State Responsibility for Support of Armed Groups in the Commission of Mass Atrocities

Submitted in partial fulfillment of the requirements of the Degree of Doctor of Philosophy

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Statement of Originality

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Abstract

Since 1945, there has been a proliferation of armed groups in conflict theatres across the globe. Although these groups exist outside of the regular forces of States, they are in most instances supported and controlled by States. Despite this, the complicit support of States in the commission of international crimes by armed groups is not recognised under international law and the tests of control through which the conduct of individuals could be attributed to States are almost impossible to meet. This allows States to maintain compelling roles in international crimes committed by armed groups with impunity. Despite this, the role played by States in modern international conflict has received only intermittent attention in the literature. This thesis seeks to address this disparity by addressing the critical role of State support of armed groups in the commission of international crimes by challenging the existing tests of attribution of conduct to States under the present rules of international responsibility.

Therefore this thesis asks whether there can be variation to the current tests for attribution of conduct of individuals who are members of non-State armed groups to States which provide support to them, by approaching the interpretation of "control" in a purposive, less literal manner. It argues this by analysing the limitations of the current law through selected case studies. It further examines alternative approaches in the fields of international human rights law and international criminal law, again through selected case studies with a view to determining whether they can assist in crafting more purposive approaches towards the determination of State control over armed groups. This will augment the current corpus of literature by suggesting improvements that can, hopefully, pass into the *lex lata* and stymie continued State impunity in this area.

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Abbreviations and Acronyms

Armed Activities Congo	*Armed Activities in the Territory of the Congo* (*DRC v Uganda*)
ARSIWA	Articles on the Responsibility of States for Internationally Wrongful Acts
BGHSt	*Entscheidungen des Bundesgerichtshofs in Strafsachen*
Bosnian Genocide	*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro*)
Čelebići	*Prosecutor v Zdravko Mucić aka "Pavo", Hazim Delic, Esad Landžo aka "Zenga", Zejnil Delalic*
Croatian Genocide	*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*
DRC	Democratic Republic of the Congo
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
FRY	Federal Republic of Yugoslavia (Serbia and Montenegro)
Genocide Convention	Convention for the Prevention and Punishment of the Crime of Genocide
ICC	International Criminal Court
ICC Statute	Statute of the International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILC	International Law Commission
IMT	International Military Tribunal
IMTFE	International Military Tribunal of the Far East
JCE	Joint Criminal Enterprise
JCE 1	Joint Criminal Enterprise 1 – shared intention
JCE 2	Joint Criminal Enterprise 2 – inference of intention from knowledge of the common plan

JCE 3	Joint Criminal Enterprise 3 – inference of intention where crimes are foreseeable
JNA	Yugoslav's People's Army
London Agreement	The Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and the Charter of the International Military Tribunal
MLC	Movement for the Liberation of the Congo (*Mouvement pour la liberation du Congo*)
MPICC Report	General Legal Principles of International Criminal Law on the Criminal Liability of Leaders of Criminal Groups and Networks, Max Planck Institute for Foreign and International Criminal Law 16 (Unpublished Report, 2009) (German)
MRT	Moldovan Republic of Transdniestria
Nicaragua	*Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States)*
PCIJ	Permanent Court of International Justice
SCSL	Special Court for Sierra Leone
SDS	Serbian Democratic Party
SFRY	Socialist Federal Republic of Yugoslavia
Tadić Appeal	*Prosecutor v Dusko Tadić* (Appeal Judgment)
TRNC	Turkish Republic of Northern Cyprus
UN Charter	Charter of the United Nations
USDFC	United Self-Defense Forces of Colombia
VRS	*Vojska Republike Srpske*

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Chapter One: Introduction

1.1 The rationale for the study

History is scored with violent episodes of armed conflict during which atrocities have often been committed on dramatic scales, marked by the number of both victims and perpetrators. These atrocities are usually perpetrated by members of a defined social, ethnic, political or religious group against individuals belonging to another defined group in one or more of these categories.[1] The atrocities committed during the Second World War and those committed during the last decade of the twentieth century in the Balkans and Rwanda serve as examples of this, but they are by no means isolated.[2] Unlike the atrocities committed during the Second World War, which were largely committed by organs of the State, the atrocities committed in the latter half of the twentieth century, for the most part, have been perpetrated by members of non-State armed groups. These armed groups by definition do not form part of the regular armed forces of a State, but nevertheless are availing themselves of some level of State support, which may either come from a third State, or from the State on whose territories the atrocities are committed.[3]

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[1] There are several good works that discuss the proposition that international crimes are usually committed by members of particular social, ethnic, political, or religious groups against other groups. In this regard N Jain, *Perpetrators and Accessories in International Criminal Law: Individual Modes of Responsibility for Collective Crimes* (Hart 2014) 1-9, HC Kelman, 'The Policy Context in International Crimes' in H van der Wilt and A Nollkaemper (eds), *System Criminality in International Law* (Cambridge University Press 2009) 26–41, and M Drumbl, *Atrocity, Punishment and International Law* (Cambridge University Press 2007) 23–46 provide good discussion on this.

