REGRESSION

#### 3.4.9.2.1 Modes of Liability

Regression analyses, which have independent categorical variables, are always based on reference categories. The reference categories in this study are the following: (i) war crimes for the group ‘category of crimes’; (ii) aiding and abetting for ‘mode of liability’; (iii) No for ‘guilty plea’ and medium for ‘rank’.

TABLE 6: ANALYSIS WITHOUT JUDGES FOR ALL TRIBUNALS AND COURTS TOGETHER

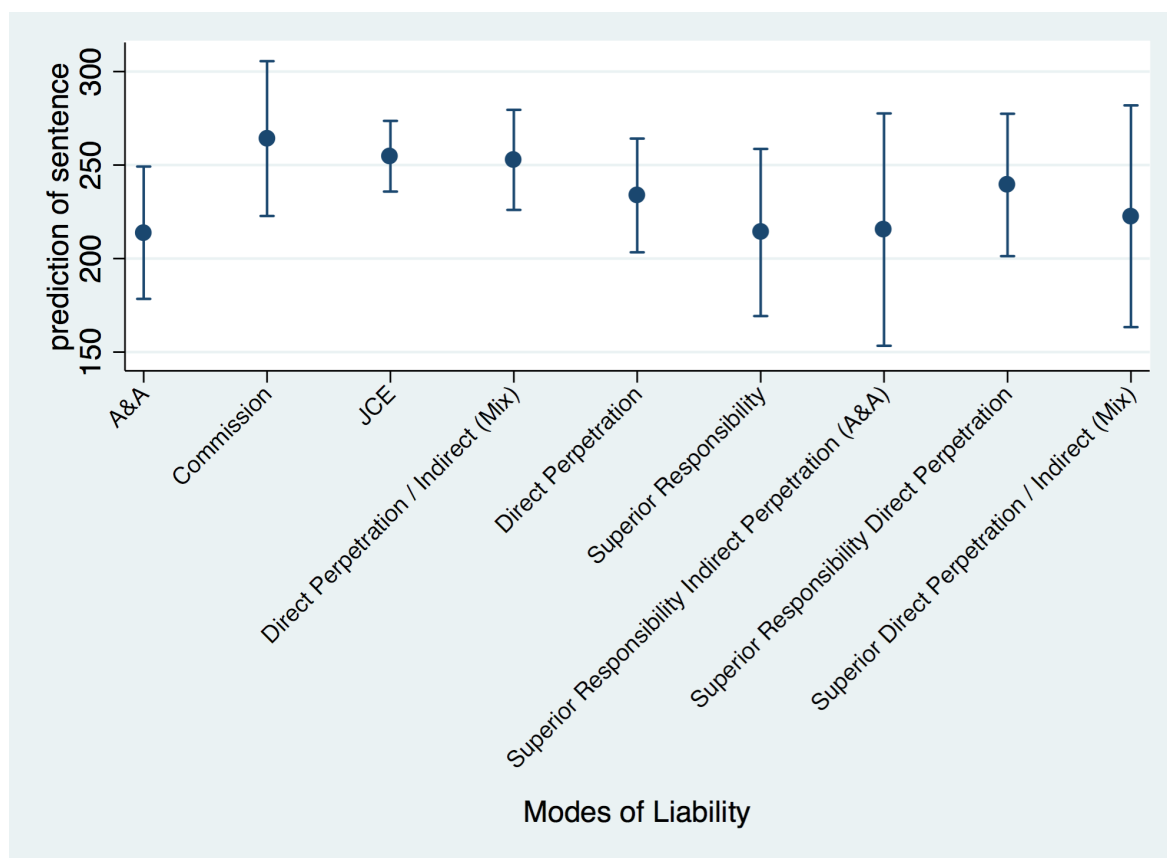
	Variable	b	t	p
	Number of Counts	8.390	6.387	<b>0.000</b>
<b>Category of Crime</b> (base: War Crimes)	CaH	6.969	0.515	0.607
	CaH/WC	31.865	1.918	0.056
	Genocide	296.249	13.049	<b>0.000</b>
	Genocide/CaH	308.751	12.849	<b>0.000</b>
	Genocide/CaH/WC	319.966	13.347	<b>0.000</b>
<b>Modes of Liability</b> (base: A&A)	Commission	47.111	2.113	<b>0.036</b>
	JCE	37.663	2.228	<b>0.027</b>
	Direct Perpetration/Indirect (Mix)	40.238	2.152	<b>0.032</b>
	Direct Perpetration	0.713	0.036	0.971
	Superior Responsibility	7.058	0.301	0.764
	Superior Responsibility and Indirect Perpetration A&A	-21.654	-0.712	0.477
	Superior Responsibility and Direct Perpetration	5.849	0.271	0.786
	Superior Direct Perpetration/Indirect (Mix)	21.410	0.634	0.527
	Mitigating Factors	-12.385	-5.652	<b>0.000</b>
	Aggravating Factors	16.157	7.035	<b>0.000</b>
<b>Guilty Plea</b> (base: no)	yes	-2.164	-0.175	0.861
<b>Rank</b> (base: medium)	high	74.537	5.530	<b>0.000</b>
	low	-24.288	-2.274	<b>0.024</b>
	_cons	107.554	4.819	0.000

According to the findings shown in Table 6, which indicate statistical significance,<sup>810</sup> those convicted on the basis of commission liability are punished to considerably lengthier prison terms, four years longer (M= 3.92 years / 47.11 months) than aiders and abettors, and three years longer (M= 3.13 years / 37.66 months) than members of a JCE. However, someone convicted on the basis of direct and indirect perpetration, which embraces all various forms of liability in combination with aiding and abetting, save for superior responsibility, is sent to prison for an additional three and a half years (M= 3.35 years / 40.23 months). Thus, as Table 6 shows, this creates a hierarchy of modes of liability, whereby “hands-on” perpetrators receive an average prison term of 22 years (M= 22.01 years / 264.15

<sup>810</sup> Commission, JCE, Direct and Indirect Perpetration (Mix) and A&A, as can be seen in Table 5.

months). This is followed by members in a JCE, who are sentenced to 21 years (M= 21.22 years / 254.70 months), and finally, indirect perpetrators, aiders and abettors, who are sentenced to 18 years (M= 17.81 years / 213.81 months). Direct and indirect perpetrators are, on average, imprisoned for 21 years (M= 21.06 years / 252.76 months). Thus there is only a negligible difference in sentence length for members of a JCE. This gradation of modes of liability and corresponding penalties, as manifested in these findings, strongly points to a gradation of blameworthiness, which may be characterised by specific modes of liability. Ultimately, in accordance with these statistical findings, it may be at least concluded that aiding and abetting is regarded as a mode of liability expressing a lower degree of culpability than “hands-on” perpetration. The prediction of the sentence via modes of liability is not significant for all categories of modes of liability.<sup>811</sup> Figure 2 below (and more specifically the blue points) show the predicted values per category of modes of liability with a 95% confidence interval (CI), which describes the 95% range of prediction for sentence via modes of liability.

FIGURE 2: PREDICTION OF THE SENTENCE VIA LIABILITY MODES FOR ALL INTERNATIONAL(ISED) TRIBUNALS



Furthermore, Table 7 shows the exact values as indicated in Figure 2 above.

<sup>811</sup> Direct Perpetration, Superior Responsibility, Superior Responsibility and Indirect A&A, Superior Responsibility and Direct Perpetration and Superior (Responsibility Direct Perpetration/Indirect Mix did not produce significant results.



TABLE 7: PREDICTION OF THE SENTENCE VIA LIABILITY MODE

<b>Modes of Liability</b>	<b>predicted sentence</b>
<b>A&amp;A</b>	213.81
<b>Commission</b>	264.16
<b>JCE</b>	254.71
<b>Direct Perpetration / Indirect (Mix)</b>	252.77
<b>Direct Perpetration</b>	233.75
<b>Superior Responsibility</b>	213.93
<b>Superior Responsibility and Indirect Perpetration A&amp;A</b>	215.49
<b>Superior Responsibility and Direct Perpetration</b>	239.37
<b>Superior Direct Perpetration / Indirect (Mix)</b>	222.62

#### 3.4.8.2.2 Findings Relating to Other Independent Variables

As Table 6 reveals, each mitigating factor extends the sentence by one year (M= 1.03 years / 12.38 months) whereas each aggravating factor increases the sentence by one and a half years (M= 1.34 years / 16.15 months). Similarly, there are clear-cut distinctions between the different types of crimes in terms of their sentence prediction. Someone who is guilty of genocide is sent to prison for 24.5 years (M= 24.68 years / 296.24 months), longer than those convicted solely for war crimes (reference category). Harsher punishment is only reserved for those convicted for all three types of crimes together, with an average prison term of 26.5 years (M= 26.66 years / 319.96 months). Thus, this finding may suggest that genocide is indeed treated as the worst crime, supporting the point of those who consider a hierarchy of crimes to be in place in international criminal justice, with genocide as the “crime of the crimes”.

Another strong predictor is the rank of the perpetrator. Someone who occupies a lower rank receives a sentence two years less (M= 2.02 years / 24.8 months) than someone of medium rank, whereas someone with a high rank is sentenced for six years longer (M= 6.21 years / 74.53 months) than someone with a medium rank. Hence a high ranking perpetrator is generally sent behind bars for an extra eight years compared to someone who holds a low rank – this is a considerable difference, emphasising the interplay of power, influence and culpability.

However, more importantly, this statistical finding supports the understanding of the nature of macro crimes, thereby taking into account a major characteristic of such large-scale crimes, involving a high

number of perpetrators, mostly acting under the authority of a high-ranking individual, who may also be physically absent from the scene of the crime.

As suggested above, the findings based on a differentiation between the various courts and tribunals did not prove to be significant.<sup>812</sup> The same holds true for the analysis of trial and appeal groups already distinguished in line with the respective tribunal/court. Accordingly, based on the data available, it is neither possible to distinguish between each court and tribunal, nor between trial and appeal, because none of the separated sets of data produced valid results. As already addressed, this may be due to the fact that the given “liability groups” do not occur sufficiently frequently. The initial solution proposed to this issue was a re-categorisation of the liability groups (in the context of coding the independent variables and more specifically, the modes of liability). Therefore, in order to achieve this objective, four further liability groups, containing broader categories,<sup>813</sup> were created in addition to the first categorisation consisting of nine liability groups. Thereafter, the analysis was run for each of those groups again.<sup>814</sup> Unfortunately, none of the groups produced any significant findings. Accordingly, the intended assessment of respective results is impossible and thus failed.<sup>815</sup>

#### 3.4.10 THE MIXED MODEL (MULTILEVEL)

Following regression, multilevel analysis was conducted for the ICTY and the ICTR with the sets of data including judges and type of opinion (ie majority, separate opinions and pertinent combinations thereof). A multilevel model (mixed model) enables the analysis of each mode of liability as a separate level. The advantage of such mixed models in comparison to linear regressions is that the former may comprise both fixed effects as well as random effects, and thus they are predestined to be used in cases where repeated measurement of the same units are carried out.<sup>816</sup>

<sup>812</sup>  $p = 0.272$ ; moreover the deterioration is also observed when looking at the R, which is lower.

<sup>813</sup> The degree of specificity decreases, so that each group covers several different combinations of modes of liability for which an individual has been convicted.

<sup>814</sup> Group 1: (i) A&A; (ii) Commission; (iii) JCE; (iv) Direct Perpetration/Indirect (Mix); (v) Direct Perpetration; (vi) Superior Responsibility; (vii) Superior Responsibility and Indirect Perpetration (A&A); (viii) Superior Responsibility and Direct Perpetration; (ix) Superior Responsibility/Direct Perpetration/Indirect Perpetration (Mix). Group 1 (new): (i) A&A; (ii) JCE; (iii) Commission; (iv) Direct Perpetration/Indirect Perpetration; (v) Direct Perpetration; (vi) Superior Responsibility; (vii) Superior Responsibility Mix with Direct and/or Indirect Perpetration. Group 2: (i) A&A; (ii) JCE/Commission; (iii) Direct Perpetration; (iv) Direct Perpetration/Indirect Mix; (v) Direct Perpetration; (vi) Superior Responsibility. Group 3: (i) A&A; (ii) JCE/Commission; (iii) Direct Perpetration; (iv) Direct Perpetration/Indirect; (v) Superior Responsibility Solo and Mix with Direct/Indirect. Group 4: (i) A&A; (ii) Direct Perpetration; (iii) Direct Perpetration/Indirect Perpetration; (iv) Superior Responsibility Solo and Mix.

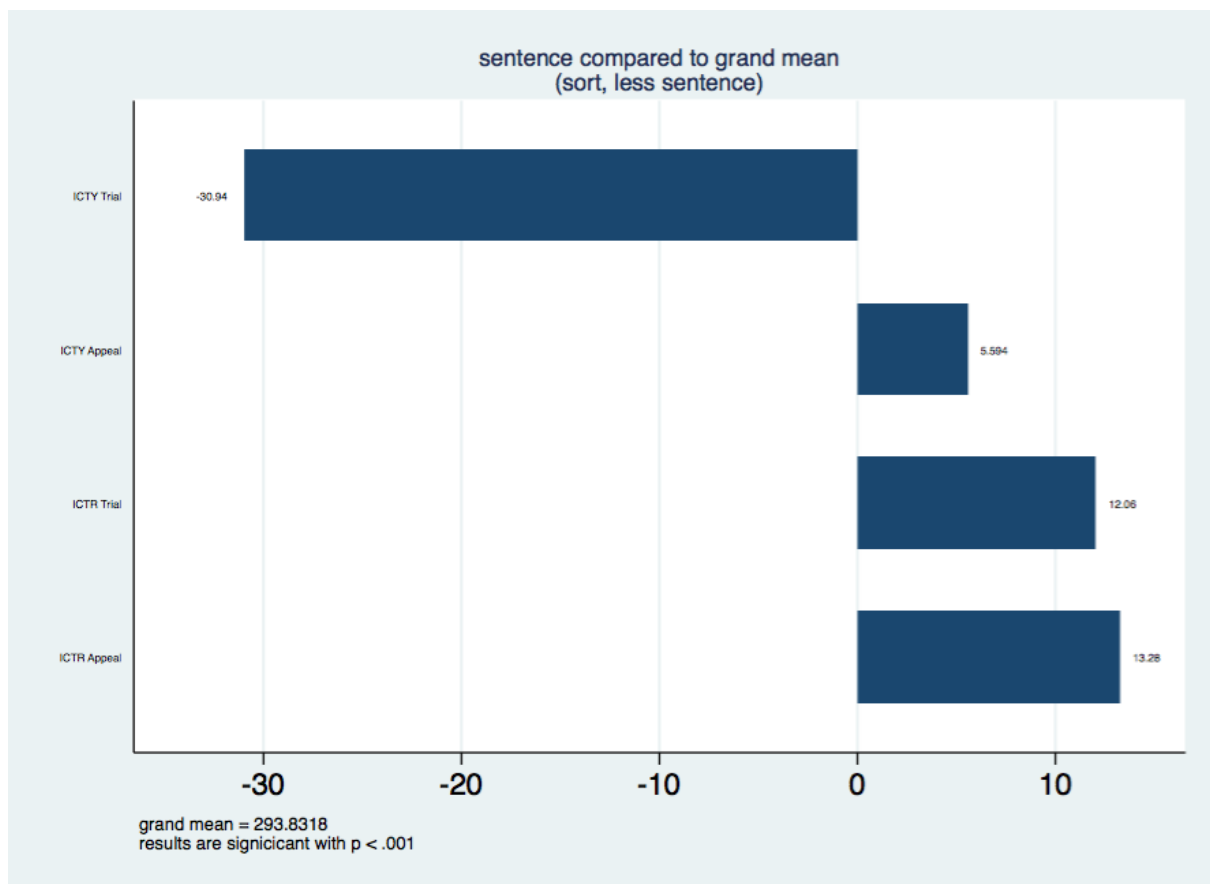
<sup>815</sup> Following a distinction between trial and appeal, for instance, the result of the finding was not significant and the R<sup>2</sup> decreased. Moreover, liability values, which were significant in the first regression, turned out to be subsequently insignificant. Similarly, this happened after regression of separate trial and appeal groups for each court/tribunal was conducted.

<sup>816</sup> In this case the same judges.

### 3.4.10.1 FINDINGS RELATING TO MULTILEVEL ANALYSIS

The grand mean for this analysis is 293.83 months (24.5 years). First, the tribunals were analysed separately and a distinction was made between trial and appeal. However, the results reveal that the difference between trial and appeal in relation to the influence of the modes of liability (or specifically the respective liability groups) on the sentence is marginal if not absent.<sup>817</sup> A difference can only be observed between the overall sentence length (Figure 3 below). Those findings are however statistically significant.

