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Imputed Criminal Liability and the Goals of International Justice

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Abstract

This article considers the suitability of employing particular modes of imputed criminal liability in trials before international criminal tribunals. It focuses specifically on the doctrines of joint criminal enterprise and superior responsibility, two forms of liability which are central to many contemporary international criminal proceedings. Both doctrines can involve a broad form of criminal liability which may not be entirely appropriate when one considers the context in which such trials take place and the significance which often attaches to them. Proponents of international justice have contended that the contribution of these trials goes beyond basic accountability and providing justice for victims, extending also to peacemaking, reconciliation, deterrence, and the creation of a historical record. This article queries whether aspects of joint criminal enterprise liability and superior responsibility are appropriate when international justice is viewed in this light.

Key words

command responsibility; criminal liability; international criminal tribunals; joint criminal enterprise

I. INTRODUCTION

The net of criminal responsibility cast by international law is a wide one. An accused individual before the International Criminal Court, for example, may be charged with physically or otherwise committing a crime; with ordering, soliciting, or inducing its commission or attempted commission; or with aiding, abetting, or assisting the commission of that crime.¹ In addition, the principle of individual criminal responsibility under international law encompasses modes of criminal liability whereby persons may be made liable for the acts of others. Imputed criminal liability arises under the doctrines of joint criminal enterprise and superior responsibility, two forms of liability which are central to many of the contemporary trials before international courts and tribunals. Participants in a joint criminal enterprise can be held liable for crimes outside the scope of the agreed plan, where they were a natural and foreseeable consequence of the effecting of the enterprise, while the doctrine of superior responsibility provides that military or civilian superiors can be held responsible for the acts of subordinates which they knew or should have known of,

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1. Art. 25, Rome Statute of the International Criminal Court (1998), UN Doc. A/CONF.183/9, entered into force 1 July 2002, 2187 UNTS 90.

and which they failed to prevent or repress. Both modes of liability test fundamental principles of criminal law and evoke notions of collective responsibility.

This article considers the suitability of employing aspects of these modes of imputed criminal liability in the light of the various goals of international criminal trials as enunciated by the proponents of international justice. While joint criminal enterprise and superior responsibility may be effective for securing the conviction of individual war criminals in the short term, the broad nature of the liability which they entail may not be entirely appropriate when one considers the context in which trials before international tribunals take place. The judicial institutions created after the Second World War and the ad hoc International Criminal Tribunals for Rwanda and the former Yugoslavia were established to account for the perpetration of horrific and large-scale atrocities during brutal conflicts, while the International Criminal Court seeks to end impunity for those who commit 'the most serious crimes of concern to the international community as a whole'.² The significance which very often enjoins international trials is one which rarely attaches to domestic criminal proceedings. Furthermore, it is argued that the contribution of these trials can go much further than simply providing accountability for violative conduct and justice for victims.

The UN Secretary-General, in his report on the rule of law and transitional justice in conflict and post-conflict societies, provides a useful summation of the various contributions that it is perceived may be made by such trials:

Criminal trials can play an important role in transitional contexts. They express public denunciation of criminal behaviour. They can provide a direct form of accountability for perpetrators and ensure a measure of justice for victims by giving them the chance to see their former tormentors made to answer for their crimes. Insofar as relevant procedural rules enable them to present their views and concerns at trial, they can also help victims to reclaim their dignity. Criminal trials can also contribute to greater public confidence in the State's ability and willingness to enforce the law. They can also help societies to emerge from periods of conflict by establishing detailed and well-substantiated records of particular incidents and events. They can help to delegitimize extremist elements, ensure their removal from the national political process and contribute to the restoration of civility and peace and to deterrence.³

Such an emphasis on the wider objectives which may be achievable by holding trials has been present ever since the emergence of international criminal justice,⁴ and has been firmly reiterated more recently in official discourse and in the constitutive documents of the various contemporary international courts and tribunals.⁵ It was

2. Preamble, Rome Statute of the International Criminal Court.

3. The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies, Report of the Secretary General, UN Doc. S/2004/616 (23 August 2004), at 13.

4. See, e.g., United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (1948), 87–104; 'Memorandum to President Roosevelt from the Secretaries of State and War and the Attorney General, January 22, 1945' (Document I); Report of Robert H. Jackson United States Representative to the International Conference on Military Trials, London, 1945, Washington: United States Department of State, 1949, 3, at 6–7. See also 'Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties, Report Presented to the Preliminary Peace Conference, March 19, 1919', (1920) 14 AJIL 95, at 116–17.

5. The states parties to the Rome Statute of the International Criminal Court declare their determination in the Preamble to put an end to impunity for the crimes within the ICC's jurisdiction, crimes

the view of Justice Robert Jackson, the US Prosecutor at Nuremberg, that 'the importance of [the Nuremberg trial] is not measurable in terms of the personal fate of any of the defendants'.⁶

In assessing whether reliance on certain modes of imputed criminal liability is compatible with the goals of international justice, two important caveats must be registered from the outset. The first is that the primary purpose of international criminal justice is to hold individuals accountable for their crimes, and any other objectives should remain subordinate to that principal aim. Hannah Arendt correctly emphasized after the Eichmann trial that the purpose of a criminal trial 'is to render justice, and nothing else; even the noblest of ulterior motives . . . can only detract from the law's main business: to weigh the charges brought against the accused, to render judgment, and to mete out punishment'.⁷ The second is that although the stated motivation for the establishment of international tribunals goes beyond simple accountability, extending also to the achievement of aims such as establishing and maintaining peace, deterrence, and reconciliation and establishing a historical record of the truth, these broader claims have thus far lacked a sufficient theoretical

which 'threaten the peace, security and well-being of the world', and to contribute to the prevention of such crimes in the future. See also 'Address by Philippe Kirsch, President of the International Criminal Court, to the United Nations General Assembly, New York, 8 November 2005', at 6, available at http://www.icc-cpi.int/library/organs/presidency/PK_20051108_English.pdf; 'Statement made by Mr Luis Moreno-Ocampo, Ceremony for the Solemn Undertaking of the Chief Prosecutor of the International Criminal Court, 16 June 2003, The Peace Palace, The Hague, The Netherlands', at 3, available at: http://www.icc-cpi.int/library/organs/otp/030616_moreno_ocampo_english_final.pdf. When the Security Council decided in 1993 to establish a tribunal to hold perpetrators responsible for crimes being committed in the Balkans, it declared that the establishment of such a body would 'contribute to the restoration and the maintenance of peace' in the region, SC Res. 808, adopted 22 February 1993 (S/RES/808). Adopting the Statute of the International Criminal Tribunal for the former Yugoslavia, the Security Council added that this judicial body 'would contribute to ensuring that such violations are halted and effectively redressed', UN Doc. S/RES/827 (25 May 1993). UN Doc. S/RES/955 (8 November 1994), creating the International Criminal Tribunal for Rwanda, stated that the prosecution of persons responsible for serious violations of international humanitarian law would contribute to 'the process of national reconciliation'. The instruments and documents establishing or proposing internationalized or hybrid tribunals for Sierra Leone, Kosovo, East Timor, and Cambodia all echo the refrain that there are broader implications around the employment of such processes than the mere conviction of individual offenders. On the Special Court for Sierra Leone see UN Doc. S/RES/ 1315 (14 August 2000); Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915 (4 October 1999). On the Kosovo courts see UN Doc. S/RES/1244 (10 June 1999); UNMIK Regulation 2000/6 on the Appointment and Removal from Office of International Judges and International Prosecutors. On the Serious Crimes Panels of the Dili District Court, East Timor, see UN Doc. S/RES/1272 (25 October 1999); Report of the International Commission of Inquiry on East Timor to the Secretary-General, January 2000, UN Doc. A/54/76, S/2000/59 (31 January 2000), paras. 153–155; UNTAET Regulation 2000/15 (6 June 2000) on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences. On the Extraordinary Chambers in the Courts of Cambodia see the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea; 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, done at Phnom Penh, 6 June 2003 (Draft Agreement at A/RES/57/228 B (22 May 2003)); Report of the Secretary-General on Khmer Rouge Trials, UN Doc. A/60/565 (25 November 2005).

6. 'Report to the President by Mr Justice Jackson, October 7, 1946' (Document LXIII), Report of Robert H. Jackson, *supra* note 4, at 437.
7. H. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (1994 [1963]), at 253. The Court itself in *Eichmann* had acknowledged the distance which had to be kept from the broad array of related issues with which it had been confronted during the trial, and stated that although, for example, material and evidence accumulated in the trial would be of considerable use to researchers and historians in the future, benefits 'are to be regarded as by-products of the trial', *Attorney-General of the Government of Israel v. Adolf Eichmann*, Israel, District Court of Jerusalem, 12 December 1961, Criminal Case No. 40/61, para. 2.

or empirical underpinning, and it would be outside the scope of this article to attempt to provide one. The discussion here proceeds on the basis that there does exist a certain potential for criminal trials to contribute to these broader goals, while also accepting, as will be demonstrated below, that there are various inherent difficulties in utilizing trials for the achievement of some of those objectives. The principal concern is whether reliance on imputed criminal liability is a help or a hindrance in the attempted realization of these broader goals of international justice.

Section 2 of the article provides an overview of the development of the joint criminal enterprise and superior responsibility theories of liability in international criminal law. It considers the statutory basis of such imputed criminal liability and seeks to lay bare the problematic aspects under general principles of criminal law of these two particular doctrines. Section 3 considers whether these controversial liability models are compatible with the various stated goals which underlie the system of international criminal justice. The section begins with a discussion of general factors which may hinder the realization of the various interrelated aims of international trials, before turning to consider the ways in which joint criminal enterprise and superior responsibility may themselves frustrate the attainment of the goals of international justice. Section 4 provides some concluding observations.