[2] Further examples of grave internecine conflicts during which mass atrocities were committed by armed groups against targeted political social, ethnic or religious groups occurred: Cambodia 1975–1991 (for a history of this conflict see DP Chandler, *The Tragedy of Cambodian History Politics, War and Revolution since 1945* (Yale University Press 1992) 173-240); Sri Lanka 1995–2001 (for a history of the root causes of the conflict, dating back to the early 1970s, see J Spencer (ed), *Sri Lanka: History and Roots of the Conflict* (Taylor and Francis 2002) 227-240; Sierra Leone 1991–2002; see D Harris, *Sierra Leone: A Political History* (C Hurst 2013) 81-101; during the Congo Wars 1998–2002 (see PN Okowa, 'The Legal Dimension of a Protracted Conflict' (2007) 77 *British Yearbook of International Law* 203, particularly 205-208).

[3] One notable example of third State support occurred during the conflict between the Sandinistas and the Contra rebels in Nicaragua in 1986. Here, the USA provided a strong degree of logistical and tactical support to the Contra rebels, as discussed in *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States)* (Judgment) ICJ Reports 1986, 14 (the "*Nicaragua*" case). This was also the case in the conflict in Bosnia–Herzegovina as Serbia provided administrative, financial and logistical support to paramilitary groups such as the White Tigers, the Red Berets and

This support is sometimes due to the fact that the supporting State and the leaders (and members) of the armed group share a common discriminatory ideology against another social, political or religious group that is based on a complex interaction of historical, sociological and psychological factors.[4]This thesis therefore focusses on the conflict situations in which there is a commission of international crimes by individuals belonging to non-State armed groups where these groups enjoy a significant degree of State support owing to a shared discriminatory ideology against another defined social, political or religious group.

As the law stands, these individuals are personally responsible under the regime of individual criminal responsibility. However, over-reliance on individual or personal responsibility masks the important role that States play in international crimes through their motivation and support of armed groups. With the focus on the individual, at most the individual is punished and this is a deterrent aimed at warning others who may be similarly minded. It also takes the criminal leader or official away from management of official affairs with the hope that his removal will somehow suppress further international crimes from occurring. This is an almost naïve approach to a complex situation. Mass atrocities, for the most part, operate within the context of States and State support and to focus the thrust of responsibility on the individual is, without being hyperbolic, hopeless. The problem that remains with individual criminal responsibility is that another person can substitute the

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the Scorpions in different operations undertaken by these groups. This was discussed in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro*) (Judgment) ICJ Reports 2007, 43 (the "*Bosnian Genocide*" case). An analysis of the legal effect of this level of support is considered in Chapter Four of this thesis. In distinction to this, an example of instances where the support came from the State on whose territories the atrocities were committed is the Colombian 51-year civil war. Here, Colombian State organs supported members of the Fuerzas Armadas Revolucionarias de Colombia ("FARC").

[4] The rationalisation of appropriate legal methods for determining responsibility for these systematic and widespread atrocities needed to consider the unique motivational factors that drive these offences. For a good discussion of the impact of these historic, social and psychological factors see M Drumbl, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity' (2005) 99 *Northwestern University Law Review* 539; MJ Osiel, *Making Sense of Mass Atrocity* (Cambridge University Press 2009) 48-90; AJ Vetlesen, *Evil and Human Agency: Understanding Collective Evildoing* (Cambridge University Press 2005) 32; H Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Viking Press 1963) 3-21; and Jain, *Perpetrators and Accessories in International Criminal Law: Individual Modes of Responsibility for Collective Crimes* (n 1) 4–5.

criminal's place and the criminal system perpetuates like a hydra, when one head expires another rises to replace it. There must, as a necessity, be consideration of the indispensable role of the State responsibility regime as these crimes are collectively perpetrated and involve complex interactions among State actors. There is thus a useful role for the regime of State responsibility. However, even here the regime is limited.