FIGURE 3: FINDINGS OF MULTILEVEL ANALYSIS FOR ICTY/ICTR/TRIAL/APPEAL



Based on the grand mean of 24.5 years (M= 24.48 years / 293.83 months) one can observe that, on average, the ICTY Trial Chamber handed down sentences which are 2.5 years shorter (M=2.57 years / 30.94 months) than the grand mean of 24.5 years (M= 24.48 years / 293.83 months). Therefore, it can be seen that ICTY Trial Chamber sentences perpetrators on average to 22 years' imprisonment (M= 21.90 years / 262.89 months). In contrast, the ICTY Appeals Chamber punishes perpetrators on average to 24.9 years' imprisonment (M= 24.95 years / 299.42 months), which could be considered to be substantially harsher. As regards the ICTR, the Trial and Appeals Chambers do not differ

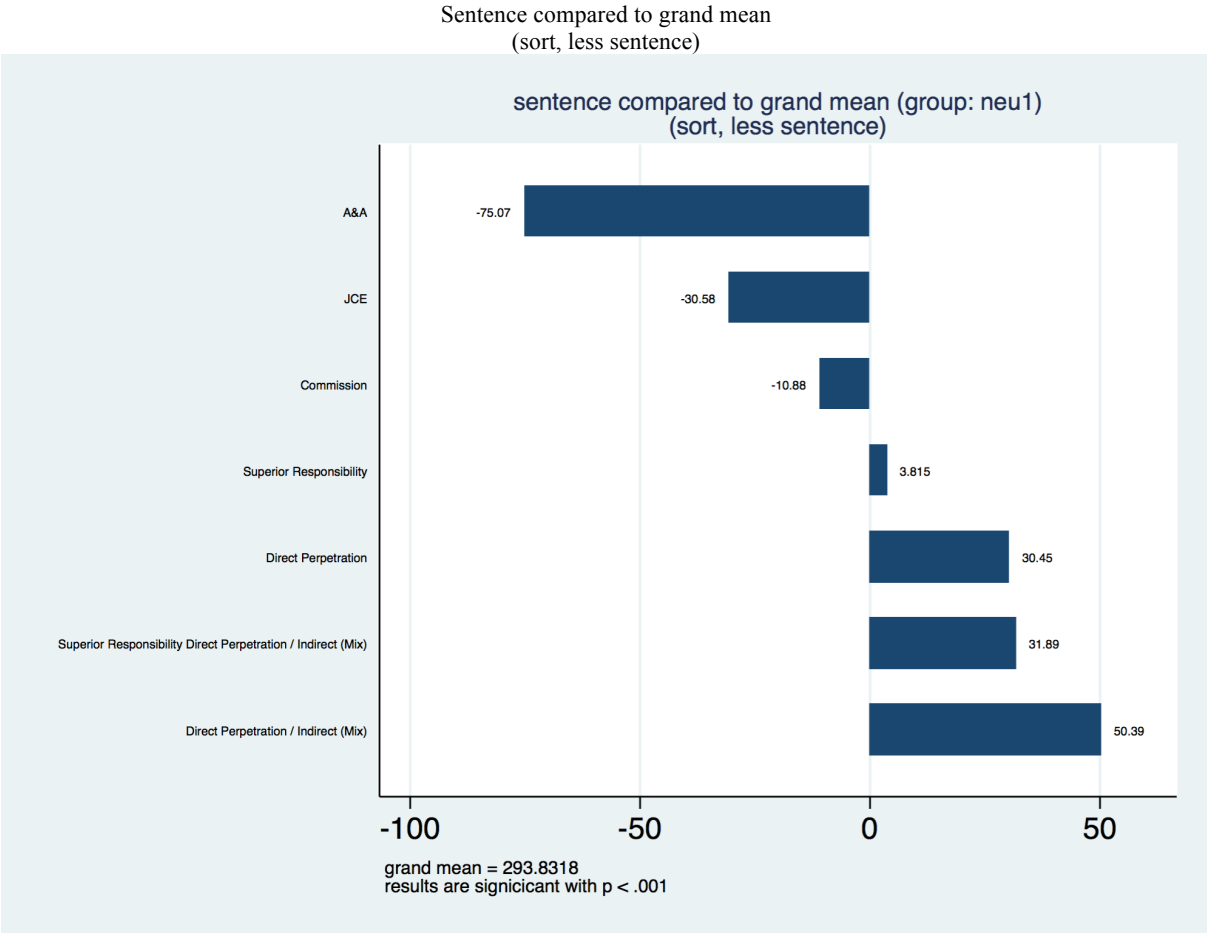
<sup>817</sup> Distinction of 0.00000003.

considerably in relation to their punishment, although it can be observed that the Appeal Chamber imposed slightly lengthier sentences with an average of 25.5 years (M= 25.59 years / 307.11 months). However, the difference of the average sentences imposed by the ICTY Appeal Chamber is, in comparison to those handed down by the ICTR Trial Chamber, vanishingly small. While the average prison term imposed by the ICTR Trial Chamber is 25.5 years (M= 25.49 years / 305.89 months), the Appeals Chamber imposed on average sentences which were only marginally lengthier. Accordingly, a substantial difference between the length of the sentence handed down can only be observed with regard to the ICTY Trial and Appeal Chambers and between the two tribunals respectively. Despite the absence of significant discrepancies between the duration spent behind bars by perpetrators tried at the ICTR or ICTY, the deviation of the sentence length between the ICTY and the ICTR is not surprising, given the higher number of convictions for life sentences handed down by the latter.

3.4.10.1.1 Modes of Liability

Figure 4 below shows the modes of liability, which were calculated as a separate level of the analysis.

FIGURE 4: FINDINGS OF MULTILEVEL ANALYSIS (MODES OF LIABILITY) <sup>818</sup>



<sup>818</sup> Based on Group 1 (new).

As the bar chart reveals, the average sentence handed down by both tribunals is 24.5 years for all individuals included in this analysis. Thus, it can be observed that aiders and abettors receive the lowest sentence, with six years less than the grand mean, and accordingly the mean sentence for aiders and abettors constitutes 18 years (M= 18.23 years / 218.76 months). The second lowest mean sentence is imposed on members of a JCE, who were on average sentenced to 22 years (M= 21.93 years / 263.25 months). This is in line with statements rendered *inter alia* in the *Ndahimana* Appeals judgment, where it was held that the “elevation” of criminal responsibility from an aider and abettor to that of a member of a JCE ‘results in an increase of his overall culpability’.<sup>819</sup> Interestingly, members in a JCE are followed by perpetrators, who are convicted based on commission liability. These “hands-on” perpetrators receive prison terms of 24 years (M= 23.57 years / 282.95 months). To the contrary, superiors, who are liable for omitting as opposed to directly committing criminal acts, are punished to 25 years’ imprisonment (M= 24.80 years / 297.64 months), a punishment marginally harsher than that of direct perpetrators guilty of commission. It must however be noted that superiors normally hold a specific rank, which is inherently higher than that of the low rank of subordinates, who receive sentences which are on average five years shorter than the sentence of medium rank perpetrators, and eight years shorter than those occupying a high rank in the political, economic or military hierarchies.

Those convicted for direct forms of perpetration, namely planning, ordering, instigating, JCE and commission, as well as all combinations thereof,<sup>820</sup> receive on average 27 years’ imprisonment (M= 27.02 years / 324.28 months). Moreover, superiors who are additionally found guilty of another form of perpetration, either a form of direct and/or indirect perpetration, are (on average) punished to 27 years’ imprisonment (M= 27.14 years / 325.72 months). The most severe punishment is reserved for those convicted for both direct and indirect forms of participation (all possible combinations thereof), who were on average sent to prison for 28.5 years (M= 28.68 years / 344.22 months).

Again, akin to the findings of regression, these results reveal that, to date, the lowest sentences have been handed to aiders and abettors. These are followed by JCE members who received the second-lowest sentences. “Hands-on” perpetrators received the third lowest sentence. The reason for the comparatively mild punishment of “hands-on” perpetrators, convicted based on commission liability, in comparison to the punishment received by those convicted on direct and indirect modes of liability jointly, may be explained by the higher number of counts, implying that each count is linked to a mode of liability. Due to the fact that each count is normally charged with a corresponding mode of liability, someone convicted of indirect perpetration in addition to direct perpetration may be assumed to be at least guilty of two counts and a plurality of criminal acts, leading inevitably to a higher degree

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<sup>819</sup> *Ndahimana* Appeal Judgment (n 2) para 252; see also paras 250 and 253 respectively.

<sup>820</sup> Commission and JCE alone are not covered by this category, as they are already dealt with separately with own categories. This group covers them only linked to other modes. Planning, instigating and ordering, however, are covered alone.

of culpability.<sup>821</sup> Thus, a harsher sentence may be imposed due to the cumulative effect of several forms of direct and indirect perpetration as well as other sentencing factors, such as mitigating and aggravating factors and the number of counts, which may be particularly influential in this instance as a higher degree of involvement by more criminal activity is reflected in that a perpetrator is likely to be convicted on several counts. This is supported by the findings of regression, which shows that for each count the sentence increases on average by eight months.

Finally, although commission liability does not seem to attract the highest sentences, it can be observed that aiders and abettors receive the lowest sentences. This may imply that activities covered by the mode aiding and abetting tend to be perceived or considered as being less blameworthy. Contrary to what one might have expected, superiors receive marginally lengthier sentences than those convicted for commission liability, although they are not physically committing an offence. Instead, superiors commit a crime by omitting to utilise their authority to prevent their subordinates from committing atrocities. A possible explanation could be that, due to the influence they exercise over others, and the cruelty of allowing such acts of brutality to happen despite such influence, the degree of culpability is augmented. Thus, the blame ascribed to superiors seems to be equal or marginally greater than the culpability ascribed to physical perpetrators. Moreover, as Figure 4 reveals, direct perpetrators, those who either plan, instigate, or order, either alone or in combination with commission or JCE liability (direct perpetration) receive on average a prison term of 27 years (M= 27.02 years / 324.28 months). This supports the statement of the ICTR that the highest sentences are reserved for those who plan, order or instigate crimes.<sup>822</sup>

Higher sentences, in accordance with these findings, are only imposed on those who are guilty of superior responsibility in addition to either direct and/or indirect perpetration, 27 years (M= 27.11 years / 325.42 months), and those who are guilty of perpetrating a crime directly and indirectly. The latter can include someone who is guilty of a number of modes of liability, including aiding and abetting. It is noteworthy to underline that if a superior is not solely convicted of superior responsibility, but instead also based on other modes of liability, the sentence is immediately increased by an extra three years. However, it must be recalled that although all liability modes may of course be charged along with several counts but, particularly, those mixed liability groups as Superior/Direct (Mix) and Direct/Indirect, imply immediately a higher number of counts, which could be the reason for the imposition of lengthier sentences.

What remains the same for both analyses is the hierarchy established between aiding and abetting, JCE and commission liability, in that the sentences imposed suggest that culpability gradually increases, starting with aiding and abetting.

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<sup>821</sup> Although it should be added that judgments transparently listing each pertinent mode of liability charged with each count are rather rare.

<sup>822</sup> See *Simba Judgment and Sentence* (n 181) para 434.

### 3.4.10.1.2 Findings Relating to the Other Independent Variables

The findings in Table 8 below show that, save for the plea and instance, all independent variables, namely the category of the crimes, the mitigating and aggravating factors, the rank of the perpetrator and whether it was a majority opinion or a minority opinion, are significant and thus can be said to form predictors of the sentence (Table 7). Whether the perpetrator pleaded guilty or not and whether it was a first or second instance judgment does not appear to be significant. Again, as in regression analysis, the same sentencing predictors along with additional factors were part of the analysis. Accordingly, they are briefly addressed below.

TABLE 8: FINDINGS OF MULTILEVEL ANALYSIS

	variables	coefficient	std err	p	95% CI-	95% CI+
	Number of Counts	10.5979	1.3781	0.000	7.8969	13.2989
<b>Category of Crime (base: WC)</b>	CaH	136.4793	21.6513	0.000	94.0436	178.9150
	CaH/WC	99.6508	21.1404	0.000	58.2164	141.0852
	Genocide	205.4086	28.3562	0.000	149.8315	260.9857
	Genocide/CaH	295.8670	23.1295	0.000	250.5341	341.1999
	Genocide/CaH/WC	280.6442	21.5666	0.000	238.3745	322.9139
	Mitigating Factors	-7.6448	2.2435	0.001	-12.0420	-3.2477
	Aggravating Factors	13.6099	2.5866	0.001	8.5403	18.6795
<b>Guilty Plea (base: no)</b>	yes	-24.6922	17.7541	0.164	-59.4895	10.1052
<b>Rank (base: medium)</b>	high	40.5310	11.7098	0.001	17.5803	63.4817
	low	-61.7936	14.9661	0.000	-91.1266	-32.4607
<b>Instance (base: 0)</b>	1	-11.5696	10.5200	0.271	-32.1883	9.0491
<b>Document (base: majority)</b>	opinion	53.1800	16.1399	0.001	21.5465	84.8136

Generally, it can be observed that individuals convicted for crimes other than war crimes alone are sent behind bars for considerably lengthier terms. Those convicted based solely on crimes against humanity have generally been sentenced to an extra 11 years (M= 11.37 years / 136.47 months) than those convicted for war crimes alone. Perpetrators guilty of genocide were even sentenced 17 years more (M= 17.11 years / 205.40 months) than those convicted for war crimes. The highest sentences seem to be reserved for those convicted for genocide and crimes against humanity jointly and for those convicted for all three categories of crimes jointly. Both receive sentences of 24.5 years (M= 24.65 years / 295.86 months) and 23 years (M= 23.38 years / 280.64 months), and thus longer sentences than those convicted solely based on war crimes. Moreover, the model shows that per increase of the mitigating factors by the value one, the sentence decreases on average by seven and a half months (M= 0.63 years / 7.64 months), while it increases for one year (M= 1.13 years / 13.6 months) per increase of the aggravating factors by one. The number of counts form another strong sentencing predictor. Per increase of the count by one, the sentence length is extended by 0.8 years (M= 0.88 / 10.59 months).

Regarding the rank of the perpetrator either in a military hierarchy or in terms of the general influence of the perpetrators, it can be observed that high-ranking perpetrators receive sentences an average of three years longer (M= 3.37 / 40.53 months) compared to the sentences of those who hold a medium rank, and perpetrators with low ranks receive on average sentences five years shorter (M= 5.14 years / 61.79 months) than medium-ranked perpetrators. Interestingly, it can also be seen that judges who deviate from the majority opinion, generally punish perpetrators on average four and a half years more harshly (M= 4.43 years / 53.18 months).

### 3.5 CONCLUSION

The primary objective of this study was the examination of the impact of modes of liability on the sentencing process and, more specifically, whether aiders and abettors are perceived to be less blameworthy. Is the differentiation between different modes of liability merely terminological or is it linked to corresponding penalties? The above findings reveal a clear answer to the question posed.

Despite the fact that the tribunals/courts subjected to the two analyses vary, one major similarity in both findings can be observed: aiders and abettors are punished more mildly than all other perpetrators. This supports the preliminary conclusion derived from the jurisprudential analysis concerning the *ad hoc* tribunals and answers the central question of this dissertation: the distinction between principals and accessories in the practice of the tribunals is not merely terminological. In fact, modes of liability are sentencing predictors and a gradation of blameworthiness can clearly be observed.

It is striking that regression, which involved the *ad hoc* and hybrid tribunals, denotes a lower sentencing range (17.5-21 years) for all modes of liability, while multilevel analysis, exclusively based on the *ad hoc* tribunals, shows sentences between 18 and 28 years. This difference in years may be down to the inclusion of hybrid tribunals, which have generally not handed down sentences as lengthy as the *ad hoc* tribunals and particularly the ICTR. However, against this backdrop, it is even more striking that aiders and abettors are, according to both analyses, sentenced to an average of 17.5/18 years imprisonment. These findings are almost identical.

While regression reveals that members of a JCE receive the most severe sentences, the multilevel model places them second, after aiders and abettors. A possible explanation could be the wide scope of JCE in that a perpetrator may or may not be physically involved. As the jurisprudential analysis in Chapter 3 has shown, judges have repeatedly placed much greater emphasis on the direct or physical form of participation in a crime and the high culpability linked to it. Based on the proposition that physical perpetration is psychologically considered to be a graver form of participation, this may explain why sentences based on JCE, which is viewed as a form of commission liability, may be



extremely discrepant (this is, of course, also subject to other factors, as both analyses show that the high rank of the perpetrator significantly raises the sentence).

Furthermore, the combination of direct and indirect forms of liability attracts the highest sentences. As mentioned above, the combination of modes of liability for which a perpetrator is convicted, implies a multitude of counts and at least two, which may explain the more severe punishment.

When looking at regression, it can be observed that those perpetrators responsible based on superior responsibility (17.82 years) are punished almost as mildly as aiders and abettors (17.5 years) and superior responsibility in combination with aiding and abetting (18 years). Moreover, the findings show that, as soon as acts are covered by a mode of the group “Direct Perpetration” (19.47 years), which denotes all forms of direct perpetration (instigating, ordering, planning, committing and membership in a JCE) the punishment is immediately increased by two years.

In contrast, multilevel analysis, restricted to the datasets extracted from the *ad hoc* tribunals, reveals that superiors at the *ad hoc* tribunals are not punished as mildly.<sup>823</sup> Considering that the high rank of a perpetrator increases the sentence, the harsher punishment of superiors by the *ad hoc* tribunals may be explained by the fact that these have tried higher-ranking perpetrators than some hybrid tribunals, which predominately try low and medium ranked individuals.

These results also indicate that, in relation to modes of liability, a consistent pattern seems to have emerged, thereby confirming the numerous instances where judges confirmed the lower culpability of aiders, usually by reference to previous case law. This reliance on precedent, as can be seen in the next chapter, may have contributed to this prevalent approach, despite no statutory basis for the application of the differentiated theory. Ultimately, it appears safe to conclude that secondary liability attracts lower sentences, as confirmed by the empirical findings.

However, because the analysis of each hybrid tribunal separately did not produce significant results, the question of whether the differentiated approach predominantly chosen by the *ad hoc* tribunals has influenced the practice of pertinent hybrid tribunals in this regard, remains unanswered – further quantitative research will be needed in this respect.