2. IMPUTED CRIMINAL LIABILITY

The majority of cases currently being tried before the ad hoc International Criminal Tribunals and the Special Court for Sierra Leone (SCSL) rely on the doctrines of joint criminal enterprise liability and superior responsibility. A case in point is one of the more recent set of proceedings to commence before the International Criminal Tribunal for the former Yugoslavia (ICTY), those against Milan Martić.⁸ The indictment against Martić, holder of various leadership positions in the 'Serbian Autonomous District Krajina' and the 'Republic of Serbian Krajina', alleges that he planned, instigated, ordered, committed, or otherwise aided and abetted crimes such as persecution, extermination, murder, torture, and the wanton destruction of property.⁹ In using the word 'committed', the Prosecutor does not allege that the accused physically perpetrated the crimes but rather that he participated in a joint criminal enterprise as a co-perpetrator. The indictment elaborates:

The purpose of this joint criminal enterprise was the forcible removal of a majority of the Croat, Muslim and other non-Serb population from approximately one-third of the territory of the Republic of Croatia ('Croatia'), and large parts of the Republic of Bosnia and Herzegovina ('Bosnia and Herzegovina'), in order to make them part of a new Serb-dominated state through the commission of crimes in violation of Articles 3 and 5 of the Statute of the Tribunal. . . .

The crimes enumerated in this indictment were within the object of the joint criminal enterprise and Milan MARTIC held the state of mind necessary for the commission

8. Press Advisory, *Start of Milan Martić Trial*, The Hague, 8 December 2005, CVO/MO/248.

9. *Prosecutor v. Milan Martić*, Amended Indictment, Case No. IT-95-11, 14 July 2003, para. 3. For the full list of crimes charged see paras. 47–55.

of each of these crimes. Alternatively, the crimes enumerated in Counts 1 to 9 and 12 to 19 were the natural and foreseeable consequences of the execution of the object of the joint criminal enterprise and Milan MARTIC was aware that such crimes were the possible outcome of the execution of the joint criminal enterprise.¹⁰

The indictment then describes how the accused participated in the criminal enterprise, reiterating that he ‘knowingly and wilfully participated in the joint criminal enterprise, sharing the intent of other participants in the joint criminal enterprise or being aware of the foreseeable consequences of their actions’.¹¹

The indictment against Martić also relies on the doctrine of superior responsibility, under which a military or civilian superior can be held liable for the unlawful acts of subordinates. It sets out the scope of this responsibility pursuant to Article 7(3) of the Statute of the Tribunal:

A superior is responsible for the criminal acts of his subordinates if he knew or had reason to know that his subordinates were 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.¹²

Both joint criminal enterprise and superior responsibility involve an imputation of criminal liability to individuals for the acts of others: in the case of superior responsibility, it is for the crimes of subordinates which the superior failed to prevent or repress, while under joint criminal enterprise liability can be imposed for offences outside the scope of the agreed plan which were a ‘natural and foreseeable consequence’ of the execution of the plan.¹³ In both cases there exists the possibility for an accused to be held criminally responsible for crimes which they neither knew of nor intended. These doctrines tend now to form the central planks of contemporary prosecution strategies before international courts and tribunals. Although superior responsibility has some identifiable historical pedigree, joint criminal enterprise is very much a recent feature of international criminal proceedings.

2.1. Joint criminal enterprise

The 1999 Appeals Chamber judgment in *Prosecutor v. Tadić* marked the first concerted use of the joint criminal enterprise theory of liability by the ICTY.¹⁴ In this judgment the Appeals Chamber overturned the trial chamber’s acquittal of Tadić for killings committed by a group of which he had been a member, upholding the prosecution’s argument that ‘if a person knowingly participates in a criminal activity with others, he or she will be liable for all illegal acts that are natural and probable consequences of that common purpose’.¹⁵ The Appeals Chamber identified three distinct categories of ‘collective criminality’ according to which all those who participate in a common criminal purpose may be held liable for offences committed

10. Ibid., paras. 4–5.

11. Ibid., para. 8.

12. Ibid., para. 9.

13. See further S. Darcy, *Collective Responsibility and Accountability under International Law* (2007), 197–255, 293–357.

14. *Prosecutor v. Tadić*, Judgement, Case No. IT-94-I-A, Appeals Chamber, 15 July 1999.

15. Ibid., para. 175.

in furtherance of the agreed plan.¹⁶ The first two categories both required a shared intent or knowledge among all co-defendants for the offences in question before liability could be imputed.¹⁷ Under the third category, however, criminal culpability could arise in those instances involving a common design to pursue a particular course of conduct where one of the members commits an act outside the common design, but which was nevertheless a natural and foreseeable consequence of carrying out the common purpose.¹⁸ The Appeals Chamber found that in a case of ethnic cleansing, where the forcible removal of civilians at gunpoint might lead to the deaths of some civilians, criminal responsibility may attach to participants in such a common criminal enterprise, 'where the risk of death occurring was both a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk'.¹⁹

The Appeals Chamber deemed the objective elements to be the same for each of the three categories of common design:

- i. *A plurality of persons.* They need not be organised in a military, political or administrative structure . . .
- 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 . . . but may take the form of assistance in, or contribution to, the execution of the common plan or purpose.²⁰

A different *mens rea* element, however, was required for each category. The first category called for a shared intent among all the co-perpetrators to commit a specific crime, while for the second, culpability would only arise where there was personal knowledge of the system of ill-treatment and an intent to further it.²¹ As to the third category, the Appeals Chamber proposed that there be an 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 an offence by the group'. Criminal responsibility for offences outside the common design would be incurred if it had been foreseeable that such a crime was likely to be committed by a group member and the accused '*willingly took that risk*'.²²

16. Ibid., para. 195.

17. See *ibid.*, paras. 196–201, paras. 202–203.

18. Ibid., para. 204.

19. Ibid.

20. Ibid., para. 227.

21. Ibid., para. 228.

22. Ibid. (emphasis in original).

In the case in hand, the Appeals Chamber found that Tadić had intended to rid the Prijedor region of its non-Serb population by committing inhumane acts against them.²³ It held that it was foreseeable that non-Serbs might be killed in the effecting of this common plan and that although the appellant was aware that such killings were likely, he willingly took that risk and was accordingly guilty of those killings.

The third category of joint criminal enterprise holds much appeal for prosecution lawyers – it has been labelled by one commentator as ‘the magic bullet of the Office of the Prosecutor’.²⁴ The doctrine does not require that there be proof of a clear intent on the part of an accused that the crimes in question be committed, or that he or she knew that members of a criminal enterprise were going to commit them. What is required instead is the lower *mens rea* standard of *dolus eventualis*, a type of recklessness which involves the wilful taking of a risk that crimes which are foreseeable are likely to occur. A decision of ICTY Trial Chamber II in *Prosecutor v. Brđanin and Talić* loosened the subjective mental element requirement under this category of joint criminal enterprise, holding that an accused must be aware that the crime is a ‘possible consequence’ of participation in the common plan.²⁵ Subsequent judgments using joint criminal enterprise have relied on this standard, which departs from the *Tadić* formulation that offences outside the agreed plan must be likely to occur.²⁶ Appealing as this mode of criminal liability may be, there are profound shortcomings with its continued use in the pursuit of international criminal justice.

2.1.1. Statutory basis

Joint criminal enterprise liability is not expressly provided for in the statutes of the ad hoc Criminal Tribunals or the SCSL. The relevant provisions of those instruments provide that criminal responsibility arises for those who ‘planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of crime’.²⁷ Superior responsibility is the only other form of liability explicitly set out in each of those statutes.²⁸ The Rome Statute of the ICC includes largely similar bases of criminal liability, but it also incorporates a form of common purpose liability which is clearly distinguishable from the other modes of criminal liability.²⁹ Although the *Tadić* Appeals Chamber sought to argue that participation

23. Ibid., paras. 230–232.

24. W. A. Schabas, ‘*Mens Rea* and the International Criminal Tribunal for the Former Yugoslavia’, (2003) 37 *New England School of Law Journal* 1015, at 1032.

25. *Prosecutor v. Brđanin and Talić*, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, Case No. IT-99-36-PT, Trial Chamber II, 26 June 2001, para. 30.

26. See, e.g., *Prosecutor v. Brđanin*, Judgement, Case No. IT-99-36-T, Trial Chamber II, 1 September 2004, para. 265; *Prosecutor v. Kvocka et al.*, Judgement, Case No. IT-98-30/1/A, Appeals Chamber, 28 February 2005, para. 83; *Prosecutor v. Vasiljević*, Appeals Judgement, Case No. IT-98-32-A, Judgement, 25 February 2004, paras. 99–101; *Prosecutor v. Blagojević and Jokić*, Judgement, Case No. IT-02-60-T, Trial Chamber I, Section A, 17 January 2005, para. 703.

27. Art. 7(1) of the ICTY Statute, Art. 6(1) of the ICTR Statute, and Art. 6(1) of the SCSL Statute.

28. Art. 7(3) of the ICTY Statute, Art. 6(3) of the ICTR Statute, and Art. 6(3) of the SCSL Statute.

29. Art. 25(3)(d) of the Rome Statute sets out that criminal liability arises for persons who in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

- i. Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
- ii. Be made in the knowledge of the intention of the group to commit the crime.

in joint criminal enterprise falls under the general heading of Article 7(1),³⁰ the view now taken, as demonstrated in the *Martić* proceedings, for example, is that joint criminal enterprise is akin to 'committing' a crime.³¹ This approach conflicts with the ordinary meaning of 'committing' as the physical perpetration of a crime or a culpable omission contrary to the criminal law³² and, therefore, the general principle that penal statutes should be interpreted strictly.³³ The trial chamber in *Prosecutor v. Stakić* felt that joint criminal enterprise liability was too much of a departure from the traditional meaning of 'committing' and relied instead on the notion of 'co-perpetratorship'.³⁴ The Appeals Chamber found that the trial chamber 'erred in employing a mode of liability which is not valid law within the jurisdiction of this Tribunal' and proceeded to consider the case using the doctrine of joint criminal enterprise.³⁵

The Appeals Chamber in *Tadić* underpinned its use of the joint criminal enterprise doctrine by turning to customary international law, primarily a few minor national cases from the post-Second World War period, as well as Article 25(3)(d) of the Rome Statute and a similar provision in the International Convention for the Suppression of Terrorist Bombing.³⁶ Although the Nuremberg Tribunal declined to use the expansive form of common plan liability provided for in the London Charter,³⁷ there is some support in the postwar jurisprudence for the basic type of joint criminal enterprise liability identified by the ICTY.³⁸ But for the third category, the Appeals Chamber relied on a few Italian decisions and a small number of trials before Allied military courts, mostly concerning instances of mob violence, which relied on such a doctrine.³⁹ It is doubtful that the employment by a few states of this expanded form of common plan liability at that time gave it the status of customary law, particularly seeing that none of the treaties adopted in the postwar period recognized the concept.⁴⁰ The Appeals Chamber found some limited support for

30. *Prosecutor v. Tadić*, Appeals Chamber Judgement, *supra* note 14, para. 191.