In the vast majority of situations in which mass atrocities are perpetrated by individuals affiliated to non-State armed groups, States maintain a role because these groups exist either because the supporting State created them, or because their very existence depends on the support of that State. The present thesis questions State responsibility in circumstances where that support is maintained where either (a) it is reasonably foreseeable that the armed group is likely to commit mass atrocities, or (b) State support continues to be given, even in circumstances where the group has previously committed atrocities. This, for instance, happened during the Balkan wars. The Trial Chambers at the International Criminal Tribunal for the Former Yugoslavia ("ICTY") in both *Krstić*[5] and *Blagojević*,[6] found that "Bosnian Serb forces killed over seven thousand Bosnian Muslim men following the takeover of Srebrenica in 1995."[7] According to the Majority Decision in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro* (the "*Bosnian Genocide*" case),[8] even if there was no information available to the Belgrade authorities that a genocide was imminent, they could hardly have been unaware of its risks once Bosnian-Serb forces began an occupation in Srebrenica.[9]

The thesis questions whether situations like this, where State support continues in circumstances where the commission of mass atrocities can be seen as

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[5] *Prosecutor v Radislav Krstić* (Trial Judgment) IT-98-33-T, ICTY, 2 August 2001 paras 426-427.
[6] *Prosecutor v Blagojević and Jokic* (Trial Judgment) IT-02-60-T, ICTY, 17 January 2005 para 643.
[7] *Bosnian Genocide* (Judgment) (n 3) para 290.
[8] Ibid.
[9] Ibid para 436.

imminent, could have or maybe even should have bearing on questions of attribution of conduct to the State.

As is discussed in later chapters, the current approach by the International Court of Justice ("ICJ") does not consider these questions or the impact that it has on assessing the interpretation of "direction" and "control" when considering whether conduct of individuals could be attributed to States under the customary rules reflected in Article 8 of the International Law Commission's ("ILC") Articles on the Responsibility of States for Internationally Wrongful Acts ("ARSIWA") so as to render that group a *de facto* State organ.[10] It further does not consider these questions or the impact that it has on assessing the degree of support that is required to consider an armed group "completely dependent" on the State so as to render that armed group a *de facto* State organ under the customary rules reflected in Article 4 ARSIWA.[11] The present work moves from the observation that the approach used in considering the tests of attribution presently employed by the ICJ fail to reflect in full the role of the State in the commission of mass atrocities by members of non-State armed groups. In other words, this thesis argues that these approaches do not ensure that States incur international responsibility in a manner which fully mirrors the actual role they play with regard to the commission of mass atrocities by members of non-State armed groups.

This is due to the fact that the approach towards determining what constitutes "direction," "control" and "complete dependence" appears to be very literal and does not consider the more insidious ways in which direction, control or creation of a relationship of dependence can be made. Sometimes a State can maintain a position

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[10] The 2001 Articles on Responsibility of States for Internationally Wrongful Acts 53 UN GAOR Supp. (No. 10) at 43; UN Doc. A/56/83/2001.
Article 8 ARSIWA (n 10) provides: "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."
[11] Article 4 ARSIWA (n 10) provides: "1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State. 2. An organ includes any person or entity which has that status in accordance with the internal law of the State."

of omniscience in the development and sustenance of an armed group without formal power structures. The most typical examples of this occur where the supporting State and the paramilitary group share a common ethnic or religious identity and they are both vested in control over territory where there are competing group-based identities. This is explored in this thesis through the examination of the Serbian identity of the array of paramilitary groups that Serbia supported during the Balkan wars. There is that obedience to those who are seen as protecting the ethnic or religious group at whatever costs and thus questions of direction and control require a more nuanced or purposive approach towards its interpretation and application in the context of the present tests of attribution.

Although in domestic legal systems questions of aid, assistance or support or joint participation fall under the umbrella of complicity or accessorial/accomplice liability, the same does not obtain in international law. The law on complicity as reflected under the principle proposed by the ILC in Article 16 ARSIWA on the basis of aid or assistance provided by a State is only in relation to the internationally wrongful act committed by another State.[12] This exceptional basis of responsibility involves a form of complicity by one State in the internationally wrongful act of another, and thus does not involve questions of attribution of conduct. It is accordingly of little assistance for the purpose of the present enquiry insofar as the present thesis is focussed on identifying the extent to which State responsibility may arise as the result of provision of support to a non-State armed group.

While this thesis in no way seeks to resurrect the debate over the notion of "State crimes,"[13] it takes issue with the limited scope of responsibility for States that support non-State groups that either immediately commit atrocities or eventually commit atrocities, under the present approach of the international law of

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[12] Article 16 ARSIWA (n 10) states:
"A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
(a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
(b) The act would be internationally wrongful if committed by that State."

[13] For further on this issue, see discussion in section 2.2.

responsibility. As the present rules on complicity in the international law of State responsibility are structured, State complicity can normally only arise in State-to-State relationships as a result of the aid or assistance provided by one State to another in the commission of another State's internationally wrongful act.[14] This therefore normally precludes State responsibility as a consequence of complicity in the conduct of non-State actors as a matter of positive law. It thus has only a limited role to offer when addressing State responsibility for support of armed groups in the context of armed groups committing atrocities during armed conflict.[15] Therefore, a more detailed examination is needed of the principles addressing direct attribution of individual conduct to States as it is these provisions that have the potential to act as a barrier to potential impunity for States significantly involved with armed groups who go on to commit atrocities.