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<sup>823</sup> It has to be recalled, however, that for statistical reasons, superiors were not grouped in three categories as for the regression, but instead it was only differentiated between two groups: Superior (Solo) and Superior (Mix), embracing a combination with all other forms of participation.

CHAPTER 4  
INTERNATIONAL JUDGES, LEGAL CULTURAL BACKGROUND AND THE IMPACT ON  
SENTENCING

*Much harm is done by the myth that, merely by putting on a black robe and taking the oath of office as a judge, a man ceases to be human and strips himself of all predictions, becomes a passionless thinking machine.*<sup>824</sup>

#### 4.1 INTRODUCTION

Judges come from diverse legal cultural backgrounds. They may have been judges, prosecutors, or defence counsel in the jurisdictions they represent; in different legal fields, in common or civil law, and adversarial or inquisitorial legal systems. They may have also served as diplomats or are established academics. These professional experiences are likely to influence their acquired legal skills, which they have to utilise and enhance within the international criminal justice system. Accordingly, the objective of this chapter is to explore whether there is a correlation between the legal cultural background of judges and the legal weight they ascribe to principal perpetrators and accessories respectively in the context of sentencing.

In the light of the above discussion, some central questions arise. Perhaps the most important of these is why some judges opt for a unitary approach, while others maintain a principal-accessory distinction for sentencing purposes. Considering that the significance of such a distinction for the purpose of sentencing is not established by international instruments but instead rooted in domestic criminal law, it is essential to ask why judges resort to one or the other approach. Is their decision related to their legal cultural background? Or is it possibly mere coincidence in the absence of a black letter provision? Could a lack of judicial experience or experience in criminal justice explain the inconsistency? Perhaps there is no obvious rationale explaining a certain path taken. As Ewald suggests, behavioural economics may help – amongst other perspectives – to explain the decision-making process as one may not be aware of sub-conscious processes<sup>825</sup> influencing the decision-making process.<sup>826</sup> This of course may be true for all human beings, and the mere fact of being a judge

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<sup>824</sup> M Lachs, *The Teacher in International Law: Teachings and Teaching* (Martinus Nijhoff Publishers 1987) 206.

<sup>825</sup> See for example, L Mlodinow, *Subliminal: How Your Unconscious Mind Rules Your Behavior* (Pantheon 2012).

<sup>826</sup> See generally Ewald (n 70).

does not exclude such influence. There has been some research from a psychological perspective, however, in relation to the role of psychology in judicial decision-making in a domestic context.<sup>827</sup>

Given that the ICTR, ICTY, ICC and hybrid tribunals do not expressly provide for a differentiated approach, one can assume that such distinction and the concomitant consequence of mitigated punishment for accessories is an established international criminal law principle as it is not prescribed by the statutory instruments establishing the *ad hoc* tribunals and the ICC.<sup>828</sup> The starting point when trying to extract the reason for a particular decision is therefore to examine closely these judgments in which the judicial bench has ascribed a specific legal value to modes of liability for sentencing purposes to direct and indirect perpetrators respectively. More specifically, this chapter scrutinises the composition of the bench in pertinent cases. Due to the fact that a solidly articulated attitude towards one or the other approach can only reasonably be deduced<sup>829</sup> in the practice of the ICTY, ICTR, and the ICC, although only limited to the few judgments, only the *ad hoc* tribunals will be examined closely in relation to the cultural legal background of judges. As could be seen in the previous chapters, the ECCC, the SICT, Kosovo Panels, the East Timor Special Panels and the STL have neither addressed this issue in a manner which is noteworthy, nor can a clear approach be identified. The SCSL has broached the issue in the *Taylor* judgment, but due to the small number of judgments and the lack of information on judges, the focus remains on the *ad hoc* tribunals, which have, at the time of writing, produced the largest body of purely international jurisprudence.

#### 4.2 THE PSYCHOLOGY OF JUDICIAL DECISION-MAKING AND BEHAVIOURAL ECONOMICS

*When judges know more about some issues than others, or in the past, have drawn analogies to one kind of outcome, they might be more likely to unintentionally find in a direction consistent with past judgments.*<sup>830</sup>

Ewald rightly observes that it is ‘somewhat surprising’ that judicial and thus human decision-making is ‘understudied in the analyses of international sentencing’,<sup>831</sup> thereby suggesting that case-based reasoning (CBR) could contribute to an explanation as to why a specific choice is made. This approach embraces the idea that the decision maker, the judge, appears to ‘compare a new case against the backdrop of completed cases, initially guided by certain perpetrator and offence related key

<sup>827</sup> See for instance different contributions to D E Klein and G Mitchell (eds), *The Psychology of Judicial Decision Making* (OUP 2010); L S Wrightsman, *Judicial Decision Making: Is Psychology Relevant? Perspectives in Law and Psychology* (Springer 2012).

<sup>828</sup> Although interpretation of the applicable provisions may indicate that such a distinction is intended, this is disregarded for the purpose of this argumentation.

<sup>829</sup> Or at least this issue has been addressed expressly.

<sup>830</sup> B A Spellman, ‘Judges, Expertise and Analogy’ in D E Klein and G Mitchell (eds), *The Psychology of Judicial Decision Making* (OUP 2010) 162 seq.

<sup>831</sup> Ewald (n 70) 385 referring to M Oswald and W Langer, ‘Versuch eines integrierten Modells zur Strafzumessungsforschung: Richterliche Urteilsprozesse und ihre Kontextbedingungen’ in C Pfeiffer and M Oswald (eds), *Strafzumessung – Empirische Forschung und Strafrechtsdogmatik im Dialog* (Ferdinand Enke Verlag, 1989) 197-228.

variables'.<sup>832</sup> Accordingly, as Ewald writes, some findings 'indicate that some offender-related features, indicating the dangerousness and culpability of a perpetrator, have a particular impact on the initial decision for an appropriate sentencing range'.<sup>833</sup> In the light of a principal-accessory distinction, it may be argued that, should a mode of participation be assumed to be an offender-related feature for the purpose of this observation, the fact that a perpetrator committed an offence "physically" could theoretically be a potential factor implying a higher degree of culpability, given that the physical nature of a specific contribution is frequently emphasised by judges in the collective decision-making process.

Nevertheless, it must be recalled that sometimes no rational underpinning may be immediately obvious. Going back to the instance of the physical character of a contribution, an important question raised should be whether it is possible that a judge may simply be subconsciously convinced of the idea that physical perpetration is an offence which is more blameworthy than indirect or non-physical perpetration. If a representative of a jurisdiction has a civil law background, is for instance German, and is therefore – due to his domestic judicial experience (used to applying the statutory manifest principle that aiders and abettors are punished more mildly), will this be treated as a relational similarity in the decision-making process? Similarly, it may also be asked whether it is likely that the majority of judges with such a background deeply believe that the specific contribution of an aider and abettor and thus a secondary perpetrator, or indirect perpetrator may never raise the same degree of culpability as the conduct of a principal perpetrator.

Spellman points out, although in a domestic legal context, that:

Political scientists have shown that one can anticipate how a judge will decide a case more often than chance, or a reading of the facts, might allow. Using various predictors – party affiliation, party of appointment, the judges' own decisions on earlier similar cases – regression analyses can demonstrate that judges are behaving in a manner consistent with their explicit prior beliefs.<sup>834</sup>

As a possible explanation, Spellman suggests an interpretation which is a rather 'extreme version of the "legal-realist" view' in that she puts forward that '[t]he simplest explanation for such behavior is that judges first decide what they want the outcome of the case to be, then go back and find the precedents that justify their opinions'.<sup>835</sup> However, she adds that a more "nuanced" view is that judges are 'sensitive to both attitudinal and jurisprudential concerns'.<sup>836</sup>

#### 4.2.1 ANALOGICAL REASONING

Spellman provides two examples which can serve to illustrate the meaning of law-related analogical reasoning:

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<sup>832</sup> Ewald (n 70) para 385.

<sup>833</sup> Ibid.

<sup>834</sup> Spellman (n 830) 149.

<sup>835</sup> Ibid.

<sup>836</sup> Ibid fn 1.

Analogical reasoning typically involves several steps including retrieval and mapping. As an illustration, consider that one is a lawyer, and a potential client would like to know whether she has a strong negligence claim against a cruise line. She had been asleep in her locked cabin when someone reached through a window and stole her handbag including \$500 in cash.<sup>837</sup>

According to Spellman, three steps can be distinguished when it is intended to find

potentially analogous source cases in memory (...). First, you recall a case in which a businessman was asleep on a train berth in an open sleeping car and had his expensive cell phone stolen from the pocket of the coat he was using as a blanket. Second, you recall a case in which a man in a resort hotel had his wallet stolen from his room while he slept. Third, you recall a case in which a woman on a cruise ship was hit by another woman on the ship who used her handbag as a weapon.<sup>838</sup>

Spellman then explains that the next stage of analogical reasoning is to ‘create a mapping—find a set of appropriate correspondences between elements of the source and target’.<sup>839</sup> Hence, Spellman concludes that the choice made depends on the resemblance to facts of cases already known, and says with reference to the above examples:

You might think of your client as the business traveller, the cruise ship as the train, and handbag as the cell phone. Alternatively, you might think of your client as the man on vacation, the ship as the hotel, and the handbag as the wallet. If you think your case is most like that of the businessman on the train (who lost), you will expect the same outcome as in the case; if you think it is most like that of the vacationing man in the hotel (who won), you will expect that result. But despite the fact that the third case involves a woman, a cruise ship and a handbag—just like your own—it probably doesn’t seem very similar to your case because the objects that are the same don’t stand in the same relations [sic] to each other – and relations are the key to analogy.<sup>840</sup>

#### 4.2.1.1 ANALOGICAL REASONING IN INTERNATIONAL CRIMINAL LAW

There is a number of characteristics that make international criminal law distinguishable from domestic criminal law, such as the nature of macro-crimes, the plurality of persons frequently involved in the commission of international crimes, the hierarchical structures within the organisation of criminal entities as well as a perpetrator's respective mode of participation, with the masterminds of the offence usually being physically detached from the crime scene. Accordingly, analogical reasoning, as described above, would not immediately seem adequate. Of course, and this is probably the most important reason for the necessity of some judicial discretion, it is clear that each case is different, and that it has to be assessed individually, thereby taking all specific circumstances into account. In *Semanza*, the ICTR Appeal Chamber stressed the limited value of comparison to other cases and held that the ‘comparison to other cases in support of a move to have the sentence increased may indeed provide guidance’<sup>841</sup> on the assumption that the offence in question is the same and more specifically if the crimes in question were committed in ‘substantially similar circumstances’.<sup>842</sup> It

<sup>837</sup> Ibid 150.

<sup>838</sup> Ibid 150.

<sup>839</sup> Ibid 150.

<sup>840</sup> Ibid 150, 151.

<sup>841</sup> *Semanza* Appeal Judgment (n 118) para 294; M A Drumbl, *Atrocity, Punishment, and International Law* (CUP 2007) 59, 60.

<sup>842</sup> Ibid.

stressed, however, that ‘such comparison may be of limited value given that each case has its own particular circumstances and that the aggravating and mitigating factors may dictate different results’.<sup>843</sup> Thus, ‘[u]ltimately, the decision as to the length of sentence is a discretionary one, turning on the circumstances of the case.’<sup>844</sup>

In a similar manner the Appeals Chamber referred to the “limited assistance” of comparison to similar cases, by stating that, in *Babić*, ‘the differences are often more significant than the similarities’ and that ‘the mitigating and aggravating factors dictate different results’.<sup>845</sup> In *Stakić* the Appeals Chamber then went even further as to deny the appropriateness of case comparison in *Stakić* by arguing that the ‘appellant’s case was “unique”’,<sup>846</sup> and that comparison to other cases was accordingly inadequate.<sup>847</sup> In fact, it appears that reaching such a conclusion presupposes a comparison. In casu it appears that the point of reference was the mode of liability, on which ground similarity to *Krstić* was ultimately denied.

In *Semanza* the Appeals Chamber recalled that there is a general principle according to which ‘comparison to other cases in support of a move to have the sentence increased may indeed provide guidance if it relates to the same offence’.<sup>848</sup> It clarified, however, that against the backdrop of the individual particulars of each case ‘such comparison may be of limited value’.<sup>849</sup> This inevitably poses the question whether a judge, as a human being, is able to “switch off” the process of finding relational similarities to other (international or domestic) cases while analogical reasoning is taking place. If this is possible, how can analogical reasoning be conducted in the absence of comparable cases, as this was the situation at the beginning of the operation of international and hybrid courts and tribunals? Would an international judge attempt to find relational similarities to domestic cases if a similarity was given (eg the mode of liability)? If the answer is no, there would be the presumption that judges are able to distance themselves or abstain from allowing domestic jurisprudence, or more specific, “relational similarities” linked to domestic jurisprudence, to influence their decision.

International courts and tribunals may in the absence of pertinent legal instruments also resort to Article 38 c) referring to ‘general principles of law recognized by civilized nations’. Accordingly, analogical reasoning within international criminal law may have to take place under the heading of general principles manifest in domestic law. In the light of the idea that this may prevent lacunae, it is clear that it is the last fallback option. However, it seems logical as it appears to be reasonable that the application of varying domestic principles by an international bench may inevitably lead to clashes,

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<sup>843</sup> Ibid.

<sup>844</sup> Ibid.

<sup>845</sup> *Babić* Judgment on Sentencing Appeal (n 597) para 33; Drumbl (n 841) 60.

<sup>846</sup> *Stakić* Appeal Judgment (n 620) para 382, (n 841) 60.

<sup>847</sup> Ibid.

<sup>848</sup> *Semanza* Appeal Judgment (n 118) para 394.

<sup>849</sup> Ibid.

which may be an explanation for the discussion revolving around the differentiation between principals and accessories for the purpose of sentencing.

Analogical reasoning is an established element of a jurist's work. Law school and vocational education also focus on analogical reasoning.<sup>850</sup> Spellman concludes that 'judges (like laypeople) know that when using analogies it is important to look for relational similarities and – because of their specialised training in legal content – they know which relational similarities matter within their domains of expertise'.<sup>851</sup> Yet the question remains – how do these mechanisms function within the process of analogical reasoning? Are they automated to some extent, or are they solely applied based on conscious choice? International criminal justice is a relatively recently developed field of law and accordingly the naturally established sentencing patterns are far from being solid, if not rather fragmentary. Some of the representatives of various jurisdictions have domestic criminal (judicial) experience. Therefore, it is arguable that, in their international capacity, judges may not isolate their domestic sentencing experience from pertinent international sentencing practice. According to Spellman, the 'retrieval of analogies' may take place automatically:

(...) as the WWII/Vietnam study shows, unconscious reminders of known analogs that are not present can affect judgments even though, when made explicit, the analogues are not viewed as any better or worse than other ones. In addition to this automatic retrieval of analogies, judges' knowledge and interests may influence how they mentally represent and use different analogs [sic]. When judges know more about some issues than others, or in the past, have drawn analogies to one kind of outcome, they might be more likely to unintentionally find in a direction consistent with past judgments – in part because of what they see as more (or less) similar, in part because of the level of abstraction (ie how deep the relations) they use, and in part because of an effort to maintain coherence in their beliefs. Thus, although judges might decide consistently with predictions, it is possible that they do so not for any intentional (and sometimes seemingly "nefarious") reasons suggested by legal realism.<sup>852</sup>

Accordingly, it might be argued that within the framework of analogical reasoning, subconscious memories may be recalled and even unintentionally consistent directions may be taken throughout this process. A reason why this reasoning would not apply to international judges is not immediately obvious.

#### 4.3 THE LACK OF SUFFICIENTLY ESTABLISHED CASE PATTERNS

At the beginning of the operation of the ICTY, gradually developed sentencing patterns were inevitably absent. Instead, one could observe how comparative analyses were conducted whereby domestic legal doctrines were addressed and as a result thereof fundamental differences became apparent.<sup>853</sup>

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<sup>850</sup> Spellman (n 830) 154.

<sup>851</sup> Ibid 162.

<sup>852</sup> Ibid 162, 163.