31. *Prosecutor v. Milan Martić*, Amended Indictment, Case No. IT-95-11, 14 July 2003, para. 3.

32. *Prosecutor v. Tadić*, Appeals Chamber Judgement, *supra* note 14, para. 188.

33. Art. 22(2) of the Rome Statute, for example, states that 'The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.'

34. *Prosecutor v. Stakić*, Case No. IT-97-24-T, Trial Chamber, Judgement, 31 July 2003, paras. 437–438, 441.

35. *Prosecutor v. Stakić*, Case No. IT-97-24-A, Appeals Chamber, Judgement, 22 March 2006, paras. 62, 64–104.

36. *Prosecutor v. Tadić*, Appeals Chamber Judgement, *supra* note 14, paras. 205–219, 221–222.

37. Art. 6 of the Charter of the International Military Tribunal provided that 'Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.'

38. See, e.g., *The Almelo Trial, Trial of Otto Sandrock and Three Others*, British Military Court for the Trial of War Criminals, Almelo, Holland, 24–26 November 1945, Case No. 3, I *Law Reports of Trials of War Criminals* 35; *The Belsen Trial, Trial of Josef Kramer and 44 Others*, British Military Court, Luneburg, 17 September–17 November 1945, Case No. 10, II *Law Reports of Trials of War Criminals* 1.

39. *Prosecutor v. Tadić*, Appeals Chamber Judgement, *supra* note 14, paras. 204–220.

40. Under the 1949 Geneva Conventions, criminal responsibility was limited to those persons who committed or ordered the commission of grave breaches, see e.g. Art. 146, Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War (1949), entered into force 21 October 1950, 75 UNTS 287. Common plan liability did not feature in either the Genocide Convention or in the Principles of International Law adopted by the International Law Commission; see Art. 3 of the Convention on the Prevention and Punishment of the Crime of Genocide (1948), entered into force 12 January 1951, 78 UNTS 277; 'Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal', Report of

the third category in domestic criminal laws, but noted, however, that the major legal systems do not all treat the notion in the same way.⁴¹ Critics argue that a large number of jurisdictions do not support liability for crimes outside the scope of the agreed objective for those persons who participate in a common criminal plan.⁴²

2.1.2. *The mental element*

An accused need not have intended that the crimes in question be committed or even have known of their commission for liability to arise under the extended category of joint criminal enterprise. This represents something of a departure from accepted *mens rea* standards for serious crimes. Genocide, aggression, crimes against humanity, and war crimes are considered to be ‘the most serious crimes of concern to the international community as a whole’.⁴³ As a general rule, an accused before the International Criminal Court will only be held criminally responsible and liable for punishment when the material elements of a crime are committed ‘with intent and knowledge’.⁴⁴ The drafters of this provision prefaced it with the phrase ‘unless otherwise provided’ in order to insulate modes of criminal liability such as common purpose which rely upon a markedly lower *mens rea* standard.⁴⁵

The drafters of the Rome Statute have left unresolved the apparent clash between modes of imputed liability which do not require intent or knowledge and those crimes which additionally require a special intent. Genocide, most notably, comprises any of a number of acts such as killing, causing serious bodily or mental harms, or forcibly transferring children of one group to another, when committed ‘with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such’.⁴⁶ Under the Rome Statute, crimes against humanity are specific acts which must be committed ‘as part of a widespread or systematic attack directed against any civilian population, *with knowledge of the attack*’.⁴⁷ The extensive list of war crimes in Article 8 includes offences such as ‘wilful killing’, ‘[w]ilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial’, ‘intentionally directing attacks against the civilian population’, and ‘[d]eclaring that no quarter will be given’. A finding in 2003 by a trial chamber of the ICTY that the *mens rea* requirement for genocide could not be satisfied under the extended category of joint criminal enterprise was overturned, somewhat unconvincingly, on appeal.⁴⁸

the International Law Commission, UN GAOR V, Supp. 12 (A/1 316) 11–15 (1950), excerpted in M. Cherif Bassiouni (ed.), *International Criminal Law, Vol. III: Enforcement* (1999), 84, at 85.

41. *Prosecutor v. Tadić*, Appeals Chamber Judgement, *supra* note 14, paras. 224–225.

42. A. Marston Danner and J. S. Martinez, ‘Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law’, (2005) 93 *California Law Review* 75, at 109.

43. Preamble, Rome Statute.

44. *Ibid.*, Art. 30.

45. See G. Werle and F. Jessberger, ‘“Unless Otherwise Provided”: Art. 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law’, (2005) 3 *Journal of International Criminal Justice* 35.

46. Art. 6, Rome Statute.

47. Art. 7, Rome Statute (emphasis added).

48. See *Prosecutor v. Brđanin*, Decision on Motion for Acquittal Pursuant to Rule 98 *bis*, Case No. IT-99-36-T, Trial Chamber, 28 November 2003, para. 57, and *Prosecutor v. Brđanin*, Decision on Interlocutory Appeal Case No.

Since the *Tadić* Appeals judgment, joint criminal enterprise has featured prominently in international criminal proceedings – on several occasions existing indictments before the ad hoc Criminal Tribunals were amended in order to include this mode of imputed liability.⁴⁹ Numerous judgments have been delivered and convictions secured on the basis of one or other of the three categories of joint criminal enterprise.⁵⁰ The Prosecutor of the Special Court for Sierra Leone has relied heavily on the doctrine,⁵¹ and while indictments have yet to be issued by the Prosecutor of the International Criminal Court, Luis Moreno Ocampo has already indicated his desire to use the similar concept of common purpose liability provided for in the Rome Statute.⁵² The Report of the International Commission of Inquiry on Darfur assessed the potential criminal liability of various parties to the conflict in the Darfur region of Sudan on various grounds, including joint criminal enterprise.⁵³ These developments have not been met with unanimous approval and several commentators have critiqued joint criminal enterprise, particularly from the perspective of its compatibility with fundamental principles of criminal liability.⁵⁴ The way in which the doctrine is employed makes it hard to avoid the impression that there is some sort of equation of collective criminal action or group crime with collective criminal responsibility. It is difficult not to view joint criminal enterprise liability as being a nuanced form of guilt by association.

IT-99-36-A, Appeals Chamber, 19 March 2004, paras. 8–10. See also *Prosecutor v. Rwamakuba*, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide Case No. ICTR-98-44-AR72.4, Appeals Chamber, 22 October 2004.

49. See, e.g., *Prosecutor v. Milošević et al.*, Second Amended Indictment, Case No. IT-99-37-PT, 16 October 2001; *Prosecutor v. Krajisnik and Plavšić*, Amended Consolidated Indictment, Case No. IT-00-39 & 40-PT, 7 March 2002; *Prosecutor v. Gatete*, Decision on the Prosecution's Request for Leave to File an Amended Indictment, Case No. ICTR-00-61-I, Trial Chamber I, 21 April 2005; *Prosecutor v. Mpambara*, Decision on the Defence Preliminary Motion Challenging the Amended Indictment, Case No. ICTR-2005-65-I, Trial Chamber I, 30 May 2005.
50. See, e.g., *Prosecutor v. Kordić and Čerkez*, Judgement, Case No. IT-95-14/2-T, Trial Chamber, 26 February 2001; *Prosecutor v. Krnojelac*, Judgement, Case No. IT-97-25-T, Trial Chamber II, 15 March 2002; *Prosecutor v. Vasiljević*, Judgement, Case No. IT-98-32-T, Trial Chamber II, 29 November 2002; *Prosecutor v. Kvočka et al.*, Judgement, Case No. IT-98-30/1/A, Appeals Chamber, 28 February 2005; *Prosecutor v. Simba*, Judgment, Case No. ICTR-01-76-T, Trial Chamber I, 13 December 2005.
51. See, e.g., *Prosecutor v. Taylor*, Indictment, Case No. SCSL-2003-01-I, 3 March 2003; *Prosecutor v. Koroma*, Indictment, Case No. SCSL-2003-03-I, 3 March 2003; *Prosecutor v. Brima et al.*, Further Amended Consolidated Indictment, Case No. SCSL-2004-16-PT, 18 February 2005.
52. *Situation in the Democratic Republic of the Congo, in the Case of Prosecutor v. Thomas Lubanga Dyilo*, Submission of the Document Containing the Charges pursuant to Art. 61(3) (a) and of the List of Evidence pursuant to Rule 121(3), Case No. ICC-01/04-01/06, Pre-Trial Chamber I, 28 August 2006, para. 12. See, however, G. P. Fletcher and J. D. Ohlin, 'Reclaiming Fundamental Principles of Criminal Law in the Darfur Case', (2005) 3 *Journal of International Criminal Justice* 539, at 548–50.
53. Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 25 January 2005, at 136–9. On 31 March 2005 the situation in Darfur was referred by the Security Council to the International Criminal Court under Resolution 1593.
54. Schabas, *supra* note 24; Marston Danner and Martinez, *supra* note 42; Fletcher and Ohlin, *supra* note 52; M. J. Osiel, 'Modes of Participation in Mass Atrocity', (2005) 38 *Cornell International Law Journal* 793. The doctrine is apparently referred to by Prosecutors at the Tribunals as the 'just-convict-everyone liability concept'. See, e.g., the comments of defence counsel in *Prosecutor v. Popović et al.*, Transcript, Case No. IT-05-88-T, 23 August 2006, at 596. See also M. E. Badar, 'Just Convict Everyone!' – Joint Perpetration: From *Tadić* to *Stakić* and Back Again', (2006) 6 *International Criminal Law Review* 293, at 302.