Consequently, this thesis advocates a more considered approach towards the questions of attribution of individual conduct to States, whereby States can be held *directly* responsible in international law for the conduct of non-State armed groups that go on to commit atrocities, due to the circumstances in which they have rendered support and the implications that this in turn has on the questions of attribution of conduct. This would require reconsideration of the current tests for attribution of conduct to States and suggestion of proposed modifications that can hopefully pass into the *lex lata*.

Since international criminal law has considered the different ways in which individuals are found responsible for participation in complex, collectively perpetrated atrocities, this thesis examines whether some of the doctrines and legal tests deriving from international criminal law can be relied upon for a proposed variation of the considerations that are made in applying tests of attribution under the

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[14] Article 16 ARSIWA (n 10); In *Bosnian Genocide* (n 3) 217 para 420, the ICJ expressed the view that Article 16 ARSIWA reflected customary international law).

[15] Exceptionally, in *Bosnian Genocide* (n 3) 216-217 paras 419-420, the ICJ made reference to Article 16 ARSIWA by analogy in the very specific context of interpreting and elucidating the notion of "complicity in genocide" under Article III(e) of the Genocide Convention for the purposes of assessing Serbia's potential international responsibility as a result of the provision of aid or assistance to those who carried out the genocide at Srebrenica.

law of State responsibility. This enquiry departs from the position that international criminal law has rigorously considered questions of allocation of criminal responsibility for participation in crimes of a "collective" nature in a sustained and detailed manner and this can inform the suggestion for modification of the tests for attribution advocated in this thesis.

In addition, since international human rights courts have also tackled the different ways in which the State can be found responsible for the violation of human rights on the basis of attribution of conduct of individuals from paramilitary groups where the acts of these individuals fall under its jurisdiction, the approach towards determining "direction" or "control" and most significantly "complete dependence" under those tests of attribution are also examined during the course of this thesis.

However, there are several issues that this proposed modification of the tests of attribution of conduct raises and these are identified in the next section.

1.2 The issues raised in proposing a modification of the tests of attribution of conduct

International criminal law and State responsibility fall under two distinct regimes in international law. Thus, suggesting a modification or variation of the tests of attribution of conduct will require an intersection or harmonisation between two separate areas of law. To apply the tests from one regime into another has been the subject of strong judicial[16] and academic criticism.[17] There are very few who accept the merits of such cross-fertilisation in the field of international law.[18] International

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[16] *Bosnian Genocide* (n 3) paras 405-407.
[17] M Milanović, 'State Responsibility for Genocide' (2006) 17 *European Journal of International Law* 553, 602.
[18] A Cassese, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment in Bosnia' *European Journal of International Law* (2007) 18, 649 especially 665-668, and especially fn 17 identifying his rebuttal to Milanović's analysis cited at 17 and also referencing G Bartolini, 'Il concetto di "controllo" sulle attività di individui quale presupposto della responsabilità dello Stato', in M Spinedi, A Gianelli, and ML Alaimo (eds), *La codifi cazione della responsabilità internazionale degli stati alla prova dei fatti* (2006) 25–52 in support of his views on the relevance of tests from one regime to another and on the interaction between criminal law with international responsibility issues, see also R Arnold, 'Command Responsibility: A Case Study of Alleged Violations of the Laws of War at Khiam Detention Centre' (2002) 7 *Journal of Conflict and Security Law* 191, 229-231.

criminal law, as most domestic criminal law systems, has a variety of mechanisms to deal with crimes involving multiple participants, and to ensure that the different roles played by individuals in the commission of the crime are reflected in the distinction between accessory to and perpetrators of crime, resulting in calibration of individual responsibility. However, international criminal law is only concerned with individual criminal responsibility and there is no jurisdictional basis *rationae personae* to deal with juridical actors, ie legal persons, including States and, accordingly, it does not have the jurisdiction or structural capacity to address the role of States in mass atrocities. Thus international criminal responsibility can only be addressed through individual agency as the individual is both the protagonist and victim of mass atrocities.[19]

In addition to this, the current regime of State responsibility does not include the notion of "international crimes of State" or "State crimes". The attempt to incorporate in the State responsibility regime rules which reflect the particularly serious nature of some violations of international law began during the tenure of Garcia-Amador as the International Law Commission's Special Rapporteur on State Responsibility with the proposal for the incorporation of a provision on "State crimes".[20] This was reflected in Draft Article 19 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts.[21] These developments were somewhat related to the ICJ's recognition in its 1970 judgment in the *Barcelona Traction* case of the notion of obligations *erga omnes*, which the Court defined as those obligations which a State owes to the international community as a whole.[22] According to the now famous dictum of the ICJ,

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[19] K Ainley, 'Individual Agency and Responsibility for Atrocity' in R Jeffrey (ed), *Confronting evil in international relations: ethical responses to problems of moral agency* (Palgrave Macmillan 2008) 38.