<sup>853</sup> See particularly in the context of modes of liability for instance *Tadić* Appeal Judgment (n 23) paras 224 seq, where the Appeals Chamber engaged in a comparative analysis concerning the participation in an offence by a plurality of persons in domestic legal systems. Principally, the *Tadić* Judgments include discussions of important

As described above, judges may be influenced by past judgments, which may – especially when a body of international criminal case law is not yet existent – be derived from their (judicial) legal experience in national legal systems. Moreover, international judges are appointed for limited periods and compose the bench with *ad litem* judges. It has to be recalled that “there’s always a first time”, where the above mentioned issues may be more severe. Therefore, some judges, who do not hear as many international cases as other judges, may be rather inclined to draw on analogical reasoning based on judicial experience within the jurisdiction they represent. Ewald suggests, with reference to Ariely’s work *Predictably Irrational*, that ‘case-based reasoning’ in combination with arbitrary coherence may contribute to a deeper understanding of the ‘underlying’ decision-making process. He indicates that, in a situation such as the *Tadić* trial, which produced one of the early decisions of the ICTY, for instance, ‘judges cannot draw from historically grown sentencing patterns comparable to national jurisdictions’.<sup>854</sup> Ariely describes arbitrary coherence in an economic frame of reference as follows: ‘The basic idea of arbitrary coherence is this: The initial prices (...) are “arbitrary”, once those prices are established in our minds they will shape not only present prices but also future prices (this makes them “coherent”)’.<sup>855</sup> Accordingly, if one replaces the “price” with the “sentence”,

[and] [a]ssuming that a similar psychological mechanism could work for sentencers (...) in specific situations, the principle of “arbitrary coherence” can be applied to international sentencers, in particular in a situation of insufficient sentencing history, and would translate into relatively arbitrary translation of first sentences which then serve as an “anchor value” for future cases.<sup>856</sup>

Ewald further concludes in the context of international sentencing that

[t]he notion of “arbitrary coherence” applied to sentencing where historically coherent sentencing patterns do not exist, means that there is an “anchor value” for sentencing which is relatively “arbitrary”; yet, once set and established in the minds of sentencers, it frames the range for future related cases and this makes sentencing coherent.<sup>857</sup>

This suggests that issues for the purpose of analogical reasoning could not only arise due to the absence of international criminal case law and the implied resort to national legal reference points as relational similarities, but also where the course of newly emerging patterns is set incorrectly. The implications in the context of the role of modes of liability in international sentencing were *inter alia* demonstrated in *Vasiljević*,<sup>858</sup> where the ICTY Appeals Chamber reduced Mitar Vasiljević’s sentence from 20 years’ imprisonment to 15 years’ imprisonment based on the finding that he was guilty as an aider and abettor instead of being guilty as a co-perpetrator. What emanated therefrom was a statement (aiding and abetting is a form of responsibility which generally warrants a lower sentence) which was later treated in a number of cases as a general principle. Not only was it treated blindly as a solid

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points of international law. However, a thorough discussion exceeds the scope of this work. For a thorough analysis of the *Tadić* case, see M Bohlander, ‘Prosecutor v Dusko Tadić: Waiting to Exhale’ (2000) 11 Criminal Law Forum, 217-248.

<sup>854</sup> Ewald (n 70) 387.

<sup>855</sup> D Ariely, *Predictably Irrational: The Hidden Forces that Shape Our Decisions* (Harper 2009) 26.

<sup>856</sup> Ewald (n 70) 387.

<sup>857</sup> Ewald (n 70) 387, 388; Ariely (855) 30.

<sup>858</sup> *Vasiljević* Appeal Judgment (n 1).



principle, it was cited over and over again, despite the fact that the sources which were cited in *Vasiljević* in order to corroborate this view, were partially wrong, as discussed in detail in Chapter 3. Notwithstanding that, the alleged principle that ‘aiding and abetting is a form of responsibility which generally warrants a lower sentence’ was cited in all shapes and nuances possible (from *Vasiljević*,<sup>859</sup> to *Krstić*,<sup>860</sup> *Simić*,<sup>861</sup> *Semanza*,<sup>862</sup> from *Krstić* to *Semanza*, from *Krstić* and *Kajelijeli*<sup>863</sup> to *Babić*<sup>864</sup> and so forth). It was thrown back and forth across several cases. In some cases *Vasiljević*<sup>865</sup> was cited directly; in others, *Krstić* was referenced, which drew on *Vasiljević*. Parallel to that, the ICTR, which also referred to *Krstić* and *Vasiljević* in this regard, cited (even before the *Vasiljević* judgment was rendered) *Ruggiu* and *Ntakirutimana*, and then *Kajelijeli*, which built on *Ruggiu* and *Ntakirutimana*. An interactive map displaying the journey of this “alleged principle” and the sources referred thereto, through the case law of the tribunals, would include arrows in all directions, rendering it confusing.

Accordingly, it is striking that this alleged principle, which is indeed a codified principle in a number of legal systems, was cited with a naturalness which could imply that analogical reasoning was conducted against the backdrop of domestic law (if the jurisdiction embraces a differentiated approach) or international criminal law, as for instance seems to have happened with the *Vasiljević* Appeal Judgment. This could indicate that an overreliance on domestic systems was in place, but it could also suggest that, in the absence of a scrutinised and systematic approach, a principle emanating from a seemingly rushed and partially wrongly conducted comparative analysis has spread. Of course, uniformity and predictability are only warranted if cases are compared; nevertheless, newly emerging concepts, and particularly concepts rooted in domestic law, should only be applied under close scrutiny, as they may be easily applied incorrectly in an international setting by international judges.

The process of analogical reasoning is a valuable tool in a jurist’s day-to-day work and generally it seems to serve as a good starting point. This may under certain circumstances also be true for international judges. However, although by now one can speak of a body of international jurisprudence, this was not always the case, and therefore judges were (and are still sometimes) faced with lacunae. The important role of domestic criminal law principles being applied in international criminal law is reflected in Article 38 b) and c) ICJ Statute. Although the non-exhaustive list, set out in Article 38 ICJ Statute, looks extensive, one must not underestimate the number of specific situations or issues not explicitly covered by the legal instruments enumerated in Article 38 a) or even b).<sup>866</sup> As a result, judges will have to resort to doctrines emanating from national law. That this may

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<sup>859</sup> *Vasiljević* Appeal Judgment (n 1).

<sup>860</sup> *Krstić* Appeal Judgment (n 28).

<sup>861</sup> *Simić* Appeal Judgment (n 125).

<sup>862</sup> *Semanza* Appeal Judgment (n 118).

<sup>863</sup> *Kajelijeli* Judgment and Sentence (n 31).

<sup>864</sup> *Babić* Judgment on Sentencing Appeal (n 597).

<sup>865</sup> *Vasiljević* Appeal Judgment (n 1).

<sup>866</sup> In its very first judgment, the ICTY identified as a general principle common to all nations that crimes against humanity attract the severest punishment in national legal systems: ‘The Trial Chamber thus notes that there is a

cause inconsistency and misapprehensions has been demonstrated by means of the above jurisprudential analysis.

This examination in the light of the psychology of decision-making does not, of course, provide a definite answer to all the questions raised, but it may still (in a probably rather unconventional way) contribute to more understanding of international sentencing, as this perspective seems to have been neglected, or possibly has its impact been underestimated. As Mlodinov states: ‘We humans also perform many automatic unconscious behaviours. We tend to be unaware of them, however, because the interplay between our conscious and our unconscious minds is so complex. This complexity has its roots in the physiology of our brains’.<sup>867</sup>

#### 4.4 NATIONALITY AND THE LEGAL CULTURAL BACKGROUND OF THE JUDGE: RELEVANT – IRRELEVANT?

International criminal law is a dynamic and complex system and international judges have – as the connotation reveals – diverse backgrounds. Article 36(8)(a) ICC Statute, setting out the nationality criteria, provides that throughout the selection process of judges, the States’ Parties shall *inter alia* consider the ‘representation of principal legal systems of the world’<sup>868</sup> and ensure ‘[e]quitable geographical representation’.<sup>869</sup> What may be underestimated sometimes is the heterogeneity caused by diversity, which inextricably leads to conflicts, clashes and/or misunderstandings. In the worst case these may be unrecognised as such. As much as judicial cultural diversity may contribute to

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general principle of law common to all nations whereby the severest penalties apply for crimes against humanity in national legal systems. It thus concludes that there exists in international law a standard according to which a crime against humanity is one of extreme gravity demanding the most severe penalties when no mitigating circumstances are present’. *Prosecutor v Erdemović* (Sentencing Judgment) IT-96-22-T (29 November 1996) para 31. Cf, see contrary *Tadić* Appeal Judgment (n 23) paras 224, 225, where the Appeals Chamber clearly distinguished between customary law and mere reference to national case law to show an ‘underpinning in many national systems’. It did so in relation to the liability of participants in a common plan for foreseeable acts committed by another participant. Para 224 : ‘(...) Other countries also uphold the principle whereby if persons take part in a common plan or common design to commit a crime, all of them are criminally responsible for the crime, whatever the role played by each of them. However, in these countries, if one of the persons taking part in a common criminal plan or enterprise perpetrates another offence that was outside the common plan but nevertheless foreseeable, those persons are all fully liable for that offence. These countries include civil law systems, such as that of France and Italy. They also embrace common law jurisdictions such as England and Wales, Canada, the United States, Australia and Zambia’. Para 225 : ‘It should be emphasised that reference to national legislation and case law only serves to show that the notion of common purpose upheld in international criminal law has an underpinning in many national systems. By contrast, in the area under discussion, national legislation and case law cannot be relied upon as a source of international principles or rules, under the doctrine of the general principles of law recognised by the nations of the world: for this reliance to be permissible, it would be necessary to show that most, if not all, countries adopt the same notion of common purpose. More specifically, it would be necessary to show that, in any case, the major legal systems of the world take the same approach to this notion. The above brief survey shows that this is not the case. Nor can reference to national law have, in this case, the scope and purport adumbrated in general terms by the United Nations Secretary-General in his Report, where it is pointed out that “suggestions have been made that the international tribunal should apply *domestic law* in so far as it *incorporates* customary international humanitarian law”. In the area under discussion, domestic law does not originate from the implementation of international law but, rather, to a large extent runs parallel to, and precedes, international regulation’.

<sup>867</sup> L Mlodinov, *How your Unconscious Mind Rules Your Behaviour* (First Vintage Books Edition 2013) 13.

<sup>868</sup> Article 36(8)(a)(i).

<sup>869</sup> Article 36(8)(a)(ii).

sophisticated legal solutions, it may at the same time be considered a weakness when looking at it against the backdrop of the practice in national courts, where cases are adjudicated in “culturally homogeneous settings”.<sup>870</sup> However, the notion of legal culture comprises a variety of facets. Almqvist refers to the concept of culture as embracing ‘(1) language skills, and tools (cultural equipment); (2) socio-cultural norms; and (3) culture-specific convictions about justice’,<sup>871</sup> which may serve as a starting point. It is self-evident that while some of these attitudes may closely resemble each other, or be congruent, others may be rather distinct, if not opposing.

The ICTY has emphasised its awareness of the impact of distinct legal traditions *inter alia* in the context of legal interpretation of provisions in *Delalić et al.*, where it recalled that the statutory rules of the tribunal ‘consist of a fusion and synthesis of two dominant legal traditions, these being the common law system (...) and the civil law system (...)’.<sup>872</sup> It further stressed that it has ‘thus become necessary, and not merely expedient, for the interpretation of their provisions, to have regard to the different approaches of these legal traditions’.<sup>873</sup> The Tribunal further ‘conceded that a particular legal system’s approach to statutory interpretation is shaped essentially by the particular history and traditions of that jurisdiction’.<sup>874</sup> Moreover, due to the fact that the objective of legal interpretation is to ‘discover the true purpose and intent of the statute in question, invariably, the search of the judge interpreting a provision under whichever system, is necessarily the same’.<sup>875</sup> The Tribunal thus stressed the need ‘to discuss some of the rules which could be usefully applied in the interpretation (...)’.<sup>876</sup> The following paragraphs provide a generic example of inter-cultural decision-making by reflecting a well-structured analysis concerning the means of interpretation available to the ICTY whilst taking into account the varying legal backgrounds of the bench. It is not particularly surprising that the bench was composed of representatives of the common and civil legal systems (ratio 2 to 1).

161. In every legal system, whether common law or civil law, where the meaning of the words in a statute is clearly defined, the obligation of the judge is to give the words their clearly defined meaning and apply them strictly. This is the literal rule of interpretation. If only one construction is possible, to which the clear, plain or unambiguous word is unequivocally susceptible, the word must be so construed. In cases of ambiguity, however, all legal systems consider methods for determining how to give effect to the legislative intention.

162. Where the use of a word or expression leads to absurdity or repugnance, both common law and civil law courts will disregard the literal or grammatical meaning. Under the golden rule of interpretation, the common law court as well as the civil law court will modify the grammatical sense of the word to avoid injustice, absurdity, anomaly or contradiction, as clearly not to have been intended by the legislature. (...)

163. The “teleological approach”, also called the “progressive” or “extensive” approach, of the civilian jurisprudence, is in contrast with the legislative historical approach. The teleological

<sup>870</sup> J Almqvist, ‘The Impact of Cultural Diversity on International Criminal Proceedings’, (2006) 4 Journal of International Criminal Justice, 745, 747.

<sup>871</sup> Ibid.

<sup>872</sup> *Delalić et al.* Trial Judgment (n 599) para 159.

<sup>873</sup> Ibid.

<sup>874</sup> Ibid.

<sup>875</sup> Ibid.

<sup>876</sup> Ibid.

approach plays the same role as the “mischief rule” of common law jurisprudence. (...)

164. The mischief rule (also known as the purposive approach), is said to have originated from Heydon’s case, decided by the ancient English Court of Exchequer in 1584. In Heydon’s case, four questions were posed in order to discover the intention of the legislation in question: (a) what was the common law before the making of the Act; (...). This approach to interpretation is generously relied upon in Continental and American courts. In the important case of *AG v Prince Ernest Augustus of Hanover*, Viscount Simonds spelled out what he regarded as the meaning of context in the construction of statutes, as follows: (a) other enacting provisions of the same Statute; (b) its preamble; (c) the existing state of the law; (d) other statutes *in pari materia*; (e) the mischief which the statute was intended to remedy. (...)

165. The method of judicial ‘gap-filling’, which may be adopted under the teleological interpretation of the civilian jurisprudence, would, under a common law approach, suggest two approaches. The first of these is to consider that, because the observation of the doctrine of the separation of powers preserves the judicial function to the judiciary, any judicial law-making would be an abuse of the legislative function by the judiciary. The second view is that courts are established to ascertain and give effect to the intention of the legislature. Filling any gap is also a means of securing this objective. The common law has rejected both views, despite an attempt to argue that the filling of gaps is part of the judicial role in the interpretation of statutes. The interpretative role of the judiciary is, however, never denied.<sup>877</sup>

Self-evidently, the bench draws on different concepts of interpretation specific to either common or civil law. In order to make a representative of the counterpart understand a concept, not manifest in his or her own jurisdiction, it is explained with reference to domestic case law. Although criticism may be voiced that such a thorough and systematic discussion of legal civil and common law concepts may not always be possible, this seems the only way to overcome the differences parting distinct families of law. If issues were identified and dealt with in a similar manner to the statement above and cultural differences acknowledged and solved at best, misapprehensions and conflicts would certainly be reduced. Ultimately, it must be recalled that cultural differences can have vast implications on the international criminal justice process, as well as for victims, perpetrators and witnesses. Every effort to contribute to more common understanding will enable judges to work together in order to create more sophisticated and reliable solutions as a response to complex legal issues.

#### 4.4.1 LANGUAGE AND MODES OF LIABILITY

*Decisions—interim and final—at the ICTY are issued in both English and French, but only one is the authoritative version and I am told that there are often not insubstantial variations in the two versions.*<sup>878</sup>

*Dealing with the language differences in international trials is perhaps the most critical aspect. Technology can certainly help in breaching the gap (I know of no judge in such a tribunal who does not acknowledge that he or she is totally at the mercy of the translator in the courtroom).*<sup>879</sup>

<sup>877</sup> Ibid paras 161-165.

<sup>878</sup> P M Wald, ‘Running the Trial of the Century: The Nuremberg Legacy’ (2006) 27 *Cardozo Law Review* 1559, 1571; Judge Wald also added: ‘In my own case, if it were drafted in French, it would have to await my final approval until translated into English (reportedly, some judges were willing to sign on to a document in a different language on faith; I was not). Often my collegial colleagues [sic] blinked first and were willing to approve a final version in English after our legal assistants mediated the discussion in both languages’.

<sup>879</sup> Ibid 1570.

As discussed above, a closer examination of the role of modes of liability in the sentencing process and the attempt to identify potential reasons for the discrepant approaches in this regard revealed *inter alia* that there are terminological issues arising in the context of a principal-accessory distinction and more notably in relation to the terms “direct” and “indirect” perpetration. While pertinent jurisprudence of the *ad hoc* tribunals proves that the term “direct” embraces only physical perpetration, “indirect” perpetration appears to denote non-physical contributions to a crime. However, there are also instances which prove that the terms “direct” and “indirect” are not as clearly defined as assumed.

In *Semanza*, the ICTR Trial Chamber clarified that instigation was a mode of indirect perpetration by stating that ‘[t]he Accused’s acts of complicity, aiding and abetting, and instigating are crimes of indirect participation’,<sup>880</sup> thus subsuming instigation under the head of indirect perpetration. Notwithstanding that, the majority seems to regard aiding and abetting as the only mode of liability, belonging to the group of ‘indirect participation’. Accordingly, there is a tendency to regard aiding and abetting as the sole mode of liability, which is inferior to the others. Paradoxically, the gradation of blameworthiness, as expressed by both *ad hoc* tribunals includes the words “physical”, “active” or “direct” involvement, which implies that “hands-on” perpetration is viewed as the mode of liability, reflecting the highest culpability. This is again in line with the literal meaning of the words direct and indirect as mentioned above – direct perpetration includes only direct contributions, and thus hands-on perpetration, while indirect perpetration embraces all forms of non-physical perpetration.

It is obvious that terminological misunderstandings seem to be in place when it comes to the evaluation of labels, which are part of a doctrinal theoretical framework, for the purpose of sentencing. Despite potential clashes of doctrines arising from the common-civil law contrast, it appears that these misunderstandings may also be caused by translation issues, judicial lack of command of English language skills, and so on.