2.2. Superior responsibility

Some of the criticisms that have been levelled against the extended category of joint criminal enterprise have similar resonance with aspects of superior or command responsibility. At its outer limits this doctrine allows for superiors to be held responsible for the crimes of subordinates which they failed to prevent or repress because of their own reckless or even negligent behaviour. There are, however, some important differences for contemporary reliance on this form of imputed liability when compared with the extended category of joint criminal enterprise. For one thing, superior responsibility has a clearer statutory basis in international criminal law.⁵⁵ It is unsurprising and relatively uncontroversial that some form of responsibility should be imposed on military commanders for subordinate crime, given the highly structured and hierarchical nature of military organizations. Furthermore, it is not unknown in criminal law for liability to be imposed on individual persons who fail to act to prevent the acts of others when they are under a legal duty to do so. Hugo Grotius wrote that rulers who exercise authority over other persons ‘may be held responsible for the crime of a subject if they know of it and do not prevent it when they could and should prevent it’.⁵⁶

For criminal responsibility to arise under this mode of imputed liability the superior must exercise effective control over the subordinates in question and be in a position actually to alter their conduct – the codification in Article 28(1) of the Rome Statute elaborates:

A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

- (a) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
- (b) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Article 28(2) provides that civilian superiors can similarly be held responsible for crimes committed by subordinates under their effective authority and control if they knew or ‘consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes’. Such crimes must have arisen in connection with activities within the effective responsibility and control of the superior, and, likewise, there must have been a failure on his or her part to prevent or repress them or to submit the matter to the competent authorities.⁵⁷

55. Art. 28 of the Rome Statute, Art. 7(3) of the ICTY Statute, Art. 6(3) of the ICTR Statute, and Art. 6(3) of the SCSL Statute.

56. H. Grotius, *De Jure Belli ac Pacis Libri Tres* (1646), Book II, Ch. XXI, trans. Francis W. Kelsey, Vol. II (1925), 523.

57. Art. 28(2)(b) and (c).

The modern doctrine of superior responsibility has its roots in a number of post-Second World War cases, most notably in the *Yamashita* proceedings.⁵⁸ The Commanding General of the Japanese Army in the Philippines had been charged with having '[u]nlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes'.⁵⁹ The Military Commission found Yamashita guilty and sentenced him to death, holding that he had failed to provide effective control of his troops as required in the circumstances.⁶⁰ It found that

Where murder and rape and vicious, revengeful actions are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending on their nature and the circumstances surrounding them.⁶¹

The judgment of the Commission was criticized for having neglected to show that Yamashita had ordered or even condoned the crimes in question, or that he even knew of their occurrence.⁶²

The International Military Tribunal for the Far East (IMTFE) held that government, military, or naval officers could be held criminally liable for particular subordinate offences if they knew of those crimes or if they should have known of them 'but for negligence or supineness'.⁶³ US Military Tribunals sitting in Germany held military commanders responsible for the crimes of their subordinates on a similar basis.⁶⁴

The Geneva Conventions of 1949 espouse criminal liability only for those 'committing, or ordering to be committed', grave breaches,⁶⁵ and it was not until the adoption of Additional Protocol I in 1977 that superior responsibility was codified in international humanitarian law. Article 86(2) of the Protocol sets out that

The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to

58. *Trial of General Tomoyuki Yamashita*, United States Military Commission, Manila, 8 October–7 December 1945, Case No. 21, IV *Law Reports of Trials of War Criminals* 1.

59. *Ibid.*, at 3–4.

60. *Ibid.*, at 35.

61. *Ibid.*

62. See, e.g., the dissenting judgments of Justices Murphy and Rutledge when the case went to the US Supreme Court, *In re Yamashita*, Supreme Court of the United States, 327 US 1, at 28, 43–4, 52–4. See also R. L. Lael, *The Yamashita Precedent: War Crimes and Command Responsibility* (1982).

63. *The Tokyo War Crimes Trial*, November 1948, International Military Tribunal for the Far East, excerpted in L. Friedman (ed.), *The Law of War: A Documentary History*, Vol. II (1972), 1029, at 1039.

64. Most notably in *United States of America v. Wilhelm List et al.*, Judgment, 19 February 1948, Case No. 7, XI *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10* 757 and *United States of America v. Wilhelm von Leeb et al.*, Judgment, 27 October 1948, Case No. 12, XI *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10* 462.

65. Art. 146, Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War (1949), entered into force 21 October 1950, 75 UNTS 287.

commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.⁶⁶

At the diplomatic conference which created the Additional Protocols there was some concern expressed at the inclusion of an objective *mens rea* standard in this provision.⁶⁷

2.2.1. *The ad hoc International Criminal Tribunals*

In his report on the establishment of an international criminal tribunal for the former Yugoslavia, the UN Secretary-General proposed the inclusion of 'imputed responsibility or criminal negligence' for superiors who failed to prevent or punish the offences of a subordinate.⁶⁸ The Statute of the ICTY provides that a superior shall not be relieved of criminal responsibility for subordinate crimes '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'.⁶⁹ The Statutes of the ICTR and SCSL include almost identically worded provisions on superior responsibility.⁷⁰ Jurisprudence from the ad hoc tribunals has stressed that there are three essential elements needed for the operation of this doctrine: (i) a superior-subordinate relationship; (ii) knowledge on the part of the superior or 'reason to know' that subordinates were about to or had committed criminal acts; and (iii) a failure to take necessary and reasonable measures to prevent the offences or to punish the perpetrators thereof.⁷¹ Considerable attention has been devoted to clarifying the meaning of the 'had reason to know' mental requirement.

In its 1998 judgment the ICTY trial chamber in the *Čelebići* case held that fulfilment of the second element of superior responsibility required either actual knowledge on the part of the superior of subordinate offences, proven by direct or circumstantial evidence, or the possession of information of such a nature as to put the superior 'on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed by his subordinates'.⁷² The chamber stressed that superior responsibility does not involve strict liability. It reiterated that the information in question did not have to confirm that offences were occurring, but simply had to alert the superior to the need to investigate subordinate activity further.⁷³ This interpretation has been

66. Art. 86(2), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), (1977), entered into force 7 December 1978, 1125 UNTS 3.

67. See, e.g., Summary Record of the Forty-Third Meeting, CDDH/I/SR.43, 23 April 1976, *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977)*, Volume IX, at 22; Summary Record of the Fiftieth Meeting, CDDH/I/SR.50, 4 May 1976, *ibid.*, at 109.

68. Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, 3 May 1993, para. 56.

69. Art. 7(1).

70. Art. 6(2) of the ICTR Statute and Art. 6(3) of the SCSL Statute.

71. *Prosecutor v. Delalić et al.*, Judgement, Case No. IT-96-21-T, Trial Chamber, 18 November 1998, para. 346.

72. *Ibid.*, para. 383.

73. See *ibid.*, paras. 387-393.

reaffirmed in subsequent decisions of both ad hoc tribunals.⁷⁴ The trial chamber judgment in *Prosecutor v. Blaškić*, however, saw a marked departure from the *Čelebići* understanding of ‘had reason to know’.

In *Blaškić* an ICTY trial chamber agreed that liability could be imposed on superiors where information at their disposal put them on notice that there was a risk that subordinates had committed or were about to commit offences.⁷⁵ It felt that the scope of liability could go beyond this, that ignorance of such crimes could not be a defence for a superior ‘where the absence of knowledge is the result of negligence in the discharge of his duties’.⁷⁶ The trial chamber found that the accused ‘had reason to know’ of the crimes against Bosnian Muslim detainees because he ‘could not have not sought information on the detention conditions’.⁷⁷ It applied a negligence standard to convict Blaškić of the cruel and inhumane treatment of detainees by his subordinates, a *mens rea* standard that was also upheld in a subsequent ICTR trial chamber judgment.⁷⁸ The Appeals Chamber of the ICTY, however, was not persuaded and overturned this finding, holding that superiors may be held criminally liable ‘for *deliberately* refraining from finding out but not for negligently failing to find out’ about subordinate crimes.⁷⁹

2.2.2. *Liability for omissions and the mental element*

Criminal liability for omissions, as already noted, is not an unknown concept. In common law jurisdictions there must be a legal duty present before liability can arise for a failure to act – there are no general duties imposed on citizens.⁸⁰ The limited number of accepted duties includes the duty of parents to ensure the safety and welfare of their children, a duty of care undertaken by contract, or the duty of a property owner to prevent the commission of offences on their property.⁸¹ In some civil law countries, in contrast, a ‘Good Samaritan’ principle operates, whereby criminal liability can arise for any person who voluntarily neglects to prevent a crime or to assist someone in peril where such actions could be taken without any personal risk or risk to others.⁸² When one considers the doctrine of superior responsibility from this perspective a number of important issues arise.

The duty of military commanders to prevent, repress, or punish subordinate crime is provided for in international law by Article 87(3) of Additional Protocol I:

The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit

74. See, e.g., *Prosecutor v. Kayishema and Ruzindana*, Judgment, Case No. ICTR-95-1-T, Trial Chamber, 21 May 1999, paras. 226–228; *Prosecutor v. Aleksovski*, Judgment, Case No. IT-95-14/1-T, Trial Chamber, 3 March 2000, para. 80; *Prosecutor v. Delalić et al.*, Judgment, Case No. IT-96-21-A, Appeals Chamber, 20 February 2001, para. 241; *Prosecutor v. Strugar*, Judgment, Case No. IT-01-42-T, Trial Chamber II, 31 January 2005, paras. 369–370; *Prosecutor v. Limaj et al.*, Judgment, Case No. IT-03-66-T, Trial Chamber, 30 November 2005, paras. 519–529.

75. *Prosecutor v. Blaškić*, Judgment, Case No. IT-95-14-T, Trial Chamber, 3 March 2000, para. 324.

76. *Ibid.*, para. 332.

77. *Ibid.*, para. 733.

78. *Prosecutor v. Bagilishema*, Judgment, Case No. ICTR-95-1A-T, Trial Chamber I, 7 June 2001, para. 46.

79. *Prosecutor v. Blaškić*, Judgment, Case No. IT-95-14-A, Appeals Chamber, 29 July 2004, para. 406 (emphasis in original).

80. A. Ashworth, *Principles of Criminal Law* (2003), at 47.

81. *Ibid.*

82. As provided for in Art. 223 of the French Penal Code, cited in *ibid.*, at 49.

or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.