[20] J Crawford, 'International Crimes of States', in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (Oxford University Press 2010) 406.

[21] See Report of the International Law Commission on the Work of its Forty-eighth Session, 6 May–26 July 1996, UN doc. A/51/10, 60, 70-72.

[22] *Barcelona Traction, Light and Power Company Limited* (Second Phase) ICJ Reports 1970, 3, 32 para 33. In an often cited dictum, the ICJ then proceeded to provide examples of those obligations, holding that "Such obligations derive, for example, in contemporary international law, from the

> [w]hen a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*…[23]

Draft Article 19 attempted to translate this idea of *erga omnes* obligations into the regime of State responsibility, by creating the notion of "international crime" of States, defined as:

> [a]n internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as whole constitutes an international crime.[24]

However, as is well known, this provision did not survive the final reading.

Despite the fact that there were those who felt that the *erga omnes* character of the norms should give effect to distinct consequences in the form of a separate and distinct regime of State responsibility for international crimes,[25] a distinct regime of State responsibility for international crimes was never realised.

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outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law […]; others are conferred by international instruments of a universal or quasi-universal character […]"; ibid 32 para 34.

[23] Ibid para 33.

[24] Report of the International Law Commission on the Work of its Forty-eighth Session, 6 May–26 July 1996, UN Doc. A/51/10, 60, Draft Article 19 reproduced in J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press 2005) 352.

[25] The States who advocated a distinct regime included Austria, the Czech Republic, Denmark on behalf of the Nordic countries, France and Ireland: in J Crawford, 'The First Report on State Responsibility by Mr. James Crawford, Special Rapporteur' (1998) *Yearbook of the International Law Commission*, Vol II Part I, UN Doc A/CN.4/SER.A/1998/Add.1 (Part 1) 113 para 3; 114 para 4; 115 para 2; 115 para 9; 116 para 19, respectively.

Before the ARSIWA were adopted in 2001, the ILC under Special Rapporteur James Crawford, reconsidered the issues of international crimes.[26] It was agreed that Draft Article 19 would be excised, as there was a failure to agree as to what these penal consequences would be and how they would be implemented in practice. In the main, States took issue with punitive reparations being allowed under the State responsibility regime, as to some the very nature of the State responsibility regime was a *sui generis* (neither delictual nor criminal) system and the introduction of the notion of State crimes would confuse the notions of State interest with the principles of individual criminal responsibility.[27] Instead, a compromise was reached so that, notwithstanding the deletion, there would be provisions that incorporated consequences for breach of *erga omnes* obligations and peremptory (*jus cogens*) norms of international law.[28]

Thus, the ARSIWA instead reflected the particularly concerning nature of certain violations of international law by introducing a somewhat special regime for "serious breaches of obligations arising under peremptory norms of international law" as outlined in Article 40 ARSIWA.[29] In relation to those serious breaches, Article 41 introduced further special consequences for third States, namely, the obligation to cooperate to bring about an end to the breach, the obligation not to render aid or assistance to the responsible State and the obligation not to recognise as

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[26] Report of the International Law Commission on the Work of its Forty-ninth Session (12 May–18 July 1997) (1997) *Yearbook of the International Law Commission*, Vol II Part Two, UN Doc. A/CN.4/SER.A/1997/ADD.1 (Part 2) 11 para 30; and 58 para 161.

[27] Crawford, 'The First Report on State Responsibility (n 25) UN Doc A/CN.4/490/1998/ and Add.1-7 paras 52-54.

[28] A peremptory norm of general international law is defined in Article 53 of the Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force January 27 1980) 1155 UNTS 331 is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can only be modified only by a subsequent norm of general international law having the same character. On the debate which eventually led to the abandonment of the notion of "State crimes", see Crawford, 'The First Report on State Responsibility (n 25) UN Doc A/CN.4/SER.A/1998/Add.l (Part 2) paras 322-332. For commentary see Crawford, 'The First Report on State Responsibility (n 25) Add.1 (Part 1) paras 46-86 and Crawford, *The International Law Commission's Articles on State Responsibility* (n 24) 36.

[29] Article 40 ARSIWA (n 10) provides:

"1. This Chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of international law.