Judge Wald pinpointed the issue of multi-language translation in international proceedings by providing a very pictorial description of events, observing that ‘[t]he ICTY courtrooms are supplied with first-rate translators who provide the judges with instantaneous translation through high-tech audio, supplemented by close-captioned television monitors in English, French, and Serbo-Croat – the native language of most defendants, witnesses, and many defense counsel’.<sup>881</sup> She then went on to describe the issue of command of language of the judges as follows:

In the Trial Chamber in which I served the presiding judge spoke in French; I spoke in English with limited French; the third judge alternated between the two. Typically the Prosecution asked a question in English, pausing while it was translated to the witness in Serbo-Croat, whose answer in Serbo-Croat was translated into both French and English for the Court and Prosecution.<sup>882</sup>

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<sup>880</sup> *Semanza* Judgment and Sentence (n 149) para 557.

<sup>881</sup> Wald (n 878) 1571.

<sup>882</sup> *Ibid.*

Bohlander notes that ‘the languages spoken by the judges do not correlate directly to those spoken by their assistants or clerks’.<sup>883</sup> He further stresses that ‘we need to remind ourselves that it is the judges who (should) decide which sources merit inclusion as proper sources, not their assistants’.<sup>884</sup> By conducting a survey among the 35 legal officers employed by the ICC in order to identify the languages used by them and comparing them to the languages spoken by former and current judges, he observed:

It becomes apparent (...) that there appears to exist a definite filtering effect from the array of languages spoken by legal officers, through the languages used by them for research, for communication with the individual judges they worked for and finally the Chamber as a whole. Most curious is the apparent self-censure by some legal staff with regard to which languages they use for research. At the final stage, the language that is left is mostly English and some French. With mixed background panels, it would almost appear that English trumps all other languages as long as there is one judge on the panel who does not speak any language but English.<sup>885</sup>

This concern is also supported by an answer given by an ICTY judge in the context of a survey conducted by Terris and others *inter alia* about the challenges of linguistic diversity.<sup>886</sup> The ‘non-native English-speaking polyglot’ said that it would be reasonable to require judges to speak at least two of the official working languages.<sup>887</sup> In this context, he underlined the detriment of the help from legal assistants by observing: ‘When you have two languages only, you should select candidates who have at least a good basic knowledge of both, otherwise it can’t work. Sometimes, for judges who speak just one language, I have the impression that they are maybe led to a certain extent by their bilingual assistants’.<sup>888</sup>

Moreover, when recalling that, as discussed in the previous chapter, the terms direct and indirect participation, which form in relation to the legal label the distinguishing feature of a principal-accessory distinction, are understood in at least two different ways, linguistic misunderstandings may lie at the core of this issue. In addition, domestic concepts, such as Claus Roxin’s control theory<sup>889</sup> used by the ICC in order to distinguish between principals and accessories, may simply not exist in other legal systems. It must be recalled that language is frequently inextricably linked to the articulation of specific legal doctrines of a domestic legal system, which may not be “readily” translated.<sup>890</sup>

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<sup>883</sup> M Bohlander, ‘Language, Culture, Legal Traditions, and International Criminal Justice’ (2014) 12 Journal of International Criminal Justice, 491, 498.

<sup>884</sup> Ibid.

<sup>885</sup> Ibid 499.

<sup>886</sup> D Terris and others, *The International Judge: An Introduction of the Men and Women Who Decide the World’s Cases* (OUP 2007) 74.

<sup>887</sup> Ibid.

<sup>888</sup> Ibid.

<sup>889</sup> See Roxin (n 515).

<sup>890</sup> R Mackenzie and others, *Selecting International Judges, Principle, Process and Politics*, International Courts and Tribunals Series (OUP 2010), 43.

Judge Patricia Wald describes a scenario corroborating this issue, which causes the inconsistent use of terminology:

[I]f the judges had to huddle together to make a ruling on some procedural matter, we usually had to do so in vaguely imperfect English with asides in French. In Chambers' deliberations – again without translators – it was perceptibly more difficult to debate or argue; there was first the problem of finding the counterpart words in the other language for what you wanted to say, but, perhaps more basically, finding the contextual analog in a different legal system for the procedure or the concept you want to discuss – which in the end might not even exist outside your own legal system.<sup>891</sup>

Although Judge Wald's observations are linked to procedural law, it is conceivable that such a scenario may also occur in relation to questions of substantive law, such as the attribution of modes of liability. As it becomes apparent, the potential reasons for inconsistent approaches in this regard may differ, or even overlap. However, the inaccurate use of terminology is certainly more likely to occur in an international setting, where the majority of judges do not speak their mother tongue and may therefore be prone to misconceptions caused by a lack of language competence. This may then itself, or in combination with the imprint of the judges' legal cultural influences, cause misunderstandings.

#### 4.4.2 LEGAL CULTURAL BACKGROUND – CIVIL VS COMMON LAW

One of the most obvious influences in this regard is a legal representative's common or civil law background respectively,<sup>892</sup> as the "overriding role of geographical representation" is peculiar to international courts and tribunals.<sup>893</sup> However, one can distinguish between two main families of law – civil and common law, or Romano-Germanic and Anglo-Saxon law.<sup>894</sup> Despite the fact that both belong to the 'larger Western law family',<sup>895</sup> both possess distinguishing features, such as the different position of the judge in the trial, which is probably the most prominent difference. Nevertheless, a distinction based on restricted reference points, or characteristics, needs to be treated with caution, as their 'summary character bears in itself potential for distortion by oversimplification'.<sup>896</sup> As far as the role of modes of liability in the sentencing is concerned, they differ categorically, as has been addressed in previous chapters. Given the fact that the majority of judges have been educated either in a civil or common law jurisdiction, one could assume that this could cause conflicts in the application of concepts, emanating from domestic law. Bohlander notes this common and civil law divide 'results in the clash of doctrines and sometimes fundamental attitudes inherited by the representatives of the jurisdictions making up the spectrum of opinions at any international criminal court'.<sup>897</sup> This could

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<sup>891</sup> Wald (n 878) 1571.

<sup>892</sup> This categorisation should merely serve as a rough guidepost. As Bohlander denotes, 'There is no such thing as "the" common or civil system. Over the course of history the countries belonging to each of those families of legal systems have all given their idiosyncratic national cultural imprint to any template they may have inherited through political affiliation or colonial influence'. Bohlander, 'Language, Culture, Legal Traditions' (n 883) 493.

<sup>893</sup> Mackenzie and others, *Selecting International Judges* (n 890) 60.

<sup>894</sup> Others are religious and mixed jurisdictions.

<sup>895</sup> Terris and others, *The International Judge* (n 886) 248.

<sup>896</sup> Bohlander, 'Language, Culture, Legal Traditions' (n 883) 493.

<sup>897</sup> *Ibid* 495.

imply that judges may be inclined to adhere to legal skills developed in the jurisdiction they represent, leading to conflicts in their application.

That the common-civil law divide is one of the most prominent issues and potentially perceived as impeding a fair trial if no judicial balance is maintained in this regard, was demonstrated in the decision concerning the request of Katanga for re-composition of the judicial bench.<sup>898</sup> The ground for the request for re-composition of the bench was that it did not include a judge with a common law background. The defence counsel submitted that ‘the current composition of the bench’<sup>899</sup> was ‘too narrowly drawn’<sup>900</sup> in that it did not include a ‘judge with a common law background’.<sup>901</sup> He then drew the attention to the objectives of Article 36(8) of the Statute, arguing that the provision ‘would be void of any meaning if judges from similar legal systems were then concentrated in the same Chamber’.<sup>902</sup> In support of this submission it was stressed that ‘in particular, common law and civil law traditions operate in a fundamentally different manner’.<sup>903</sup>

According to D’Ascoli, up to 2010, the judicial bench was in 82 cases composed of a majority of civil law judges at the ICTY and in 53 at the ICTR respectively. In comparison, a majority of common law judges sat on the bench in 34 cases at the ICTY and in eight cases at the ICTR.<sup>904</sup> Therefore, one could be inclined to assume from such numbers that, in a majority of the judgments rendered by the *ad hoc* tribunals, a majority of civil law judges composed the judicial bench. If transferring this chain of reasoning to the provisional conclusion that the *ad hoc* tribunals show a preference for a differentiated approach, it may be inferred that such preference could be connected to their civil or common law origin respectively. However, some judges may have practised in civil law countries where a unitary approach was embraced, such as Denmark, Norway or Italy. Others may in theory not have had any experience practising in one of the main legal traditions. After all, the requirement to combine both main legal traditions and their specificities appears to be one of the major challenges posed.<sup>905</sup>

Accordingly, an examination of the previous judicial/legal experience of the judges who composed the bench in the cases where a differentiated approach was embraced (see Table 4, Chapter 3) may contribute to greater understanding as to why the differentiated approach was taken and, more specifically, it might provide an answer to the question as to whether there is a correlation between a judge’s background (civil-common law/differentiated-unitary) and the differentiated approach

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<sup>898</sup> *Prosecutor v Katanga and Ngudjolo Chui* (Decision concerning the Request of Mr Germaine Katanga of 14 November 2008 for re-composition of the bench of Trial Chamber II), Katanga and Ngudjolo (ICC-01/04-01/07) 21 November 2008.

<sup>899</sup> *Prosecutor v Katanga and Ngudjolo Chui* (Katanga Defence observations on the composition of the bench) ICC-01/04-01/07 (14 November 2008) 3.

<sup>900</sup> *Ibid.*

<sup>901</sup> *Ibid.*

<sup>902</sup> *Ibid.*

<sup>903</sup> *Ibid.*

<sup>904</sup> D’Ascoli (n 70) 258.

<sup>905</sup> Terris and others, *The International Judge* (n 895) 17.



followed. For the purpose of this work, a distinction is made only within the context of a civil-common law dichotomy.

#### 4.4.3 PROFESSIONAL EXPERIENCE OF ICTY AND ICTR JUDGES IN THE LIGHT OF THE PREVAILING DIFFERENTIATED APPROACH

Before taking a closer look at the professional background of ICTY and ICTR judges, it is useful to provide a brief outline of the requirements as set out in the statutes of the *ad hoc* tribunals<sup>906</sup>. Article 13 of the ICTY Statute requires permanent and *ad litem* judges to be ‘persons of high moral character, impartiality and integrity’. Moreover, they shall be in possession of the ‘qualification required in their respective countries for appointment to the highest judicial offices’. Thus, as regards the ‘overall composition of the bench’, emphasis shall be added to the criminal and international law experience of the judges, ‘including humanitarian law and human rights law’. Article 12 of the ICTR is almost identical by providing the same selection criteria. As can be observed in the context of the required qualifications, the reference to ‘respective countries’ implies a variety of requirements for appointment to the highest judicial offices in their respective domestic systems. As Bohlander stresses, these may differ immensely:

It cannot be accepted that if one country, for example, allows people without any legal training at the age of 18 to be appointed their Supreme Court bench, while others require an academic education and years of judicial experience, the lower standard will in effect prevail if that country’s 18 year-old candidate for some obscure political reasons manages to attract more votes in the General Assembly than a seasoned trial judge of 20 years’ standing with added knowledge of international law. This is, admittedly, an extreme scenario, but it represents the bandwidth of possibilities under the existing law and practice.<sup>907</sup>

Indeed, this statement pinpoints the issue of diversity relating to the experience of international judges. That is to say, in terms of the domestic professional experience of international judges, there are several paths to a judicial office at the *ad hoc* tribunals, which do not seem conditional upon each other. This means that as a result of these very narrowly articulated selection criteria, some judges may have significant domestic judicial experience, while others do not. Some may have focused on criminal litigation in their previous professional careers, while others did not. To articulate it more specifically: the diversity of judges spans from non-judicial experience to senior trial experience in complex criminal cases over decades. Self-evidently, although ‘some people have shown to be very quick learners’,<sup>908</sup> it may be regarded as common sense to see that the former coupled with diverse international (criminal) law experience suits the needs of international criminal law probably much better. Moreover Articles 13 and 12 respectively of the Statutes of the *ad hoc* tribunals are silent as to

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<sup>906</sup> A thorough discussion exceeds the scope of this work. See particularly, M Bohlander ‘The International Criminal Judiciary – Problems of Judicial Selection, Independence and Ethics’ in M Bohlander (ed) *International Criminal Justice: A Critical Analysis of Institutions and Procedures* (Cameron May 2007) 325 seq. See also Mackenzie and others, *Selecting International Judges*, (n 890) and Terris and others, *The International Judge* (n 857).

<sup>907</sup> Ibid 60.

<sup>908</sup> Ibid 20.

pertinent language requirements. Table 9 below provides an overview of the domestic professional background of certain former and current judges.<sup>909</sup> This selection is based on Table 3 in Chapter 3, which identified the composition of the bench in cases where a differentiated approach was not only considered but also “directly” and “indirectly” applied. Hence, in these instances, the modes of participation demonstrably influenced the sentence in that they either augmented or extenuated the penalty. It is therefore interesting to extract the information related to the composition of the bench and to identify the judges’ professional experience and whether this experience is predominantly governed by common or civil law. The selection of judges of respective jurisdictions is therefore confined to those displayed in Table 3 in Chapter 3.<sup>910</sup>

The second column identifies the legal family of the jurisdiction represented. Column three goes further by specifying the sentencing approach in relation to principals and accessories as embraced by the respective jurisdiction the judge represents. Thus, a distinction is only made between the unitary and differentiated approaches respectively. As mentioned before, for the purpose of this work, a jurisdiction may only be considered to embrace a differentiated approach if it expressly sets out mandatory mitigation for accessories. Accordingly, all other approaches, including cases where discretionary mitigation in relation to accessories may be invoked by judges, are considered to constitute unitary paths. The fourth column identifies judicial experience. This includes only domestic experience; international judicial experience is disregarded.<sup>911</sup> Finally, the fifth column entails relevant<sup>912</sup> extracts of the judges’ CVs to allow for a more coherent account of a judge’s relevant professional experience.<sup>913</sup>

First and foremost, it can be observed more generally that the professional qualifications of judges are not only quite diverse, but also denote very different levels of judicial experience, spanning from non-existent to extensive. While some judges do not have a criminal judicial or judicial background at all, others have national criminal judicial experience, even coupled with international (criminal)

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<sup>909</sup> Due to the fact that the *ad hoc* tribunals do not anymore provide biographies of former judges on their websites, some biographical notes had to be obtained from other sources (exclusively UN sources and in very rare instances other official sources), rendering them different in relation to structure and attention to detail. Where there is no information as to the origin of the curriculum vitae (CV), it is obtained from the ICTY website (biographical notes).

<sup>910</sup> Another reason for confining the selection of judges to those in Table 3 is the high number of former and current ICTY/ICTR judges. Due to the fact that the biographical notes of the former are no longer accessible on the ICTY and ICTR websites, it is impossible to find official/original CVs with similar attention to detail. A large number of biographical notes may not be found at all, rendering a complete compilation impossible.

<sup>911</sup> Due to the fact that it is not always obvious whether a judge with judicial experience also has experience in criminal law matters, reference to criminal experience has only been made where express reference thereto is included in the accessed CV. *Vice versa*, judicial criminal experience is not excluded where only judicial experience is referred to in column three.

<sup>912</sup> The extracts are based on accessible CVs. They are neither meant to reflect the complete professional education of a respective judge, nor shall they provide a complete, coherent account of a judge’s achievements. They should merely serve as indicators for his/her criminal (judicial) experience, or experience in other relevant fields. The information is limited to that which publicly accessible and further restricted to information from a specific, public CV. Accordingly, where no judicial experience is expressly stated, it will be inferred that a judge has no previous domestic judicial experience.

<sup>913</sup> Fields marked with \* indicate that no public CV has been found.

judicial experience. The latter of these clearly forms the minority in this instance. Some are reputable academics in the field of international law; some have judicial experience but not criminal. Others appear to have a background restricted to public international law, where no previous criminal experience is immediately visible. The experience of some judges seems to revolve mainly around politics and international relations. While such diversity may constitute a valuable contribution to the decision-making process, deliberations may not only require ample time and good cooperation in order to enable judges to discuss adequately each point of law addressed, they may even be impeded by such an imbalance of practical judicial experience. As Bohlander notes, there is a ‘worrying tendency at the international level to disregard the experience of practitioners and legal policy makers gained from domestic context’.<sup>914</sup> A lack of judicial experience may not necessarily always pose an obstacle to the ability to apply law, particularly if the person has extensive academic legal experience and the ability to grasp and apply new legal concepts competently. Although domestic criminal judicial experience may enhance international judicial skills, it can also be argued that previous domestic experience potentially “preoccupies” international judges, as discussed in the context of the psychology of law-making, thereby hampering judges’ ability to respond to the unique nature of international crimes.

The table reveals that judges educated in civil law countries clearly outnumber judges with common law backgrounds. An important question raised, therefore, is whether the composition of the bench and potentially the imbalance of judges’ legal backgrounds may impact the role attributed to modes of liability in view of the sentence pronounced. Having said that, a closer look at the sentencing approach reveals that a high number of the enumerated civil law jurisdictions, such as Norway, Russia, Austria and Denmark, do not embrace a differentiated approach, but rather a unitary approach. Therefore, with reference to the sentencing approach, it can be observed that the judges representing jurisdictions opting for a unitary approach strongly outnumber judges from countries where a differentiated approach is entrenched. The number of the former is more than twice as high as the number of the judges representing jurisdictions opting for a differentiated approach. Although it might be doubtful whether the respective sentencing approach is relevant where international judges did not serve as domestic judges (or at least as defence counsel), it can be observed that even when only including those judges with domestic judicial experience, the number of judges from unitary-favouring countries constitute the vast majority. This observation may not be true for all former and current *ad litem* and permanent judges of the *ad hoc* tribunals. Notwithstanding that, due to the fact that the judges represented in Table 9 are those who composed the bench when a differentiated approach was followed, one could infer that the approach specific to their home jurisdiction may not have influenced them (at least not when the bench was by majority composed of judges from unitary-favouring

<sup>914</sup> Bohlander, ‘The International Criminal Judiciary’ (n 906) 60.

countries), at least not primarily. Again, this is of course also dependent on other factors,<sup>915</sup> such as the specific ratio of civil/common, differentiated/unitary jurisdictions represented on the bench.