Commanders have a duty to act when they are *aware* of the commission or imminent commission of breaches. It has been shown that Article 86(2) of the Protocol allows for penal or disciplinary responsibility to be imposed on superiors for a failure to act when they knew or had information which should have enabled them to conclude at the time of subordinate offences. So although the duty in this context relates to preventing acts of which a commander is aware, liability can arise for failure to act where the commander should have known of the breaches.

Additional Protocol I allows some scope for determining how to hold such a superior responsible. It specifies disciplinary or penal proceedings, but does not dictate the exact nature of the criminal charges to be taken, thus leaving the door open for offences such as ‘dereliction of military duty’ or ‘failure to properly supervise troops’. International criminal law, in stark contrast, specifies that military or civilian superiors who may not have known of the crimes of subordinates are held responsible *for those crimes* and not for some lesser offence regarding their failure to act.⁸³ In this way, and given that there may not always be a causative link between the superior’s omission and the subordinate crimes,⁸⁴ it seems that the doctrine of superior responsibility also involves elements of vicarious liability.

Although vicarious liability is primarily a tort law concept and is uncommon in criminal law, Joel Feinberg argues that if a relationship of agency is present, then ‘a principal will be co-responsible with his agent when the latter commits a criminal act at the former’s direction or with his advance knowledge or subsequent ratification’.⁸⁵ Superior responsibility allows for an imputation of criminal liability even absent such knowledge. Moreover, and as with the extended category of joint criminal enterprise, superiors may be held responsible under this doctrine on the basis of recklessness or even negligence for crimes which require a special intent. Although the ICTY has moved away from the latter *mens rea*, Article 28 of the Rome Statute opens the door for future reliance on such a standard. The International Criminal Court Preparatory Commission claimed in 2000 that the ‘should have known’ standard applicable to military commanders under Article 28 ‘was not sufficient to meet the mental element for genocide’.⁸⁶

As with joint criminal enterprise liability, superior responsibility tests the basic tenet of criminal liability that responsibility must be personal and individual. It attributes the crimes of subordinates to persons who may not have the necessary guilty mind. Mirjan Damaška points out how the doctrine leads to superiors, who may not have even condoned the crimes in question, being ‘stigmatized in the same

83. Marston Danner and Martinez, *supra* note 42, at 121.

84. The *Čelebići* trial chamber did not consider causation to be a *conditio sine qua non* for imposing criminal liability under the superior responsibility doctrine. It held that causation might be relevant to a superior’s failure to prevent crimes but it was not with regard to the punishment of subordinates after the commission of crimes; *Prosecutor v. Delalić et al.*, Trial Chamber Judgement, *supra* note 71, paras. 396–400.

85. J. Feinberg, ‘Collective Responsibility’, in J. Feinberg, *Doing and Deserving: Essays in the Theory of Responsibility* (1970), 222, at 230–1. See also D. Ormerod, *Smith & Hogan Criminal Law* (2005), at 224–34.

86. Draft Report of the Fourth Meeting of the Preparatory Commission, 30–31 March 2000, prepared by the Coalition for an International Criminal Court, at 27.

way as the intentional perpetrators of those misdeeds'.⁸⁷ Although negligent superiors should undoubtedly be held to account for their own conduct, it is questionable whether international criminal law is the most appropriate vehicle for achieving such an aim.

3. HELP OR HINDRANCE IN REALIZING THE GOALS OF INTERNATIONAL JUSTICE?

When the *Yamashita* proceedings came before the US Supreme Court, Justice Murphy, dissenting, contended that the doctrine of command responsibility was a mode of liability that was without precedent in either international law or the 'recorded annals of warfare', and that the application of a concept that so violated basic principles of criminal law would lead only to 'hatred and ill-will'.⁸⁸ In his view,

That has been the inevitable effect of every method of punishment disregarding the element of personal culpability. The effect in this instance, unfortunately, will be magnified infinitely, for here we are dealing with the rights of man on an international level. To subject an enemy belligerent to an unfair trial, to charge him with an unrecognized crime, or to vent on him our retributive emotions only antagonizes the enemy nation and hinders the reconciliation necessary to a peaceful world.⁸⁹

Justice Murphy's comments encapsulate much of what is problematic with the use of these modes of imputed criminal liability in international proceedings. The potential achievement of goals such as the maintenance of peace or contributing to reconciliation may be jeopardized by the employment of these legal doctrines. This section will consider the impact, if any, that reliance on joint criminal enterprise and superior responsibility may have on the possible achievement of the goals of international justice. This discussion underlines the thrust of recent scholarship highlighting the 'pivotal and paradoxical role played by law and legal process in times of transition'.⁹⁰

3.1. A bridge too far? The goals of international justice

Both previous and ongoing international criminal trials have been subject to a number of broad criticisms, and a brief consideration of these demonstrates the inherent general difficulties for realizing the stated goals of these trials. From the time of its inception, it has been argued that the international criminal justice project is a political undertaking which serves the interests of the 'great powers'. It is claimed that the International Military Tribunal (IMT) was established to justify US participation in the Second World War,⁹¹ while the IMTFE was created in part to further geopolitical

87. M. Damaška, 'The Shadow Side of Command Responsibility', (2001) 49 *American Journal of Comparative Law* 455, at 464.

88. *In re Yamashita*, Supreme Court of the United States, 327 US 1 [1946], at 28–9.

89. *Ibid.*

90. C. Bell, C. Campbell, and F. Ní Aoláin, 'Justice Discourses in Transition', (2004) 13 *Social and Legal Studies* 3, at 305.

91. See K. R. Chaney, 'Pitfalls and Imperatives: Applying the Lessons of Nuremberg to the Yugoslav War Crimes Trials', (1995) 14 *Dickinson Journal of International Law* 57, at 75.

interests in the Far East.⁹² The creation of the ad hoc International Tribunals was castigated for amounting to little more than ‘acts of political contrition’ by the international community for the failure to intervene to prevent atrocities in Rwanda and the former Yugoslavia.⁹³ In a similar vein, international trials are often regarded as ‘victor’s justice’, whereby only the vanquished are made to atone for their wrongful conduct.⁹⁴ And even where no particular party to a conflict emerged victorious, the selectivity in the choice of indictees tends to exclude individuals from more powerful states, as evidenced by the decision of the ICTY Prosecutor not to pursue any action against individuals involved in the 1999 NATO bombing campaign in the former Yugoslavia.⁹⁵

While there is considerable support at the international level for the use of international or domestic trials as a means of accountability, the view also remains that in certain instances the holding of such trials may provoke a violent backlash or a resurgence of conflict – a dissonance that is played out in the ongoing debate over the use of amnesties as a peacemaking tool.⁹⁶ Serious doubt was cast on the claim by the UN Security Council that the ICTY could assist in the establishment of peace in the former Yugoslavia, given the ‘rather obvious tensions between criminal law and peacemaking’.⁹⁷ The creation of the ICTY did not prevent the outbreak of the Kosovo conflict in 1999. The inclusion of a reference to peacemaking in the various UN resolutions which led to the creation of the tribunals may be explained as having been an essentially *legal* requirement, which ‘justifies the intervention of the Security Council’ in this way.⁹⁸

In addition to these macro-level criticisms, international trials have also attracted criticism for the way in which trials have been conducted and their occasional failure to comply with legal principles. Many of the proceedings after the Second

92. J. N. Maogoto, *War Crimes and Realpolitik: International Justice from World War I to the 21st Century* (2004), at 100–6.

93. R. Zacklin, ‘The Failings of Ad Hoc International Tribunals’ (2004) 2 *Journal of International Criminal Justice* 541, at 542. See also M. Humphrey, *The Politics of Atrocity and Reconciliation: From Terror to Trauma* (2002), 135; R. Teitel, ‘Bringing the Messiah through the Law’, in C. Hesse and R. Post (eds.), *Human Rights in Political Transition: Gettysburg to Bosnia* (1999), 177, at 179.

94. R. Minear, *Victor’s Justice: The Tokyo War Crimes Trial* (1971). In the context of Rwanda see Humphrey, *supra* note 93, at 137. In the context of the ICTY, there is a similar perception among certain groupings in Bosnia and Herzegovina; see L. E. Fletcher and H. Weinstein, ‘A World unto Itself? The Application of International Justice in the Former Yugoslavia’, in E. Stover and H. Weinstein (eds.), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (2004), 29, at 40–1.

95. See Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia, 2000, available at <http://www.un.org/icty/pressreal/nato061300.htm>. See generally R. Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (2005). See also M. Mandel, *How America Gets Away with Murder: Illegal Wars, Collateral Damage and Crimes against Humanity* (2004).

96. See for example the differing views on this subject of the Special Court for Sierra Leone and the Sierra Leone Truth and Reconciliation Commission, *Prosecutor v. Kallon and Kamara*, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty Case Nos. SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), Appeals Chamber, 13 March 2004; and *Report of the Sierra Leone Truth and Reconciliation Commission*, Vol. 2 (2004), ch. 2, ‘Findings’, at 109–10.

97. Teitel, *supra* note 93, at 179.

98. W. A. Schabas, *The UN International Criminal Tribunals* (2006), at 68.

World War were censured for violating the principle of *nullem crimen sine lege*.⁹⁹ The various procedural shortcomings inherent in the process before the IMTTFE probably contributed to the decision of the UN General Assembly not to affirm its work officially, as it had done with the principles of international law laid out in the Nuremberg Charter and Judgment.¹⁰⁰ Recurring criticisms of the International Criminal Tribunals for Rwanda and the former Yugoslavia have focused on the distance between the trial locations and where the crimes occurred, the lengthy nature of proceedings, the massive financial costs involved in the trial of a relatively small number of persons, and the prohibitive bureaucracy which restricted recruitment in the past.¹⁰¹ Both tribunals have previously neglected to communicate effectively with the public on whose behalf they are meant to operate, thus failing to counter public misconceptions about their work or to promote reconciliation.¹⁰² There are questions over the ability of these trials to contribute in a practically significant way to the process of reconciliation.¹⁰³ The argument can also be made that international courts and trials involve a typically Western concept of retributive justice that may have little resonance with many of the communities in whose favour they are supposed to operate, such as those in Sierra Leone or Rwanda.¹⁰⁴

The International Criminal Court will operate in a largely similar way to the ad hoc tribunals and will probably be far removed from the site of the crimes with which it is concerned. It may, however, avoid some of the above criticisms, given that it was created by a multilateral treaty and that its officials have the benefit of being able to draw on the experience of previous courts and tribunals. The ICC stands apart from those other judicial institutions, given that it is a permanent institution which is more or less independent of the Security Council. It has a vastly wider territorial and personal jurisdiction and has the potential to exercise jurisdiction over aggression, 'the supreme international crime',¹⁰⁵ although certain more powerful states have notoriously decided to remain outside the fold and are not likely to be the subject of the Court's attentions. It is clear, though, that for many societies which may emerge from conflict in the future, the ICC will quite probably

99. For a German perspective on this issue see H. Ehard, 'The Nuremberg Trial against the Major War Criminal Trials and International Law', in W. E. Benton and G. Grimm (eds.), *Nuremberg: German Views of the War Trials* (1955), 76.