2. A breach of such obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation."

lawful any situation created by the breach.[30] Furthermore, in parallel, the ARSIWA also created unique rights of invocation for breaches of this category of obligations. Article 48(1)(b)[31] allows States not directly injured by the breach to have a right of standing if "the obligation breached is owed to the international community as a whole,"[32] ie if the obligations are *erga omnes*. This special provision for invocation thus embeds the principle that the obligations owed under these norms are so important that all States maintain an interest in their protection.[33] This is distinguishable from the right of standing created under Article 48(1)(a) in relation to obligations *erga omnes partes*, ie they apply to a group of States as, for instance, under a particular treaty.[34]

The challenge here is that if State support is to be addressed, it can only be done through the regime of State responsibility and the question is how best can that regime offer up solutions to this apparent loophole for States on questions of responsibility for support of armed groups? The solution might be to determine if there is a junction point between the two regimes, a common ground they both share

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[30] Article 41 ARSIWA (n 10) provides:
"1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of Article 40.
2. No State shall recognise as lawful a situation created by a serious breach within the meaning of Article 40, nor render aid or assistance in maintaining that situation.
3. This Article is without prejudice the other consequences referred to in this Part and to such further consequences that a breach to which this Chapter allies may entail under international law."
[31] Article 48 ARSIWA (n 10) provides:
"1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:
a) The obligation breached is owed to a group of States including that State, and is establishes for the protection of the collective interest of the group; or
b) The obligation breached is owed to the international community as a whole.
2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:
a) cessation of the internationally wrongful act and assurances or guarantees of non-repetition in accordance with Article 30; and
b) performance of the obligation of reparation in accordance with the preceding Articles, in the interest of the injured State or of the beneficiaries of the obligation breached.
3. The requirements for the invocation of responsibility by an injured State under Articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1."
[32] Article 48(1)(b) ARSIWA (n 10).
[33] *Barcelona Traction, Light and Power Company Limited* (Second Phase) (n 22) 32 para 33.
[34] Article 48(1)(b) ARSIWA (n 10).

and then determine the extent to which this ground can allow for a cross-fertilisation of legal tests or methods for the assigning of responsibility.

Firstly, both regimes are premised on the basis of individual agency. With international crimes, individuals are personally responsible for their role in a mass atrocity based on the Kantian notion that individuals should be personally responsible for the actions they have voluntarily assumed.[35] Notwithstanding that this individual responsibility is sometimes contextualised within a collective, this collective does not possess these qualities of moral agency and thus an individual is personally responsible for their role in the collective.[36] While there are different theories that discuss agency in international law,[37] since the State is a juridical person, the State responsibility regime is similarly premised on the basis of individual agency. Whereas in international criminal law an individual is responsible for his own criminal acts or omissions, the State as this juridical person is only responsible in law if the conduct of individuals can be attributed to it. The regimes of individual and State responsibility are thus similar, in so far as both are concerned with the assigning of responsibility based on the acts of individuals.

Secondly, the two regimes are underscored by the Kantian approach towards morality. According to Kant, "actions are morally right by virtue of their motives, which must derive more from duty than from inclination."[38] This in turn gives the law a universality that can apply to all moral agents.[39] This universality of moral duties was very evident in the creation of the different international criminal courts

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[35] K Ainley, 'Individual Agency and Responsibility for Atrocity' (n 19) 40 discussing Kant and moral responsibility.
[36] T Isaacs 'Accountability for Collective Wrongdoing' in T Isaacs and R Vernon (eds), *Accountability for Collective Wrongdoing* (Cambridge University Press 2011) 5: "collective entities do not have the requisite qualities for moral agency and that we do better to focus on the moral responsibility of the individual members…"
[37] In this regard, see A Sereni, 'Agency in International Law' (1940) 34(4) *The American Journal of International Law* 638 for a useful overview.
[38] G Kemerling, 'Kant the moral order' *Philosophy Pages* (last modified 12 November 2011) available <www.philosophypages.com/hy/5i.htm> [accessed 12 July 2016]; I Kant, *Groundwork for the Metaphysics of Morals* (ed and transl AW Wood, Yale Press 2002) 13-14.
[39] Ibid.

and tribunals,[40] but also in the creation of the Charter of the United Nations ("UN Charter")[41] and treaties such as the Convention for the Prevention and Punishment of the Crime of Genocide (the "Genocide Convention"),[42] and the four Geneva Conventions of 1949.[43] These examples are part of a wider treaty framework created after the Second World War that are underpinned by a communitarian approach towards achieving this Kantian notion of morality.[44]

Thirdly, as is discussed in Chapter Two, this common ground is further supplemented by a bourgeoning body of academic commentary that advocates concurrent approaches towards the assigning of responsibility for mass atrocities between the two regimes.[45] This is further supplemented by some key judicial views as to the openness of the regime of State responsibility to consideration of new approaches towards the question of attribution.[46] While this is more substantially discussed later in this thesis, it is important to note that although the ICJ is interested in maintaining certainty and clarity in the interpretation and application of legal tests,

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[40] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and the Charter of the International Military Tribunal (signed 8 August 1945, entered into foce 8 August 1945) 82 UNTS 279; Statute of the International Criminal Tribunal for Rwanda; UNSC Res. 955 (1994) and last amended by UNSC Res. 1717 (2006); Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed on the Territory of the Former Yugoslavia since 1991; see UNSC Res. 827 (1993) and last amended by UNSC Res. 114 (2002)

[41] Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.