This raises the question as to what leads judges to follow a differentiated approach not expressly set out in the statutory instruments (neither materially, nor procedurally manifest) of international judicial institutions. When looking again at Table 3 in Chapter 3 in the light of the above considerations, it becomes clear that, in a large number of cases, judges with civil law backgrounds composed the majority of the bench. In fact, there was a majority of civil law judges in 22 cases, and a majority of common law judges in nine cases.<sup>916</sup> In the light of the above discussion, however, when placing the focus on the sentencing approach of the jurisdiction a judge represents, the ratio changes in that not only do the overwhelming majority of judges represent countries following a unitary approach, but they also compose the bench by a majority in most cases, despite the fact that a differentiated approach has been expressly followed in these cases. Interestingly, one of the few instances where the bench was mainly composed of judges representing civil law countries, embracing a differentiated approach, was the *Vasiljević* Appeal judgment,<sup>917</sup> which served in this regard as the most prominent precedent in subsequent case law. Could the discrepancies in relation to the professional judicial experience of judges have led some of them to rely heavily on precedents in relation to complex issues of law, and thus explain the development of an alleged differentiated approach in the sentencing practice of the *ad hoc* tribunals? In view of these diverse qualifications of judges, it does not appear surprising that the complex theoretical doctrines of attribution as well as their place within the sentencing framework seem to cause difficulties.

#### 4.4.4 PROFESSIONAL EXPERIENCE OF ICC JUDGES

For the sake of completeness, a brief outline of the selection criteria for ICC judges is provided. However, due to the low number of judgments rendered by the ICC it is not possible to examine whether there is a correlation between the legal cultural background of ICC judges and the approach taken in relation to the treatment of accessories. Therefore the professional background of ICC judges is not examined here. What can be certainly concluded in relation to the prevalent approach is that the

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<sup>915</sup> However, it must be emphasised that several factors may distort a proper account of the situation. For instance, the selection of judges limited to those enlisted in Table 4 of Chapter 3 and accordingly Table 9 does not provide an overview of all judges who have ever served as judges at the *ad hoc* tribunals. Moreover, a decisive circumstance, or at least an indicator for a potential correlation between the judges' legal background and the approach taken, would be a bench composed of civil law judges from countries favouring a differentiated approach, where the same approach was embraced. Accordingly, such a list does not provide a basis for such inferences. Other considerations include criminal experience. If, as the table above reveals, a judge with domestic judicial experience served as a judge only in constitutional cases, one could assume (if there is no experience as defence counsel, or prosecutor) that the judge has not previously been faced with the consideration of penalties for principals and accessories to an offence. In such instances the legal background of a judge may even be disregarded.

<sup>916</sup> Cases where individuals were tried together and the bench was composed therefore identically have only been counted once.

<sup>917</sup> *Vasiljević* Appeal Judgment (n 1).

*Katanga* Judgment has ultimately made clear that the ICC intends to distance itself from the differentiated approach that is accommodated at the *ad hoc* tribunals.

In contrast to the *ad hoc* tribunals, the ICC specifies language criteria in Article 36(3)(c)<sup>918</sup> of the Rome Statute. First, in relation to professional qualification and experience, there are the general requirements that ‘judges shall be chosen from among persons of high moral character, impartiality and integrity, who possess the qualification required in their respective States for appointment to the highest judicial offices’. Again, this may cause significant discrepancies in relation to the level of judges’ previous experience. Second, judges ‘must be drawn’ from two lists, namely List A and List B, enumerated in Article 36(3) *lit b* (i) and (ii). Accordingly, a judge is required either to have a criminal law background, be it as judge, prosecutor or defence counsel, or to have ‘extensive experience in a professional legal capacity, which is relevant to the judicial work of the Court’. The latter role appears difficult to define. In the past, there have been countries which defined this criterion as not necessarily requiring professional experience as a practising lawyer.<sup>919</sup> The implications of this low threshold may be regarded as self-evident when considered in the light of the application of sophisticated domestic doctrines on an international level. This is supported by the view of several interviewees in a survey conducted by Mackenzie and others concerning *inter alia* the career profiles of judges of the ICC: ‘This tension between common law and civil law perspectives was evident across the board. Several interviewees held the strong view that in addition to substantive legal knowledge, international courts need judges who have practical judicial experience, particularly in the ICC’.<sup>920</sup> Furthermore, there is a view that domestic judicial experience may be a disadvantage. One interviewee said that ‘international courts are different from national courts and that national judges operating in an international environment are limited by their conception of their role and what a national court does; this may “inhibit their vision” and their ability to think laterally about international law’.<sup>921</sup> Finally, judges with both solid domestic criminal law experience as well as international experience, account for the smallest part.<sup>922</sup>

#### 4.4.5 PRELIMINARY CONCLUSIONS

This chapter sought to explore the reasons for pertinent practice. This has been done on different levels. First, the psychology of law-making was addressed within the context of the legal cultural background of judges. As mentioned in the foregoing chapters, the civil-common law dichotomy plays a central role in that it may in many instances be an indicator for the approach manifested in the respective jurisdiction. Nevertheless, the comparative study in Chapter 2, combined with the findings

<sup>918</sup> ‘Every candidate for election to the Court shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court’.

<sup>919</sup> Mackenzie and others, *Selecting International Judges* (n 890) 50, 51.

<sup>920</sup> *Ibid* 54.

<sup>921</sup> *Ibid* 56.

<sup>922</sup> Based on the official ICC biographical note on the ICC website.

of Table 3 (Chapter 3) and Table 4 (Chapter 4) reveal that the civil-common law dichotomy is a slightly overestimated cause for the unitary-differentiated divide in international criminal law. In fact, a large number of civil law systems embody a unitary approach akin to the traditional common law approach. Therefore some civil law judges come from civil jurisdictions embracing a unitary approach, but the differentiated approach nevertheless prevails.

At the outset, the question was posed whether judges predominantly rely on differentiated theory as a result of analogical reasoning, in that judges recall their domestic judicial experience in this regard. As Spellman denotes: ‘When judges know more about some issues than others, or in the past have drawn analogies to one kind of outcome, they might be more likely to unintentionally find in a direction consistent with past judgments’.<sup>923</sup> These subconscious mechanisms may influence the path a judge may take throughout decision-making, as long as there is ample judicial discretion in place (ie opting for a differentiated or unitary approach). One cannot oppose the view that judges are also humans, and therefore also subject to subconscious trains of thought, which may be potentially influential. Moreover, one can argue that not all judges have previous domestic judicial experience and therefore may not be affected by the above; it should be recalled that experience in this regard may also be gained by criminal barristers/lawyers. Accordingly this argument is not confined to previous judges only and thus widens the group potentially affected. Given the fact that this study has shown that by now a pattern has emerged in that a differentiated approach has established itself in the practice of the *ad hoc* tribunals, and thus secured a more or less stable position within international criminal law, the analogies international judges may draw on may also be international judgments, such as *Vasiljević*, which was rendered at a time when such a pattern had not yet developed. Thus, as discussed above, one could assume that at the time of *Vasiljević*,<sup>924</sup> given the lack of sufficiently established case patterns, judges may have resorted to analogical reasoning with reference to domestic judgments. In more recent years, since a solid body of international decisions is in place and as a result a pattern has already developed, analogical reasoning may have taken place against the backdrop of previous international decisions marked by a differentiated approach, such as *Vasiljević*<sup>925</sup> and subsequent cases. This may explain the frequent cross-references to the case law of the ICTY and ICTR in relation to the alleged principle that aiding and abetting warrants a lower sentence. While other factors, such as professional experience, language issues and resulting misapprehensions may have cumulatively contributed to the transfer and establishment of the alleged principle, the chapter has shown that the civil-common law dichotomy does not appear to be a main influential factor in this regard. As Table 9 reveals, many civil law countries do not follow a differentiated approach in that mitigation for accessories is merely discretionary, as opposed to mandatory. Thus, the civil or common law background of a judge may not be a significant factor. A judge who represents a civil

<sup>923</sup> Spellman (n 830) 162, 163.

<sup>924</sup> *Vasiljević* Appeal Judgment (n 1).

<sup>925</sup> *Ibid.*

law country which embraces a unitary approach, may, for instance, not have any practical legal experience, but instead may be a leading scholar in the field of international (criminal) law. In such an instance, one may perhaps preclude the possibility that the judge has previously practised law as legal counsel or a domestic judge and/or was as such influenced by a certain approach.

However, irrespective of the cultural background, the expressive capacity of such labels should be questioned. As this study revealed, judges at the *ad hoc* tribunals have shown an affinity for the differentiated approach, which also includes judges from a common law background. This poses the question whether judges in unitary systems, who have the discretion to punish aiders more mildly, are still inclined to make use of this discretionary power. Although, as addressed above, a study of the sentencing practice of a traditional common law legal system, such as England, in this regard, would help to answer the question, it would nonetheless exceed the scope of this work. A potential explanation may denote the expressional capacity of liability labels, which may influence the culpability level one naturally ascribes to liability modes. As addressed throughout this work, it is striking how frequently judges resorted to words such as “active”, “physical” or contrary to the “indirect” acts to describe the conduct of an accused. While “indirect” characterises an accessory, the features “active” or “physical” will always directly relate to a principal perpetrator (potentially also to a member of a JCE or a co-/indirect-perpetrator). As addressed in previous chapters, judges have used such features as aggravating or mitigating factors respectively. In the face of this reality only the abolishment of these terms may guarantee an assessment of the specific criminal conduct entirely detached from apt, socially imprinted connotations. Apart from the expressional capacity of pertinent legal terminology, cultural social imprints may also lead us to perceive a person pulling the trigger, and thus the physical perpetrator, as more blameworthy. The question is whether this, probably subconscious perception, may be defeated by recalling the unique dynamics of international crimes. Feasible sentencing guidelines, embodying black letter attribution provisions adjusted to the peculiarities of international crimes, seem to be the only option to overcome such preconceptions. In the light of the above, language issues and varying previous legal professional experience may not be the primary reasons for the *status quo* – they may nevertheless contribute to confusion and foster opposing statements.

These suggestions may merely serve as potential indicators, as a thorough study would exceed the scope of this work. Interdisciplinary research in this regard may contribute to more understanding of the challenges faced by the dynamic, multifarious nature of international criminal justice.

#### 4.4.6 THE PRINCIPAL – ACCESSORY DISTINCTION AS SENTENCING DETERMINANT

The objective of this work has been to analyse coherently the role of modes of liability within the international sentencing framework and, more precisely, whether the normative distinction between

the direct or principal perpetrator and the secondary or indirect perpetrator is merely of a terminological nature or whether is it linked to corresponding penological consequences. In order to answer this question, the study was broadly divided into three parts, namely: (i) the introduction and identification of the problem against the backdrop of pertinent practice and a comparative study of domestic practice in this regard, in order to allocate and understand the concepts applied by international courts and tribunals; (ii) jurisprudential and quantitative analyses (the latter was conducted in order to verify results of the jurisprudential analysis); and finally (iii) exploration of reasons for pertinent developments (why do international judges have an affinity to opt for a differentiated approach?).

This study has revealed that recent discussions concluding that aiding and abetting does not *per se* attract lower sentences, appear to be rather perfunctory. The findings of the jurisprudential study, which have largely been verified by the quantitative findings, reveal that, despite voiced criticism and statements relating to the irrelevance of a differentiation of liability modes for sentencing purposes, the *ad hoc* tribunals clearly opt for a differentiated approach. Thus, it can be seen that, in the practice of the *ad hoc* tribunals, aiders and abettors are perceived as less blameworthy, which is ultimately reflected in the sentence. Despite the difficulty in discerning a clear approach in relation to most hybrid tribunals, regression analysis has indicated that the SPSC and the WCCBiH also punish aiders more mildly than offenders convicted on all other modes. The ICC, as discussed in the jurisprudential analysis, initially also embraced a differentiated approach, distancing itself therefrom in its latest judgment. Thus, the implications of modes of liability are not merely terminological but in fact impact on the punishment. This may also explain the ample discussions relating to the differentiation of modes of liability at the attribution stage. If modes of liability did not have any penological implications, why would judges embark on such time-consuming attribution procedures, when they could instead describe the specific criminal conduct and judge upon it?

Nevertheless, it can be observed that the practice of hybrid judicial institutions is not greatly affected by the practice of the *ad hoc* tribunals as regards the manifestation of a differentiated approach. This may in some instances be down to the fact that, in many cases, no reference is made to the mode of liability *per se*, let alone to its role at the sentencing stage. Although an analysis of the sentencing practice of the SCSL has clearly shown that it has been influenced by the *ad hoc* tribunals, and now probably more so by that of the ICC, it has set an impressive example, by scrutinising the frequently cited principle in *Vasiljević*,<sup>926</sup> thereby escaping the overreliance on “precedent” and the danger of citing wrongly established principles. Whether or not the SCSL will follow a unitary approach remains to be seen. It is immensely difficult to discern an approach in relation to the practice of the ECCC as it has never embarked on an elaborate discussion in this regard; nor has it made an express reference in

<sup>926</sup> *Vasiljević* Appeal Judgment (n 1).



either direction. The practice of the SPSC does not reveal transparency in relation to the weight accorded to different modes of liability. Despite the fact that the SPSC *inter alia* consult both the jurisprudence of East Timorese Courts and the Indonesian Penal Code. The latter embraces a differentiated approach by providing that the ‘punishment of an accessory shall be mitigated by one third from the maximum of the basic punishment’, the SPSC lack not only 'clarity' concerning the legal reasoning in attributing responsibility, but transparency in respect to the legal value of modes of liability for sentencing purposes. Considering that a differentiated theory is embodied in the Indonesian Penal Code, one may be inclined to assume that accessories receive milder punishment. After all, as regards the practice revolving around modes of liability and sentencing, the SPSC do not seem to be heavily influenced by the *ad hoc* tribunals or the ICC. If this were the case, more express references could be found in the jurisprudence of the SPSC. Similarly, the SICT Statute stipulates *inter alia* the resort to national law, which sharply differentiates between principals and accessories. Thus, the latter may be considered principal perpetrators under two circumstances provided for in the code. Notwithstanding that, no generic legal consequences relating to the penalty are in place. Moreover, the *Dujail* case did not provide more clarity in this regard. It can be observed, therefore, that the impact of the *ad hoc* tribunals concerning the role of modes of liability in sentencing is rather limited. At the time of writing, the STL has not yet rendered judgment on its first case, which commenced in 2014. The Statute of the STL specifically provides that, amongst others, the rules concerning the punishment for specific acts as well as the rules of criminal participation are applicable at the STL and thus Article 220 of the Lebanese Criminal Code, which differentiates between principals and accessories, provides a source of law for the STL. The approach of the Lebanese Criminal Code could be referred to as a modified differentiated or combined unitary differentiated approach as it distinguishes between two kind of accessories; while those accomplices ‘without whose assistance the offence would not have been committed shall be punished’ as principals, all others receive penalties which correspond to the principal’s penalties in that they are milder. However, also in the case of the STL, it remains to be seen which approach will be taken, whether the issue will be broached at all in detail, and whether the *ad hoc* tribunals or the ICC will play an influential role. Moreover, despite the vast number of WWCBiH judgments consulted, it can be observed that the distinction between principals and accessories does not entail an equally prominent position at the WWCBiH as it occupies at the *ad hoc* tribunals. Both the SFRY CC and the CC BiH embrace a unitary approach, which may be the reason for the limited attention paid to the principal-accessory distinction evident in international criminal practice. Although terminological distinctions are made, legal implications for sentencing purposes are not expressly mentioned. Moreover, the terminology utilised by judges in the context of a principal-accessory distinction may in some instances reveal that accessories are perceived to be less blameworthy. Again, this suggests that, despite the fact that a unitary approach may be statutorily manifest, a differentiated approach may be followed without violating rules, thus leading to inconsistency. Notwithstanding that, the judgments lack transparency in

this regard and the influence of the *ad hoc* tribunals is very limited. Finally, in relation to the Kosovo Panels, which were not analysed thoroughly due to limited access to judgments, a clear approach cannot be deduced either.

Ultimately, the final part of this work, which embarked on a partially interdisciplinary study by considering psychological challenges in the decision-making process on an international level, set out various potential causes, which may be responsible for the prevalence of the differentiated approach and thus the establishment of a principle of mitigation as referred to by Olásolo<sup>927</sup> in international criminal law. There are various influences, such as the legal cultural background, the legal professional experience and analogical reasoning, which are inevitably attached to the international nature of the tribunals and courts and multifarious trials and which may have encouraged a reliance on previous decisions and the establishment of this alleged “principle”. Notwithstanding the existence of factors which may have encouraged the cross references of the tribunals to previous (flawed) decisions such as *Vasiljević*,<sup>928</sup> it remains one of the main characteristics of complex, international trials with international jurists that legal concepts are regularly placed under close scrutiny, resulting in critical sophisticated discussions; but why has this high standard of care not been applied when relying on *Vasiljević*? It stands to reason that – as the jurisprudential and quantitative analyses both suggest – aiding and abetting is generally and viewed as a mode denoting a lower degree of culpability.