100. 'Affirmation of the Principles of International Law recognised by the Charter of the Nürnberg Tribunal', GA Res. 95(1), Fifty-fifth plenary meeting, 11 December 1946.

101. See Zacklin, *supra* note 93, at 545; Rule of Law and Transitional Justice in Conflict and Post-conflict Societies, *supra* note 3, at 14–15; Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, A/54/634, 22 November 1999.

102. Zacklin, *supra* note 93, at 545.

103. See J. M. Kamatali, 'The Challenge of Linking International Criminal Justice and National Reconciliation: The Case of the ICTR', (2003) 16 LJIL 115.

104. See M. A. Drumbl, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity', (2005) 99 *Northwestern University Law Review* 539, at 596–602. Related criticism is made of the ICTY for conducting its work in primarily foreign languages and for relying on unfamiliar legal rules; see I. Šimonović, 'Attitudes and Types of Reaction toward Past War Crimes and Human Rights Abuses', (2004) 29 *Yale Journal of International Law* 343, at 358.

105. As described by the Nuremberg Tribunal; see International Military Tribunal (Nuremberg), Judgment and Sentences, 1 October 1946, repr. in (1947) 41 AJIL 1, 172, at 186. Art. 5(2) of the Rome Statute sets out the way in which crime of aggression will come within the Court's jurisdiction.

play a central role in attempts to secure justice and to hold individuals accountable for wrongful conduct.¹⁰⁶ It remains something of an unanswered question as to whether the broader aims ascribed to such trials are in fact realizable.

In considering the potential of international criminal trials to make the broader contributions spoken of, it should be borne in mind that there can be difficulty in assessing whether law and legal institutions contribute positively to the effecting of justice in times of transition.¹⁰⁷ In the context of international criminal trials in particular, there has not been adequate documentation of or theorization on their social and political impact on the communities which were directly affected by violence.¹⁰⁸ Eric Stover and Harvey Weinstein have noted that 'a primary weakness of writings on justice in the aftermath of war and political violence is the paucity of objective evidence to substantiate claims about how well criminal trials or other accountability mechanisms achieve the goals ascribed to them'.¹⁰⁹ International criminal justice is at a developmental stage and would seem to be operating on the basis of some unproven assumptions regarding the objectives it can realistically achieve. This article does not seek to resolve these broader dilemmas, but seeks to assess, on the basis that there exists some potential for criminal trials to make these wider contributions, whether reliance on modes of imputed criminal liability advances or detracts from this task. It is clear that trials which rely on these doctrines can assist the fight against impunity by allowing individuals to be held accountable for wrongful conduct. Nonetheless, when one considers some of the other objectives prescribed for international criminal justice, the potential negative impact of the more controversial forms of joint criminal enterprise and superior responsibility in this regard becomes apparent.

3.2. Imputed criminal liability

In the aftermath of the First World War the majority of the 1919 Commission proposed a basic form of command responsibility for civil or military authorities 'who ordered, or, with knowledge thereof and with power to intervene, abstained from preventing or taking measures to prevent, putting an end to or repressing, violations of the laws or customs of war'.¹¹⁰ Although the majority proposed a standard that was more rigorous than that which is applicable to superiors under contemporary international criminal law, the proposal did not enjoy unanimous approval, with both the US and Japanese delegations expressing their firm opposition to the idea.¹¹¹

106. The role of the ICC was recognized and encouraged by Secretary-General Kofi Annan in his recent report, *supra* note 3, at 16–17.

107. Bell, Campbell, and Ní Aoláin, *supra* note 90, at 309. The authors also point to 'the need for a much broader conception of transitional justice than one that focuses solely on "dealing with the past" (particularly where this past is viewed in terms of male conceptions of harm)', at 322.

108. L. E. Fletcher, 'From Indifference to Engagement: Bystanders and International Criminal Justice', (2005) 26 *Michigan Journal of International Law* 1013, at 1022, noting P. Akhavan, 'The International Criminal Court in Context: Mediating the Global and Local in the Age of Accountability', (2003) 97 *AJIL*, at 720.

109. E. Stover and H. Weinstein, 'Introduction: Conflict, Justice and Reclamation', in Stover and Weinstein, *supra* note 94, 1, at 4.

110. 'Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties', *supra* note 4, at 121.

111. *Ibid.*, at 143.

The Japanese felt that 'it would be better to rely upon a strict interpretation of the principles of penal liability, and consequently not to make cases of abstention the basis of such responsibility' in order to satisfy public opinion of the justice of any proceedings.¹¹² Failure to observe established rules of criminal liability could serve to undermine the legitimacy of the proposed trials. And, as Justice Murphy highlighted, when the public in question is that of an 'enemy nation', the circumscription of the rules in this way has the potential to antagonize and to fuel resentment, and thus frustrate the possible contribution of trials to reconciliation.¹¹³ The shortcomings and perceived hypocrisy of the judgment of the IMTFE, which employed the doctrine of superior responsibility, was a notable thread of Japanese neo-nationalist thinking after the Second World War.¹¹⁴

This line of reasoning remains of relevance to international criminal proceedings in the present day, given that modes of imputed criminal liability continue to provoke controversy. In a December 2000 survey of inhabitants from the divided Croatian town of Vukovar, a Serb interviewee made the following comment about the ICTY:

The Hague is dictated by the Americans. Those that they want to send to The Hague are sent there. And the wrong people are being tried. Take Blaskic – *he didn't even know what was going on*.¹¹⁵

While it is not decipherable if this individual's view was based on the ICTY trial chamber judgment against Blaškić, delivered some months previously, it is clear that the comments are not wholly inaccurate given the superior responsibility standard applied in that case. Although it has been shown how the *Blaškić* Appeals Chamber dismissed the negligence standard put forward by the trial chamber, it remains the case that under either formulation a court can convict a superior of subordinate crime without proof of actual knowledge of those offences. What is particularly striking about the comments made is that they were those of a Serb inhabitant of Vukovar, and General Blaškić was a Croat. Those who conducted the survey noted how perceptions of the ICTY tended to be coloured by an individual's membership of a specific national group – a Croat inhabitant of the same town, for example, felt that the 45-year sentence given to Blaškić was excessive and politically motivated, on the basis that he was a Croat.¹¹⁶ While he would also have been likely to find fault with the doctrine of superior responsibility on similar grounds, the comments of the Serb interviewee indicate that he may have felt that others were more responsible for the crimes for which Blaškić was convicted.

The emergence of several critiques from Serbia on the ICTY's use of superior responsibility prompted a Human Rights Watch researcher to write an article in the

112. *Ibid.*, at 152.

113. *In re Yamashita*, Supreme Court of the United States, 327 US 1 [1946], at 28–9.

114. J. Dower, *Embracing Defeat: Japan in the Aftermath of World War II* (1999), at 474.

115. D. Corkalo et al., 'Neighbors Again? Intercommunity Relations after Ethnic Cleansing', Stover and Weinstein, *supra* note 94, at 147 (emphasis added).

116. *Ibid.*, at 148. Similar empirical work shows that the views of legal professionals in post-conflict Bosnia and Herzegovina towards the ICTY are largely determined by their membership of a particular national group; see Fletcher and Weinstein, *supra* note 94, at 39.

Serbian press entitled 'Command Responsibility Is Not a Form of Strict Liability'.¹¹⁷ Although it is not the case that superior responsibility amounts to strict liability,¹¹⁸ it is obvious that by relying on a diminished *mens rea* level in the way that the doctrine does, it comes dangerously close to a concept of automatic liability and accordingly leaves itself open to such accusations. In a sensitive post-conflict environment, there is added significance to the adage that justice must be both done and seen to be done. Recent scholarship has rightly noted that 'perceptions of international courts are critical. These tribunals must be seen as legitimate by those on whose behalf they operate in order for their work to be accepted within affected societies.'¹¹⁹ Ivan Šimonović, a former ambassador of Croatia to the UN, observed that the national proceedings against General Mirko Norac for war crimes had a 'much more sobering effect, and have done more for the establishment of the rule of law in Croatia than any of the International Tribunal's proceedings against its citizens'.¹²⁰ He noted that the former hero was convicted for his 'personal involvement' in war crimes and argues that indictments based exclusively on command responsibility cannot have the 'same psychological impact' as evidence of direct involvement.¹²¹

Proponents of international trials have argued that one of the principal psychological impacts which it is hoped that prosecution and punishment will have is the breaking of cycles of blame which attribute responsibility for crimes to entire ethnic or national groups. The first president of the ICTY, Antonio Cassese, spoke of how one of the main objectives behind the establishment of the Tribunal was

to introduce true reconciliation once the clamour of weapons has come to an end. Even after a peace settlement has been forged, how can a man refrain from harbouring hatred and suspicion if he believes – rightly or wrongly – that a neighbour has raped his wife, has killed his children, has looted his property? How can we prevent someone from instinctively hating a whole ethnic group, and thus leaving a spark of hatred to reignite the whole conflict, if the particular member of that group who has allegedly wrought havoc upon him or her is not brought to book? Collective responsibility must be replaced by individual responsibility. Only international justice can dissolve the poisonous fumes of resentment and suspicion, and put to rest the lust for revenge.¹²²

By holding individuals responsible for crimes, it is hoped that these trials can show that the blame lies with individual persons and not with all the members of a particular collectivity.