[42] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered in force 12 January 1951) 78 UNTS 278.

[43] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field ("First Geneva Convention") (adopted 12 August 1949, entered into force 21 October 1950)75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea ("Second Geneva Convention") (adopted 12 August 1949, entered into force 21 Otober 1950) 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War ("Third Geneva Convention") (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War ("Fourth Geneva Convention") (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287.

[44] The language of the Preamble to the UN Charter and as well the Preamble to the Genocide Convention evidence this.

[45] Discussed in Chapter 2.

[46] *Bosnian Genocide* (Dissenting Separate Opinion of Vice President Al Khasawneh) (n 3) 241 para 39; *North Sea Continental Shelf* (Judgment) ICJ Reports 1969, 3 para 4; *Competence of the General Assembly for the Admission of a State to the United Nations*: *Advisory Opinion* ICJ Reports 1950, 4, 12-13.

there is nevertheless some judicial opinion[47] that supports fresh interpretations or suggested modifications of particular tests, thus this thesis can be contextualised here.

Lastly, this proposed variation of the considerations that should be made during the application of the tests of attribution is necessary. At present, under the current law of State responsibility, the test for attribution of conduct of armed groups to a State is far less nuanced and arguably unable to reflect differentiated degrees of involvement by the State in the commission of mass atrocities. This is because the regime of State responsibility as currently reflected in the ARSIWA is limited because of the way in which the norms on attribution of conduct of non-State actors to States operate. In most situations involving international crimes, before conduct of individuals who are not organs of the State can be attributed to it, it must be proven that the individuals in question were either acting "on the instructions of or under the direction or control of [the] State in carrying out the conduct"[48] or were in a relationship of complete dependence upon it.[49] While this is straightforward when concerning heads of States or commanders as their conduct can be readily attributed, the tests are under-inclusive when it comes to attribution of conduct of other individuals. These tests of attribution do not adequately take account of the subtle and subversive roles States can play in contributing to the commission of international crimes by sponsoring or supporting armed groups who have committed or are likely to commit international crimes. This is because the tests for the attribution of conduct for the purpose of engaging the international responsibility of the State do not consider degrees of State involvement in mass atrocities in the same way the regime of individual criminal responsibility considers the roles of

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[47] *North Sea Continental Shelf* (n 46) para 44. For instance, in this case, the Federal Republic supported its arguments not on the standard interpretation of the natural prolongation of the coastline principles, but on another idea, namely that of the proportionality of the State's continental Shelf area to the length of its coastline." Instead of rejecting this, the ICJ considered this fresh interpretation. See also dictum of Jude Alvarez in *Competence of the General Assembly for the Admission of a State to the United Nations*: *Advisory Opinion* (n 46) 4, 12-13.

[48] Article 8 ARSIWA (n 10).

[49] The test was enunciated by the ICJ in *Nicaragua* (n 3) and clarified in *Bosnian Genocide* (n 3). This is discussed in detail in Chapter 4.

individuals under the different modes of responsibility. Thus, the different roles a State can play are not calibrated in a similarly refined fashion according to the circumstances in which they render support to armed groups who do not form part of the regular forces of the supporting State. Modification of the way the tests of attribution of conduct to States can be approached, perhaps by considering the way in which tests used in international criminal law for assigning responsibility in cases of collective criminality are done, could achieve this more nuanced approach towards State responsibility for participation in international crimes.

1.3 The research question

It is against this background that the present thesis inquires whether there can be a variation to the current tests for attribution of conduct of individuals who are members of non-State armed groups to the State or States which provide support to them, by approaching the interpretation of "control" in a different manner. This thesis suggests that there are useful approaches from the international criminal courts and international human rights courts towards considering whether this concept can be interpreted in a more rigorous and less literal way.[50]

The argument put forwards by this thesis is that this variation in the way control is considered or examined would go a long way to stemming the tide of State impunity for the support of armed groups in circumstances where the members of these groups either commit mass atrocities or are likely to do so.