It has frequently been argued that labels are not supposed to dictate a level of culpability and that the specific criminal conduct of the accused should be assessed on a case-by-case basis. Notwithstanding that it is argued against the backdrop of the above considerations, that as long as liability labels remain in place as they are now, and as long as the terminology is maintained by international legal instruments while not providing black letter provisions restricting ample judicial discretion in this regard, it simply does not seem possible to disregard the implications of culpability as embodied by their expressional capacity. An accessory is an accessory – not only is the liability of an accessory merely of a derivative nature in most legal systems, but the expressional capacity of the term accessory has strongly rooted connotations in the day-to-day lives of most if not all societies, which speaks for itself. Notwithstanding that, the differentiation between liability modes *per se* only makes sense if they have a value for the sentencing process.

#### 4.4.6.1 A DIFFERENTIATED APPROACH – BASED ON “PRECEDENT”?

The jurisprudential and quantitative studies suggest that the differentiated theory is ostensibly practised. Yet a closer look reveals a minority of opposing approaches and rather questionable justifications allegedly supposed to legitimise the use of a principal-accessory distinction. In the face

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<sup>927</sup> See, for example, Olásolo, *Responsibility of Senior Political and Military Leaders* (n 4).

<sup>928</sup> *Vasiljević* Appeal Judgment (n 1).

of this reality, inconsistencies and confusion as to the legitimatisation to follow a differentiated approach in international criminal justice are inevitable.

As a result, this may create a significant problem, leading to the application of wrongly established and potentially incorrectly applied principles. Such misapprehensions, irrespective of their origin, can have vast implications, if they result in fragile, potentially incorrect principles, which repeatedly occur in subsequent case law, as was discussed in the context of the role of modes of liability in *Vasiljević*<sup>929</sup> above. Meron observes, although in the context of customary law, that there is an increased reliance on case law by international courts and tribunals:

In addition to a generally more relaxed approach to customary international law, the ICJ and other international courts are increasingly relying on precedent rather than repeatedly engaging in detailed analysis of the customary status of the same principles in every case. We might perhaps discern in this practice something similar to a *stare decisis* principle amongst the international tribunals.<sup>930</sup>

As a consequence, judgments and the application of law by judges gain much more importance as a source of international criminal law, thus rendering each decision and the legal (comparative) analysis crucial. Yet in this context it should be recalled that international judges are not bound to follow previous decisions of each other, and thus could decline to take cognisance and apply concepts emanating from pertinent previous decisions. So why is the differentiated approach cited frequently with reference to previous case law across both *ad hoc* tribunals if there is no obligation to adhere to such decisions? It stands to reason that aiders and abettors are perceived to be less blameworthy, which leads to the consequence that the penalty has to reflect this “reality”.

It should also be acknowledged that potential conflicts which occur as a result of insufficient language competence may not necessarily be caused by the judicial bench. Although there always seems to be a potential risk of misunderstanding domestic concepts when trying to apply them in an international setting for the reasons mentioned above, “other courtroom relationships”<sup>931</sup> may also be the trigger for misunderstandings. As Judge Wald describes, there can be day-to-day difficulties for judges during trials:

Defense counsel came from all over the world, often drawn by salaries higher than at home; many were not familiar with the adversarial mode of trial and at best were initially maladroit at cross-examination. Although all counsel were supposed to have fluency in either English or French, the requirement was often waived for Balkan counsel because their clients insisted on a native speaker. The result was that questioning often proceeded in a slow and awkward fashion, and the crackling give-and-take of cross-examination as we know it in the American courtroom was impossible. Briefs written by counsel who were not really comfortable with the operative language – French or English – proved hard to follow, and the judge often had to work overtime even to understand arguments that she had then to evaluate. The prosecutors on the other hand

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<sup>929</sup> Ibid.

<sup>930</sup> T Meron, *The Making of International Criminal Justice: A View from the Bench, Selected Speeches* (OUP 2012) 31.

<sup>931</sup> Wald (n 878) 1572.

were usually well trained regulars in the courtroom and possessed greater language skills. Fifty years of technology have not solved this inherent problem of international courts.<sup>932</sup>

The difficulty in dealing with both complex facts and issues arising from points of law within a dynamic international legal sphere, which has not yet solidly established patterns, may of course be immensely exacerbated by a number of other factors inherent to the international nature of tribunals and courts. A discussion of those factors exceeds the scope of this work and these are therefore not addressed here. Nevertheless, a judge's lack of language competence, or monotonous civil- or common-law dominated professional legal experience (or even the absence of criminal legal or judicial experience) may be a driving force behind certain issues, but ultimately they may not be the only factors. It is clear from the above analysis that the answer to the question as to why judges resort to a differentiated approach is far more complex. A correlation between the conviction that a secondary party to a crime is less culpable and entitled to mitigation and the practice of the jurisdiction a judge represents is rather doubtful on the basis of the above. However, this does not exclude the possibility that other cultural, educational, and experience-related factors may be influential in this regard. Due to the complex and multifarious nature of international trials, one may speak of the cumulative effect of factors bearing the potential for overreliance on (inter)national case law, and leading to misapprehensions which may cause inconsistent approaches, thus preventing legal certainty. Jodoin argues that 'judges in ICs [international courts] exercise a measure of discretion that can only be explained by non-legal factors'.<sup>933</sup>

As mentioned above, views differ as to which previous professional experience is the preferred one, but the prevalent position requires more practical judicial experience. Yet it appears that a good mixture of public international law, international criminal law academic knowledge, coupled with solid criminal judicial experience, good language skills and a solid knowledge of the common and civil law systems may after all be most adequate.

#### 4.4.6.2 IS THE DIFFERENTIATED APPROACH IN ICL DE FACTO A DIFFERENTIATED APPROACH?

Throughout this work the notion of a differentiated attribution model was generally considered in a wider sense in that it was not only examined whether principals are generally punished more harshly than secondary participants or, more precisely, aiders. In addition, this work also embraces an analysis as to how other modes of liability are treated for the purpose of sentencing. For this purpose, the jurisprudential analysis took due account of the key characteristics of pertinent modes of liability, such as "direct" (commission and in some cases JCE), "physical" (commission and sometimes JCE), "indirect" (aiding and abetting, although in the case law of the *ad hoc* tribunals there is no consensus and may embrace JCE, ordering and instigating) and whether they were articulated and used in an

<sup>932</sup> Ibid.

<sup>933</sup> Jodoin (n 70) 4.

extenuating or aggravating manner in view of the punishment. Thus, the focus was shifted to different aspects of the differentiated approach, as utilised in international criminal sentencing law. Nonetheless, even if one opposes the conclusion that a differentiated approach is manifested in the practice of the *ad hoc* tribunals because there is no mandatory mitigation for aiders and abettors embodied in the founding instruments of the *ad hoc* tribunals and the ICC, it can still be argued in the absence of statutory prescribed mitigation that such express remarks can be found in the case law of the *ad hoc* tribunals and thus a clear pattern has evolved.

This reflects a broader notion of the differentiated approach. While some sentencing judgments state directly that aiders and abettors attract lower sentences, others have included such “key characteristics” of liability labels in the evaluation (mitigating or aggravating) for sentencing purposes. The outcome of these two approaches could be regarded as similar. If, for instance, Statute A provides for mandatory mitigation based on accessorial liability, every aider and abettor is punished more mildly in comparison to a principal. If Statute B does not provide for mandatory mitigation, this leaves space for both approaches. Notwithstanding that, if the decision makers perceive the non-physical or indirect nature of accessories as less blameworthy and *vice versa*, they may express this when considering the mitigating factors. Thus, ultimately, although the latter leaves space for both approaches, it does not prevent judges from following a differentiated approach without any restrictions and thus the outcome might be the same – particularly if the bench is composed of judges who are inclined to follow the differentiated theory due to their previous professional legal experience. Moreover, it could be observed that the emerging structure of hierarchies of blameworthiness in the context of modes of liability within the case law of the *ad hoc* tribunals differs. While some perceive physical perpetrators of atrocities to possess the highest level of culpability, others have held repeatedly that the highest penalties are reserved for instigators, order-givers and planners. This may change the sequence of modes of liability in such a hierarchy of blameworthiness but, in the wider sense, it may still be regarded as a differentiated approach, as the normative distinction between various modes of liability for the purpose of sentencing and corresponding adjustments of the penalties resulting thereof are a foundational principle of the differentiated approach. If this was not the case, why would the *ad hoc* tribunals devote so much time to the differentiation between principals and accessories, thinking of JCE and its categorisation as either commission or accessory liability?

#### 4.4.6.3 THE EXPRESSIVE CAPACITY OF MODES OF LIABILITY: CONNOTATIONS WITH ADVERSE EFFECTS?

There is the impression that the notion of the degree of culpability and the connotation of the label, describing criminal conduct, are inextricably connected and that a certain degree of culpability is always implied by a specific label, irrespective of the presence of any prescribed legal implications. When looking at the word “accessory” in a non-legal context, the Oxford Dictionary describes an

accessory as: '[a] thing which can be added to something else in order to make it more useful, versatile, or attractive'.

It is therefore obvious that, in everyday use, an accessory is something of minor importance, attached to the main object. Accordingly, it could be argued in line with a grammatical interpretation that an accessory to a crime is less blameworthy than the principal perpetrator. Moreover, in a substantive law context, it must be recalled that the liability of an accessory derives from the liability of the principal perpetrator. There is no accessory without a principal and the threshold *mens rea* requirements for an accessory are generally lower. So is it really possible to disregard cultural linguistic imprints in words/labels, which by nature embody an appreciation or a specific value and to “borrow” those in order to denote the degree of culpability? It is difficult to presume. This line of reasoning would lead to the idea that in order to implement a system ensuring that specific labels do not imply corresponding cultural linguistic imprints, which already signal their gravity in terms of blameworthiness, modes would have to be denoted differently. Accordingly the question here is: does the label “accessory” already dictate less culpability?

Going back to a characteristic of the basic form of commission liability (as opposed to liability as a member of a joint criminal enterprise), the obvious key element is the denotation “physical” or “directly”: words which may be associated with control and choice and potentially force. When considered in the light of criminal conduct, both terms overlap. On the one hand, “directly” describes the conduct in an abstract manner, suggesting that no intermediary was involved; the term “physical” does the same, but specifying the conduct figuratively. The same could be run through with “aider and abettor” and principal perpetrator. A major question that arises is whether those forceful words, associated with a number of scenarios in day-to-day life activities, thereby carrying a specific value, can be ignored. This may be possible in a unitary system, but it is doubtful that, in the absence of a black letter provision in international criminal justice, judges used to a differentiated approach will be able to view such labels as mere a instrument to impute liability, without appreciating the legal value by ascribing immediate legal relevance for sentencing. As Stewart notes, '[a] differentiated model uses legal terms to express graduated degrees of blame'.<sup>934</sup> Are these expressions not already connoted in pertinent labels (thinking of an accessory)? It follows that such labels, even in the absence of a statutory provision embodying a differentiated approach, could “invite” judges to apply them. After all, these are the terms expressly provided for in the Statutes of the *ad hoc* tribunals and the ICC.

#### 4.4.6.4 MODES OF LIABILITY – A MIRROR OF A HIERARCHY OF CULPABILITY?

The analyses of the foregoing chapters should have demonstrated that the peculiar nature of international criminal law requires a sophisticated attribution model suiting the needs of international criminal justice, by acknowledging the nature of macro crimes and the specifics of modalities of

<sup>934</sup> Stewart, 'The End of Modes of Liability' (n 103) 64.

commission and participation in an international macro criminal context. The ICC has departed from the approach of the *ad hoc* tribunals by choosing to rely on German doctrine and yet, there is also no consensus as to the legal implications of different modes of liability. It is obvious that the solution to this issue is first and foremost that a uniform approach is followed.

A central question is whether a unitary approach is really “unitary” or if, even in the absence of an established hierarchy of blameworthiness, judges may be drawn towards ascribing hierarchical legal relevance to modes of liability. It would be interesting if research in this area would be conducted, for instance by carrying out quantitative research based on judgments rendered in a common law jurisdiction such as England. Is it possible that, despite the ample discretion to punish accessories as harshly as principals, the former would still be generally considered as less culpable and thus punished more mildly? Moreover, concerning a differentiated approach, it has been asked why modes of liability ‘must do all the expressive work’ and ‘what prevents the judgment itself shouldering some of this work’?<sup>935</sup> Does a differentiated approach preclude the individualisation of a sentence? It might be argued that in fact it does not prevent a judge from evaluating the gravity of the crime and the individual circumstances of the accused and reflecting the results in the corresponding final penalty. In *Milutinović et al.*,<sup>936</sup> the five accused were sentenced and *Milutinović* was acquitted. While the Trial Chamber sentenced Šainović, Pavković and Lukić, all three convicted as members of a JCE, to 22 years, the other two defendants, Lazarević and Odjanic, were held to be liable as aiders and abettors and were sentenced to 15 years’ imprisonment. Despite the fact that this points towards the application of the differentiated theory, the Appeals Chamber criticised the sentences imposed by the Trial Chamber as being insufficiently individualised.<sup>937</sup> Following an appeal, the Appeals Chamber reduced the sentence of Šainović to 18 years, Lukić to 20 years and affirmed Pavković’s sentence. Lazarević’s sentence was reduced to 14 years. The Chamber thereby held that:

(...) the Trial Chamber erred in failing to individualise the sentences of the Appellants. Accordingly, the Appeals Chamber has duly considered the gravity of the crimes imputed to each of the Appellants. Moreover, it has carefully taken into account the conduct and contribution of Šainović, Pavković, and Lukić to the JCE, and Lazarević’s acts of assistance to the forcible displacement, as well as the Appeals Chamber’s reversal of some of its findings in this respect.<sup>938</sup>

Despite the impression that a differentiated approach was followed, the subsequent individualisation may still not change the impression that a differentiated approach was embraced. Why would a differentiated approach prevent judges from individualising a case? If it is assumed that Statute X provides that aiders and abettors may not be punished more harshly than principal perpetrators, or even if it would provide that an aider and abettor could only be sentenced to three quarters of the overall penalty prescribed for the offence (if one would exist) – would this prevent a judge to invoke mitigating or aggravating factors to punish him somewhere below this? It seems difficult to see how

<sup>935</sup> Ibid 65.

<sup>936</sup> *Milutinović et al.* Trial Judgment (n 625) vol III.

<sup>937</sup> *Šainović et al.* Appeal Judgment (n 131) para 1842.

<sup>938</sup> Ibid.

such fine-tuning would seem impossible, as judges would still have immense discretion to adjust the sentence in accordance with individual circumstances. The difference to a unitary approach in this regard is only that there would not be ample discretion anymore on part of judges.

#### 4.4.6.5 A UNIFORM APPROACH

Drawing on this work it can be seen that a differentiated approach and thus the principle of mitigation, as Olásolo refers to it, is firmly established in international criminal law. Yet due to the fact that a deviation from the differentiated approach in international criminal law is qualified as legitimate, it is to be expected that there will be plenty of thorough discussions revolving around this issue and that, in the absence of a black letter provision, tribunals may choose which path they take.

After all, sentencing inconsistency based on the legal relevance of modes of liability can have vast implications. It cannot be considered fair if an aider and abettor is entitled to what sounds like “mandatory” mitigation, whereas another aider might be treated like a principal. What can be said with certainty is that the approach taken will entirely depend on the composition of the bench.

Throughout this work it was attempted to identify the reasons for approaches taken by judges in the context of a principal-accessory distinction in order to grasp the possible reasons thereof. As expected at the outset, these reasons are deeply intertwined and significantly characterised by cultural legal imprints. Therefore, it seems unrealistic to expect that a uniform approach will ever be followed in the absence of a firmly established (codified) principle. The question is whether such a principle would resemble a differentiated or a unitary approach. It could also be argued that attribution modes are superfluous and the specific criminal conduct could be precisely described in the absence of a specific category or label. Stewart holds that ‘plain language explanation within a judgment suffices’.<sup>939</sup> He maintains that ‘a unitary theory of perpetration might better preserve (and advertise) culpability as the benchmark for international criminal responsibility ending the various phases of international courts mimicking of domestic practice and shifting academic debates to issues of sentencing, where these discussions belong’.<sup>940</sup> Moreover, Stewart wonders ‘why a court could not simply state whatever collective structures enabled the offence as part of its narrative’.<sup>941</sup> Greenwalt suggests a completely different approach in that he does not advocate uniformity. He argues for ‘a hybrid or “pluralistic” model of ICL that does not assume ICL to be a closed system of criminal laws of the State or States which, under normal circumstances, would be expected to assert jurisdiction over a case’.<sup>942</sup> When applying this notion of plurality of attributing liability to perpetrators of mass atrocities, it seems problematic whether some domestic legal attribution mechanisms would be able to acknowledge and reflect the complex structure of such large scale crimes and as such the culpability of perpetrators. In

<sup>939</sup> Stewart, ‘The End of Modes of Liability’ (n 103) 65.

<sup>940</sup> Ibid 69.

<sup>941</sup> Ibid 65.