The modes of imputed criminal liability considered in this article involve a type of collective criminal responsibility, particularly the extended-category joint-criminal-enterprise liability. These doctrines place considerable emphasis on the actions of

¹¹⁷ B. Ivanisevic, 'Command Responsibility Is Not a Form of Strict Liability', *Danas*, 25 June 2004, available at <http://hrw.org/english/docs/2004/06/25/serbia8982.htm>.

¹¹⁸ See generally W. H. Parks, 'Command Responsibility for War Crimes', (1973) 62 *Military Law Review* 1.

¹¹⁹ Fletcher and Weinstein, *supra* note 94, at 30. See also K. C. Moghalu, 'Image and Reality of War Crimes Justice: External Perceptions of the International Criminal Tribunal for Rwanda', (2002) 26 *Fletcher Forum of World Affairs* 2, at 21.

¹²⁰ Šimonović, *supra* note 104, at 358–9.

¹²¹ *Ibid.*, at 359, n. 41.

¹²² 'Address of Antonio Cassese, President of the International Criminal Tribunal for the Former Yugoslavia to the United Nations General Assembly', 14 November 1994, available at <http://www.un.org/icty/rapportan/genas-94.htm>.

other persons, in addition to those who are actually being prosecuted under the doctrine. Defendants can be held responsible for the acts of others, individuals who are more likely than not to have been a member of the same national or ethnic group, given the context in which international tribunals operate. This element of 'guilt by association' surely undermines any efforts aimed at breaking collective cycles of blame. Furthermore, the practice of international and domestic courts shows that that these controversial forms of criminal liability are largely employed only against individuals from non-Western states, as exemplified by their use by the tribunals for Rwanda and Sierra Leone. The wide net of responsibility cast by joint criminal enterprise and superior responsibility has rarely been used outside these contexts. For example, while the United States wholeheartedly embraced superior responsibility in the trial of General Yamashita, proceedings which were arguably blighted by racial prejudice against persons of Japanese origin,¹²³ it has been far more hesitant to hold its own military or civilian superiors criminally responsible for the crimes committed by their subordinates in Vietnam or Iraq.¹²⁴

On the subject of imputed criminal liability in international criminal trials, the Nuremberg trial and process provide a number of useful lessons. The preparatory work of the trial shows that the Allies intended Nuremberg to provide a flagship judgment on the basis of which thousands of members of various Nazi organizations could be convicted for their participation in a vast criminal conspiracy on the basis of their membership alone.¹²⁵ The original proposal recommended that, once this conspiracy had been established, 'each act of every member thereof during its continuance and in furtherance of its purposes would be imputable to all other members thereof'.¹²⁶ Although both aspects of the proposal drew criticism in the various stages of preparatory work leading to the adoption of the Charter of the International Military Tribunal,¹²⁷ modified versions were included in the final version of the Charter.¹²⁸ However, the Nuremberg Tribunal adopted a very cautious approach when dealing with these modes of imputed liability, declining altogether to rely on the mode of conspiratorial liability provided for in Article 6 of its Charter.¹²⁹ It viewed the concept of criminal organizations as 'a far-reaching and novel procedure'

123. A.-M. Prévost, 'Race and War Crimes: The 1945 War Crimes Trial of General Tomoyuki Yamashita', (1992) 14 *Human Rights Quarterly* 303, at 335.

124. In this regard see 'Court-Martial of Ernest L. Medina, Fort McPherson, Georgia, September, 1971', in L. Friedman (ed.), *The Law of War: A Documentary History – Volume II* (1972), 1729; T. Taylor, 'The Course of Military Justice', *New York Times*, 2 Feb. 1972, 39; Human Rights Watch, *Getting Away with Torture? Command Responsibility for the U.S. Abuse of Detainees* (2006).

125. For the original proposal see Col. M. C. Bernays, G-1, 'Subject: Trial of European War Criminals', 15 September 1944 (Document 16), in B. F. Smith, *The American Road to Nuremberg; The Documentary Record 1944–1945* (1982), 33.

126. *Ibid.*, at 37.

127. See, e.g., Smith, *supra* note 125, at 38, 86–9, 105–7, 113; Report of Robert H. Jackson, *supra* note 4, at VII, 53, 93–4, 107, 111–12.

128. Arts. 9 and 10 of the Charter of the International Military Tribunal include the criminal organizations model, while the final para. of Art. 6 provides that 'Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.'

129. See International Military Tribunal (Nuremberg), Judgment and Sentences, *supra* note 105, at 221–4.

which could produce 'great injustice' unless properly safeguarded, and added a number of restrictions to any application of the concept, 'to insure that innocent persons would not be punished'.¹³⁰ The doctrine of superior responsibility did not feature in either the judgment of the Nuremberg Tribunal or the preparatory work leading to the adoption of the London Charter. Comments made by Justice Jackson, the US representative at the 1945 London Conference on Military Trials, give an indication as to why the doctrine was not necessary for the particular individuals they were proposing to try: 'We have the captured orders, we have the reports, we have the evidence to show that they were guilty, and guilt will not be an inference merely because they were in office or in authority but because they personally knew and directed and planned these violations as their deliberate method of conducting war.'¹³¹

Although the Nuremberg process was not without criticism, particularly with regard to issues of 'victor's justice' and *nullem crime sine lege*, the judgment has stood the test of time and undoubtedly contributed to the transformation of Germany in the aftermath of the war. Empirical evidence of the time reveals that the public reaction to the trial was generally positive. Surveys carried out in the US-occupied zone during and after the trial revealed that more than 75 per cent of those surveyed felt that the trial was being conducted fairly.¹³² The trial was also credited with having increased the knowledge of the German people of the conduct and crimes of the Nazis¹³³ and, for some of those surveyed, it brought home the dangers of dictatorship and one-sided politics and emphasized the need for the maintenance of peace.¹³⁴ The whole process also provided a considerable impetus for the further development of international law for the protection of the human person.¹³⁵ What is critical from the perspective of this discussion is that the Tribunal avoided any excessive reliance on controversial forms of imputed liability – those convicted were found guilty on the basis of their wilful and purposive criminal conduct and thus the Nuremberg Tribunal did not leave any doubt as to their culpability. Several scholars of the time commended the Tribunal for restricting use of the criminal

130. Ibid., at 250–1. For the declarations of criminality see ibid. at 255–6, 261–2, 266–7. See further S. Pomorski, 'Conspiracy and Criminal Organisations', in G. Ginsburgs and V. N. Kudriatsev (eds.), *The Nuremberg Trial and International Law* (1990), 213.

131. 'Minutes of Conference Session of July 23, 1945' (Document XLIV), *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London, 1945* (1949), 328, at 332.

132. A. J. Merritt and R. L. Merritt, *Public Opinion in Occupied Germany: The OMGUS Surveys, 1945–1949* (1970), at 35.

133. Ibid., at 34.

134. Ibid., at 122. One particular survey sought to gauge the attitudes of Germans towards the imputation of responsibility to individual members of a group for the actions of other members. When asked whether a boy should help pay for a window broken by other members of his club while he was not present, responses in favour of such group responsibility ranged from 23 per cent among 10–12-year-olds, to over half of those aged 26 or older. In the scenario of a boy accompanying friends who stole a lamp, and the boy had opposed the action, around 80 per cent felt that the boy shared in the guilt of the group. Despite his opposition to the theft, 97 per cent of those West Berliners aged between 18 and 25 who were surveyed felt that the boy was equally guilty. See ibid., at 213–14.

135. Ehard, *supra* note 99, at 104.

organizations model,¹³⁶ a concept which has been firmly rejected by contemporary international criminal law.¹³⁷

One of the objectives of international criminal justice is to provide an accurate historical record and some form of truth about particular events.¹³⁸ In early 1945 the United States argued along these lines when it was seeking to convince the other Allies of the merits of an international tribunal:

We think that the just and effective solution lies in the use of the judicial method. Condemnation of these criminals after a trial, moreover, would command maximum public support in our own times and receive the respect of history. The use of the judicial method will, in addition, make available for all mankind to study in future years an authentic record of Nazi crimes and criminality.¹³⁹

In the aftermath of the Nuremberg trials, Justice Robert Jackson felt that the extensive documentation of Nazi crimes had been done ‘with such authenticity and in such detail that there can be no responsible denials of these crimes in the future and no tradition of martyrdom of the Nazi leaders can arise among informed people’.¹⁴⁰ An impartial and accurate judgment can act as an effective mechanism against revisionism and the denial of atrocities, thus preventing any further suffering for the victims of those crimes.¹⁴¹

Convicting major figures on the basis of the more controversial aspects of joint criminal enterprise liability or superior responsibility could undermine the contribution of international judgments to the record of history. William Schabas asserts that reliance on these modes of criminal liability can provide fodder for atrocity denial. He questions whether it would be a credible rebuttal to the claim made by revisionists that Hitler never intended the extermination of the Jews to say that as a superior he should have known of this, or that the genocide was a ‘natural and foreseeable consequence’ of his criminal plans.¹⁴² In deeply divided societies there is always the likelihood of denial of crimes or of a simple unwillingness to acknowledge their commission, irrespective of judicial pronouncements to the contrary.¹⁴³ Nonetheless, judgments which leave room for doubt about the guilt of a particular individual undermine the validity of their message and may serve to add fuel to

136. H. Kelsen, ‘Will the Judgement in the Nuremberg Trial Constitute a Precedent in International Law?’, (1947) 1 (2) *International Law Quarterly* 153, at 165–7. See also Q. Wright, ‘International Law and Guilt by Association’, (1949) 43 *AJIL* 746, at 754.

137. See, e.g., the failed proposal by a committee of French jurists to include the concept in the Statute of the ICTY: Letter dated 10 February 1993 from the Permanent Representative of France to the United Nations Addressed to the Secretary-General, S/25266, repr. in V. Morris and M. P. Scharf, *An Insider’s Guide to the International Criminal Tribunal for the Former Yugoslavia*, Vol. 2 (1995), 327, at 343–4.

138. See D. Joyce, ‘The Historical Function of International Criminal Trials: Re-thinking International Criminal Law’, (2004) 73 *Nordic Journal of International Law* 461.

139. Memorandum to President Roosevelt from the Secretaries of State and War and the Attorney General, January 22, 1945 (Document I), Report of Robert H. Jackson, *supra* note 4, 3, at 6–7.