<sup>942</sup> Greenwalt (n 530) 1067, 1068.



the light of the importance and impact of individual criminal responsibility on the penalty imposed, this could, in addition to a potential violation of the principle *nulla poena sine lege*, lead to immense discrepancies, as cases which are based on substantially the same facts could result in discrepant penalties, rendering such an approach in this context unfair. An interesting approach is suggested by Ashworth and Horder, albeit in the context of English criminal law. They stress that a suitable approach to provide ‘for all degrees of complicity’ would be to retain the judges’ power to ‘impose any lawful sentence on the principal’ and ‘to respect the accomplice’s right not to be punished more severely than is proportionate to the gravity of his contribution’.<sup>943</sup> They thus suggest that this could be ensured by ‘declaring a general guideline that accomplices should receive no more than half the sentence of the principal; and to permit courts to exceed this normal level in cases where the accomplice’s role was unusually influential, and to sentence below it if the accomplice’s contribution was minor’.<sup>944</sup> This would provide a frame relating to judges’ discretion allowing for more consistency, and would at the same time allow for sufficient discretion to individualise a penalty fitting the specific circumstances of the nature and commission of the offence in question. Ideally, such an approach would over time crystallise in a specific threshold test, deciding as to when an accessory’s role would be exceptionally influential or *vice versa*. This would solidify consistency in this regard. Ultimately, this approach could serve as a compromise between the unitary and differentiated approaches respectively.

Accordingly, the central question, which approach would lead to more uniformity, remains in place, but it should also be considered whether each approach *per se* could achieve more uniformity while meeting the individual needs and peculiarities of international crimes. Could such an approach be unitary, differentiated or even embrace no labelling at all, as has been suggested elsewhere? Is it necessary to relinquish modes of liability?

#### 4.5 FINAL CONCLUSION

The principles revolving around the attribution and evaluation of modes of liability in sentencing that have emerged over the past decades are rather fragmentary. This can be seen as inherently given. International criminal law is in fact a mosaic system, stemming from a not yet sufficiently established body of international (criminal law) as well as judgments and domestic concepts and doctrines rooted in different legal systems. Judges, who are entrusted to decide those cases, are from diverse origins from all over the world. The objective is and should always be a geographical representation of the world reflected in the judiciary, for only then is it possible to speak of a court adjudicating cases which concern the world, but it remains to be stressed that the addressed issues result from such a multinational setting embracing different notions of several points of material and procedural law, as well as different perceptions of justice, as these are inextricably linked thereto. Accordingly, there is

<sup>943</sup> Ashworth and Horder (n 66) 422.

<sup>944</sup> Ibid.

no way of circumventing the issues deriving from diverse cultural legal backgrounds and traditions, but it is necessary to address them adequately and to find solutions. Only then will it be possible to avoid misapprehensions.

The foregoing chapters may not provide a definite solution. However, they may serve as a starting point for further research as they identify one of the shortcomings of international criminal law in relation to sentencing, thereby attempting to shed some light on the possible origins of such issues.

This study revealed that, while on first sight positions as to the existence of a principle of mitigation appear to be contradictory, a closer look reveals that it has already occupied a solid position in the international sentencing jurisprudence. Time will tell whether the recent approach of the ICC to distance itself from a differentiated approach will succeed. It remains to be stressed that, as long as judges are not able to find a common denominator, a fair and just trial is impeded by overriding inconsistency as similar cases may be treated differently in relation to the punishment of the perpetrator, thus leading to a lack of predictability. If no uniform solution is articulated, it will remain a matter of choice whether a unitary or a differentiated approach is followed.

## Appendix

**Table 9: Qualification<sup>945</sup> of ICTY and ICTR Judges Based on Table 3<sup>946</sup>**

Judge/ Country	Legal System	Sentencing Approach	Previous Domestic	Specific Experience CV Extract
Carmel Agius <sup>947</sup>  Malta	Common Law	Unitary	Judicial	Senior Judge, Court of Appeal of Malta and the Constitutional Court of Malta Acting Chief Justice Head of the Maltese Delegation at all annual meetings of the United Nations Commission on Crime Prevention and Criminal Justice in Vienna Acting Head of Delegation and Adviser of the Government of Malta at the United Nations Plenipotentiary Conference on the International Criminal Court <a href="http://www.icty.org/en/about/chambers/president">http://www.icty.org/en/about/chambers/president</a>
Burton Hall  The Bahamas	Common Law	Unitary	Judicial	Probation Officer and Clerk, House of Assembly Assistant Counsel, Office of the Attorney General Stipendiary and Circuit Magistrate Solicitor General Justice of the Supreme Court (presiding over criminal, civil, constitutional and family matters) Judge Court of Appeal Chairman, National Crime Commission Chief Justice and Head of the Judiciary <a href="http://www.icty.org/x/file/About/Chambers/judges_bios_en/pj_hall_Bio_en.pdf">http://www.icty.org/x/file/About/Chambers/judges_bios_en/pj_hall_Bio_en.pdf</a>
Almiro Simões Rodrigues  Portugal	Civil Law	Unitary	-	Deputy to the Deputy Prosecutor, Loures and Lisbon Deputy Prosecutor, Reguengos de Monsaraz, Lisbon, Loures, Alijó Lecturer, Consultant and Researcher, Legal Studies Centre, Lisbon Prosecutor in Sintra, Aveiro and Coimbra

<sup>945</sup> Due to the fact that the *ad hoc* tribunals do not provide biographies of former judges on their websites any more, it has not been possible to transfer similarly structured CVs into the table. As a result, some biographical notes had to be obtained from other sources, rendering them different in relation to the structure and attention to detail. In order to standardise them as much as possible for the purpose of this work, some information have been omitted. Thus, for the complete official curricula vitae, please refer to the original sources.

<sup>946</sup> Table 3 in Chapter 3.

<sup>947</sup> However, the civil-common law distinction serves more to underline the general differences in legal culture. As mentioned before: a civil law country may well embrace a unitary approach similar to its common law counterparts.

				Drafter of Portuguese report on implementation of the Convention on the Rights of the Child presented to the United Nations General Assembly. Deputy Attorney-General <a href="http://www.un.org/documents/ga/docs/55/a55773.pdf">http://www.un.org/documents/ga/docs/55/a55773.pdf</a>
Lal Chand Vohrah Malaysia	Common Law	Unitary	Judicial	Judge, High Court, Malaya Judge, High Court (Criminal Law Division), Kuala Lumpur Relief Judge, Temerloh High Court Judge, High Court, Alor Setar Judge, High Court, Shah Alam Judge, Head of Civil Division, High Court, Kuala Lumpur Judge, Head of Criminal Division, High Court, Kuala Lumpur <a href="http://www.un.org/documents/ga/docs/55/a55773.pdf">http://www.un.org/documents/ga/docs/55/a55773.pdf</a>
Rafael Nieto Navia Colombia	Civil Law	Differentiated	Judicial	Judge and President, Argentine-Chilean International Arbitral Tribunal to delimit the boundary between Marker 62 and Mount Fitz-Roy Judge and President, Inter-American Court of Human Rights Associate Judge, Constitutional Division of the Supreme Court of Justice of Colombia <a href="http://www.un.org/documents/ga/docs/55/a55773.pdf">http://www.un.org/documents/ga/docs/55/a55773.pdf</a>
Navanethem Pillay South Africa	Civil Law	Unitary	Judicial	Senior Partner, Law Firm Acting Judge, Supreme Court of South Africa Lecturer, Natal University, Department of Public Law <a href="http://ictrcaselaw.org/ContentPage.aspx?cid=3014">http://ictrcaselaw.org/ContentPage.aspx?cid=3014</a>
Eric Møse Norway	Civil Law	Unitary	Judicial	Head of Division, Ministry of Justice Deputy Judge Supreme Court Advocate at the Solicitor General's Office Judge, Court of Appeals in Oslo <a href="http://ictrcaselaw.org/ContentPage.aspx?cid=3013">http://ictrcaselaw.org/ContentPage.aspx?cid=3013</a>
Pavel Dolenc Slovenia	Civil Law	Unitary	*	*
Patrick Lipton Robinson Jamaica	Common Law	Unitary	-	Crown Counsel, Office of the Director of the Public Prosecutions Legal Adviser to the Ministry of Foreign Affairs, and Crown Counsel, Attorney General's Department Senior Assistant Attorney-General Director, Division of International Law Deputy Solicitor-General

				<a href="http://www.icty.org/en/about/chambers/former-presidents">http://www.icty.org/en/about/chambers/former-presidents</a>
Richard George May UK	Common Law	Unitary	Judicial	Barrister, essentially criminal prosecution for the Thames Valley Police and some defence work Deputy Circuit Judge Recorder, South-Eastern Circuit <a href="http://www.un.org/documents/ga/docs/55/a55773.pdf">http://www.un.org/documents/ga/docs/55/a55773.pdf</a>
Mohamed El Habib Fassri Fihri Morocco	Civil Law	Unitary	Judicial	Judge, Regional Tribunal of Casablanca Vice-President, Regional Tribunal of Casablanca Crown Procurator Principal Private Secretary to the Minister of Justice Secretary-General of the Ministry of Justice Trial attorney at the Supreme Court Secretary-General of the Ministry of Justice Ambassador Extraordinary and Plenipotentiary of His Majesty the King of Morocco to the Hellenic Republic Divisional President, Supreme Court <a href="http://www.un.org/documents/ga/docs/55/a55919.pdf">http://www.un.org/documents/ga/docs/55/a55919.pdf</a>
Fouad Abdel-Moneim Riad Egypt	Civil Law	Unitary	-	Professor of Law, Cairo University (he also taught at New York, Paris, and The Hague) Arbitrator and international legal consultant Chair, Plenary Committee of the UN Conference on State Succession to Treaties <a href="http://www.icty.org/sid/7228">http://www.icty.org/sid/7228</a>
Patricia M Wald United States	Common Law	Unitary	Judicial	Law clerk to Judge Jerome N Frank of the US Second Circuit, Court of Appeals Assistant Attorney General for Legislative Affairs, Department of Justice Judge, US Court of Appeals for the District of Columbia Circuit Chief Judge, US Court of Appeals for the District of Columbia Circuit <a href="http://www.icty.org/en/press/appointment-judge-patricia-m-wald-succeed-judge-gabrielle-kirk-mcdonald-november-1999">http://www.icty.org/en/press/appointment-judge-patricia-m-wald-succeed-judge-gabrielle-kirk-mcdonald-november-1999</a>
Florence Ndepele Mwachande Mumba Zambia	Common Law	Unitary	Judicial	Assigned counsel at a trial court before Assigned counsel at a trial/appeals court Assigned counsel at the Supreme Court Director of the Department of Legal

				Aid Judge trial court President of several <i>ad hoc</i> national investigating commissions Judge, Supreme Court of Zambia <a href="http://www.icty.org/sid/8158">http://www.icty.org/sid/8158</a>
Sharon A Williams  Canada	Common Law	Unitary	-	Professor of Public International Law and International Criminal Law, Osgoode Hall Law School, York University, Toronto Member, Permanent Court of Arbitration, The Hague <a href="http://www.un.org/documents/ga/docs/55/a55919.pdf">http://www.un.org/documents/ga/docs/55/a55919.pdf</a>
Per-Johan Viktor Lindholm  Finland	Civil Law	Differentiated	Judicial	Acting Assistant Professor, University of Helsinki, Faculty of Law Counsellor of Legislation, Ministry of Justice Director of Legislative Affairs Judge, City Court, Helsinki Judge, Court of Appeal, Turku, Finland Justice, member of the Supreme Court <a href="http://www.un.org/documents/ga/docs/55/a55919.pdf">http://www.un.org/documents/ga/docs/55/a55919.pdf</a>
Yakov A Ostrovsky  Russia	Civil Law	Unitary	-	Professor of International Law, Moscow State Institute of International Relations Consultant on International Public Law and Humanitarian Law to the Constitutional Court and the Supreme Court of the Russian Federation Legal Adviser, Ministry of Foreign Affairs of the Russia Federation. <a href="http://ictrcaselaw.org/ContentPage.aspx?cid=3015">http://ictrcaselaw.org/ContentPage.aspx?cid=3015</a>
Lloyd Williams  Saint Kitts and Nevis	Common Law	Unitary	*	*
William H Sekule  Tanzania	Common Law	Unitary	Judicial	Judge, High Court of Tanzania Director of Public Prosecutions, United Republic of Tanzania State Attorney Senior State Attorney and Principal State Attorney, Attorney General's Chambers of Tanzania <a href="http://www.icty.org/en/press/judge-william-hussein-sekule-sworn-member-appeals-chamber">http://www.icty.org/en/press/judge-william-hussein-sekule-sworn-member-appeals-chamber</a>
Winston C Mantanzima Maqutu  Lesotho	Common Law	Unitary	Judicial	Advocate before the High Court, Lesotho Advocate before the Court of Appeal, Lesotho Senior Lecturer and Deputy Dean,

				Faculty of Law, National University of Lesotho Judge, High Court of Lesotho <a href="http://unictr.unmict.org/en/news/newly-elected-judges-sworn">http://unictr.unmict.org/en/news/newly-elected-judges-sworn</a>
Arlette Ramaroson Madagascar	Civil Law	Unitary	Judicial	Deputy State Prosecutor, Diego Suarez, Madagascar Examining Magistrate and Judge, Criminal Court of Appeals, Antananarivo President of Criminal Division, Criminal Court of Appeals, Antananarivo Acting President of the Supreme Court, Criminal Division Director of International Relations, Ministry of Justice, Madagascar <a href="http://www.icty.org/x/file/About/Chambers/judges_bios_en/pj_ramaroson_Bio_en.pdf">http://www.icty.org/x/file/About/Chambers/judges_bios_en/pj_ramaroson_Bio_en.pdf</a>
Andrésia Vaz Senegal	Civil Law	Unitary	Judicial	Examining Judge, Tribunal Première Instance de Dakar President, Labour Tribunal in Saint Louis, Senegal Chief of the Examining Judges in Dakar Vice President, Tribunal de Première Instance de Dakar Judge, Court of Appeal Judge, Supreme Court President, Court of Appeal President, High Court of Senegal President, Supreme Court (...) <a href="http://ictcaselaw.org/ContentPage.aspx?cid=3012">http://ictcaselaw.org/ContentPage.aspx?cid=3012</a>
Theodor Meron United States	Common Law	Unitary	-	Served as a member of the US Delegation to the Rome Conference on the Establishment of an International Criminal Court Served on the Preparatory Commission for the Establishment of the ICC Acted as counsel for the United States before the International Court of Justice Served as Counselor on International Law in the US Department of State Served on several committees of experts of the International Committee of the Red Cross (ICRC), including those on Internal Strife, on the Environment and Armed Conflicts, and on Direct Participation in Hostilities under International Humanitarian Law Professor of International Law, Graduate Institute of International and Development Studies, Geneva Visiting Professor of Law, Harvard University Visiting Professor of Law, University of California (Berkeley)

				<a href="http://www.icty.org/en/press/judge-meron-and-judge-agius-elected-president-and-vice-president-icty">http://www.icty.org/en/press/judge-meron-and-judge-agius-elected-president-and-vice-president-icty</a>
Mohamed Shahabuddeen Guyana	Common Law	Unitary	-	Attorney General, Guyana Minister of Legal Affairs, Guyana Judge, International Court of Justice Arbitrator and Consultant in International Law <a href="http://ictr-archive09.library.cornell.edu/ENGLISH/factsheets/shahabuddeen.html">http://ictr-archive09.library.cornell.edu/ENGLISH/factsheets/shahabuddeen.html</a>
Mehmet Güney Turkey	Civil Law	Differentiated	-	Barrister Senior Legal Counsellor, Ministry of Foreign Affairs Chief Legal Adviser, Ministry of Foreign Affairs Judge, European Nuclear Energy Tribunal in Paris, France Ambassador of Turkey to Cuba Ambassador of Turkey to Singapore Ambassador of Turkey to Indonesia Elected by United Nations General Assembly as a member to the International Law Commission (ILC) Arbitrator in International Panel of Accredited Arbitrators for the Singapore International Arbitration Centre Headed the Turkish delegation to the United Nations Diplomatic Conference of Plenipotentiaries in the establishment of the International Criminal Court. <a href="http://www.icty.org/x/file/About/Chambers/judges_bios_en/PJ_Guney_Bio_en.pdf">http://www.icty.org/x/file/About/Chambers/judges_bios_en/PJ_Guney_Bio_en.pdf</a>
Wolfgang Schomburg Germany	Civil Law	Differentiated	Judicial	Judge, Federal High Court, Karlsruhe, First Chamber (criminal matters) and Investigating Judge Lawyer in Berlin, assisting clients (victims and suspects) in international criminal cases Senior Public Prosecutor in Berlin (West) Judge (criminal matters) at the Berlin Regional Court (West) Seconded to the Federal Prosecutor. Seconded to the German Parliament (Bundestag/Lower House), Bonn (Research Assistant/Criminal Law and Law of Criminal Procedure). Seconded to the Federal Prosecutor Public Prosecutor in Berlin (West) Senior Lecturer at the Faculty of Law at the Freie Universität Berlin <a href="http://www.un.org/documents/ga/docs/55/a55773.pdf">http://www.un.org/documents/ga/docs/55/a55773.pdf</a>



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Guy Delvoie Belgium	Civil Law	Differentiated	Judicial	Attorney, Brussels Bar Assistant Professor on Family Law, Free University of Brussels Judge, Brussels Court of First Instance Lecturer, Free University of Brussels Judge, Brussels Court of Appeal Court Manager, Brussels Court of Appeal Judge and Section President, Brussels Court of Appeal President, Brussels Court of Appeal <a href="http://www.icty.org/x/file/About/Chambers/judges_bios_en/pj_delvoie_Bio_en.pdf">http://www.icty.org/x/file/About/Chambers/judges_bios_en/pj_delvoie_Bio_en.pdf</a>

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