140. Report to the President by Mr Justice Jackson, October 7, 1946 (Document LXIII), Report of Robert H. Jackson, *supra* note 4, 432, at 438.

141. See M. Imbleau, ‘Initial Truth Establishment by Transitional Bodies and the Fight against Denial’, in W. A. Schabas and S. Darcy (eds.), *Truth Commissions and Courts: The Tension between Criminal Justice and the Search for Truth* (2005), 159.

142. Schabas, *supra* note 24, at 1034–5.

143. For contemporary examples of a reluctance to recognize the commission of offences see Fletcher and Weinstein, *supra* note 94, at 45; Humphrey, *supra* note 93, at 136.

the fire of those who seek to advance their own version of history. In the presence of competing narratives of the causes and conduct of a recent conflict, such judgments may in turn hinder the realization of the objectives of maintaining peace and reconciliation. Intended in such a context to be a tool for imparting justice and promoting the healing of wartime wounds, law and legal mechanisms may in fact, paradoxically, inflame an already tense situation.

The principles of criminal liability to be applied by international courts should have a solid foundation in domestic legal systems in order to increase the likelihood that the judgments of those tribunals will be accepted by the local population. The lack of continuity between domestic and international criminal law can have 'a corrosive potential impact on the public support for international criminal justice'.¹⁴⁴ In the past, the Organization for Security and Co-operation in Europe encountered some resistance when it pushed for the use of the doctrines of command responsibility and joint criminal enterprise in domestic war crimes trials in both Serbia and Kosovo.¹⁴⁵ The ICTY itself acknowledged that domestic criminal law in both Croatia and Bosnia and Herzegovina at the time alleged offences were committed did not contain principles of criminal liability as far-reaching as the doctrine of superior responsibility it employed.¹⁴⁶ The UNTAET Regulations governing the work of the Serious Crimes Panels of the Dili District Court in East Timor also introduced a concept of superior responsibility which had no basis in the Indonesian Penal Code.¹⁴⁷ Defence counsel before the ICTR has argued, to no avail, that Rwandan law does not support the third category of joint criminal enterprise, that 'an individual may not be held responsible for acts of another person without having agreed to these acts or having aided and abetted in them'.¹⁴⁸ These discrepancies have the potential to undermine domestic support for these trials and to frustrate those broader achievable aims associated with the criminal process.

Finally, it is worth considering the role that international criminal trials can play in the advancement of the international rule of law and in the promotion of norms of human rights and humanitarian law. International criminal law is a discipline that is only just past its infancy, and from its very inception it has borrowed its rules and principles almost entirely from domestic criminal systems. The modes of imputed liability examined in this article, while not completely without precedent in municipal laws, are on particularly shaky grounds when applied to serious crimes,

144. Damaška, *supra* note 87, at 471.

145. See, e.g., Organization for Security and Co-operation in Europe, *War Crimes Before Domestic Courts* (2003), at 51; Organization for Security and Co-operation in Europe Mission in Kosovo, *Kosovo's War Crimes Trials: A Review* (2002), at 44–5.

146. *Prosecutor v. Ademi and Norac*, Decision for Referral to the Authorities of the Republic of Croatia pursuant to Rule 11 bis, Case no. IT-04-78-PT, Referrals Bench, 15 November 2005, paras. 32–46; *Prosecutor v. Rašević and Todović*, Case No. IT-97-25/1-PT, Referral Bench, Decision on Referral of Case under Rule 11 bis, 8 July 2005, paras. 50–51.

147. M. Bohlander, 'The Transfer of Cases from International Criminal Tribunals to National Courts', Paper presented at the Colloquium of Prosecutors of International Criminal Tribunals, Arusha, 25–27 November 2004, at 30, available at <http://69.94.11.53/ENGLISH/colloquium04/bohlander/Bohlander.pdf>. See s. 16, UNTAET Regulation 2000/15 of 6 June 2000 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences.

148. *Prosecutor v. Karemera et al.*, Decision on the Preliminary Motions by the Defence Challenging Jurisdiction in Relation to Joint Criminal Enterprise Case No. ICTR-98-44-T, Trial Chamber III, 11 May 2004, para. 17.

given their potential for departure from established principles of penal liability.¹⁴⁹ In applying these doctrines to genocide, war crimes, and crimes against humanity in a fashion that seems out of step with domestic criminal law, international criminal law may jeopardize its legitimacy and reinforce the position of those who oppose international criminal justice and favour absolute state sovereignty and isolationism. The deterrent potential of international criminal trials, although as yet unproven and perhaps even limited by the relatively low number of persons tried,¹⁵⁰ may be hampered even further. Kai Ambos contends that the deterrent effect of the superior responsibility doctrine is weakened by the lack of an exact definition in Article 28 of the Rome Statute.¹⁵¹ The common purpose provision in the Statute, it may be added, is hardly a model of clarity.

4. CONCLUSION

Trials of suspected war criminals by international courts or tribunals are by no means a panacea for the complex problems which plague many conflicted or post-conflict societies. In certain instances, the bar may simply be set too high and an excessive burden placed on the trial of a few individuals. As Daniel Joyce observes, 'the demands placed upon international criminal trials go beyond the process of securing convictions. There is an increasing expectation that such trials will contribute to broader processes of social recovery and reconciliation. Claims are also made for their having a pedagogical and documentary role.'¹⁵² In this regard it is worth noting the comments of the UN Secretary-General in his recent report:

The international community must see transitional justice in a way that extends well beyond courts and tribunals. The challenges of post-conflict environments necessitate an approach that balances a variety of goals, including the pursuit of accountability, truth and reparation, the preservation of peace and the building of democracy and the rule of law.¹⁵³

In conjunction with reconstructive and rehabilitative measures, and other complementary methods of accountability, international criminal trials can play a role in helping a society to make the transition from conflict to peace in the aftermath of atrocities. The employment of international courts or tribunals is particularly desirable where a domestic criminal justice system is either unwilling or unable to take proceedings against offenders.¹⁵⁴ In the absence of a holistic approach towards the delivery of justice, however, international trials are unlikely to fulfil the goals that have been prescribed for them.¹⁵⁵

149. Marston Danner and Martinez, *supra* note 42, at 108, 121.

150. C. Campbell, 'Peace and the Laws of War: The Role of International Humanitarian Law in the Post-conflict Environment', (2000) 83 *International Review of the Red Cross* 627.

151. K. Ambos, 'Superior Responsibility', in A. Cassese, P. Gaeta, and J. R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 1 (2002), 823, at 847.

152. Joyce, *supra* note 138, at 461.

153. Rule of Law and Transitional Justice in Conflict and Post-conflict Societies, *supra* note 3, at 9.

154. *Ibid.*, at 14.

155. In the context of the ICTY see Fletcher and Weinstein, *supra* note 94, at 37; Fletcher, *supra* note 108, at 1014; Teitel, *supra* note 93, at 189.

The employment of modes of imputed criminal liability by international courts and tribunals may further compound the difficulties that exist for the effective realization of the goals of international justice. Section 2 of this article sought to demonstrate how aspects of joint criminal enterprise liability and superior responsibility fall short of basic principles of criminal law, including the *mens rea* requirement and causation. Convictions secured under these modes of imputed liability may not accurately reflect the personal wrongdoing of an accused. It is contended that the import of these various shortcomings is amplified considerably when one considers the often temperamental nature of the situations to which the work of international courts relates, and the seriousness of the crimes over which they adjudicate. Section 3 considered whether reliance on joint criminal enterprise or superior responsibility would hinder the achievement of the goals of international criminal justice. It is argued that reliance on modes of imputed criminal liability which overstate the responsibility of a particular accused may undermine public support for the work of international tribunals and hinder the prospects for reconciliation, the breaking of cycles of collective blame, and the maintenance of peace. Furthermore, using the extended forms of joint criminal enterprise and superior responsibility may compromise prospects for deterrence and even the legitimacy of the institutions of international criminal justice.

While recent critiques have pointed to the perceived inadequacy of the individual responsibility paradigm to deal with atrocities involving multiple perpetrators and system criminality,¹⁵⁶ it would seem that the employment of joint criminal enterprise and superior responsibility is primarily motivated by a prosecutorial desire for expediency, as exemplified in the construction of the majority of indictments. Mark Drumbl has noted how various factors such as political pressure to obtain convictions have made reliance on these imputed liability concepts all the more tempting.¹⁵⁷ These broad liability models can act like a safety net and reduce the chances of an accused's acquittal. One cannot discount the idea that the tribunals are relying on these modes of imputed liability in order to ensure the conviction of indicted individuals and thus, in their view, the automatic fulfilment of the numerous broader objectives ascribed to international trials. Needless to say, it would be unacceptable for such trials to be used as a means to the end of achieving the ancillary goals, in disregard of the primary objective of holding individuals accountable in accordance with established principles of criminal liability and fair trial.¹⁵⁸

In sum, international trials can bring much to a society in transition; a domestic criminal justice system may have collapsed during the conflict, or a society in transition may remain led by a recalcitrant authority which is unwilling to bring perpetrators to justice. In comparison with domestic laws, which may have been amended to deal with the 'emergency', international law enjoys an autonomous quality and an 'externality' to the parties to the conflict: 'it is not an infinitely

156. See, e.g., Drumbl, *supra* note 104; M. Osiel, 'The Banality of Good: Aligning Incentives against Mass Atrocity', (2005) 105 *Columbia Law Review* 1751.

157. Drumbl, *supra* note 104, at 574–5.

158. Teitel, *supra* note 93, at 183.

malleable set of standards, the meaning of which states are free to appropriate according to their whims at any particular time'.¹⁵⁹ In this way trials conducted in accordance with international criminal law and human rights standards are more likely to avoid the charge of being a political show, to ensure a fair trial for the accused, and to provide a forum for victims of past abuses. Any unjustifiable deviation from established principles of criminal law, whether international or domestic, leaves a criminal process open to accusations of partiality or unfairness. While there are many parallels between the goals of international justice and those of domestic criminal justice, there is almost always significantly more at stake in international criminal trials than there is in their domestic counterparts. The modes of imputed liability examined in this article stretch considerably accepted notions of criminal liability and could seriously undermine the potential of international trials to achieve the broader goals ascribed to them.

159. Bell, Campbell, and Ní Aoláin, *supra* note 90, at 323.