This is because international criminal law has defined different tests for assigning responsibility to individuals in circumstances where these individuals are not the physical perpetrators of the crime (ie they do not perform the physical act of the crime), but they nonetheless share a common purpose with them. This is particularly in the context of large-scale criminal enterprises. Although these tests are by no means perfect, they nonetheless identify the role of different individuals

[50] This question is formulated by suggestions put forwards by Vice President Al Khasawneh in his Dissenting Opinion found in *Bosnian Genocide* (Dissenting Opinion of Vice President Al Khasawneh) (Judgment) (n 3) 241 para 39. Discussed in Chapter Two.

who either exercise executive powers within the State and motivate the crimes, or alternatively encourage the commission of these crimes by providing financial and logistic assistance to the armed groups. In many ways, States also become involved in international crimes in a similar manner by either engineering the commission of international crimes through the dissemination of ideologies that motivate, assist and encourage the work of armed groups who later go on to commit international crimes or by providing crucial financial and logistic assistance to the armed groups which gives them the means to perpetrate the crimes.[51] So too, in the international Human Rights Courts, the Courts have addressed the relationship between States and armed groups who commit serious violations of human rights norms by examining the effect of State support in the provision of arms, financial or logistic aid and the effect this had on rendering members of armed groups "State agents," under the State's territorial control.[52]

Thus, in comparison the current rules of attribution in the law of State responsibility are far too under-inclusive as they fail to take into account the varied nature of the circumstances in which State involvement gives rise to responsibility. These States are not responsible in international law because the conduct of the individuals responsible for the crimes cannot be attributed to the States in question. This has two important consequences. Firstly, the State cannot be held to account for its role as such in the commission of the atrocities. Although in such situations it is possible that a State can be found responsible for violations of other obligations, such as the obligation to prevent or punish those responsible for committing international crimes,[53] or the obligation not to intervene in the affairs of another State,[54] this does not indicate the full impact of the supporting role the State plays and provides a loophole through which States can participate in mass atrocities and still remain beyond the reach of responsibility. Secondly, the fact that the State is not called upon to respond for the atrocities themselves implies that the special

[51] Discussed in Chapter Three.
[52] Discussed in Chapter Four.
[53] *Bosnian Genocide* (Judgment) (n 3) 43 para 199.
[54] *Nicaragua* (n 3) paras 136-137.

consequences and remedies which the regime of State responsibility offers for particularly serious internationally wrongful acts simply cannot be accessed.

With this in mind, since the State is a juridical abstract, the question of responsibility turns on the question of attribution. As an abstract entity, it could only be responsible to the extent that the acts of individuals committing international crimes could be attributed to it. This thesis, as noted before, enquires whether a case could be made for that subtle variation to the current tests for attribution of conduct of individuals who are members of non-State armed groups to the State or States which provide support to them, by approaching the interpretation of "direction," "control" and "complete dependence" in a manner parallel to which international criminal courts and international human rights courts have addressed similar issues of interpretation.

This is because the tests for the assigning of responsibility in international criminal law look towards the impact of the role of different individuals on the commission of a crime and critically address the nexus between these individuals and the crime itself. This inquiry examines whether the adoption of these tests will pave the way for a more rigorous analysis of the role of States in international crimes and thereby provide greater recognition of the participatory role of States in the commission of international crimes.

So too, as noted earlier, since the international Human Rights Courts have addressed the relationship between States and armed groups who commit serious violations of human rights norms by examining the effect of State support in provision of arms, financial or logistic aid on the question of jurisdiction, those approaches might similarly pave the way for a more rigorous analysis of the role of States in these international crimes.[55]

[55] Discussed in Chapter Four.

Although there is a considerable body of literature[56] that has emphasized the importance of creating a relationship between the two regimes of responsibility, particularly so that the regimes can mutually support each other with a view to addressing both State and non-State actors in international crimes, it addresses this regime interaction[57] from the point of view of institution of parallel processes for responsibility and requests for relief. Thus far, there has been no sustained proposal that examines whether changes to the current model of attribution of conduct of individuals can be put forwards. This thesis thus seeks to make a further contribution to the existing body of literature, which is examined in Chapter Two, that advocates greater links and increased coordination between the regimes of individual and State responsibility.

Proposals along the broad lines of those advocated in this thesis have also been put forwards in the context of judicial proceedings.[58] This thesis thus seeks to fill this gap in the literature by examining the extent to which the existing tests for attribution of conduct to individuals ought to be expanded to incorporate consideration of State participation in mass atrocities committed by armed groups who receive substantial support from them.

This thesis discusses and analyses whether these suggested variations can, in part, fill the lacuna existing in the current framework of international law whereby States escape the net of responsibility in circumstances where they had a clear participatory role in the collective perpetration of international crimes. The next sections establish the use of terms in this work, provide a discussion of the methodology used to present the thesis argument and finally provide a broad outline of the structure of the work.

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[56] Discussed in Chapter Two.
[57] The phrase "regime interaction" is taken from the title of M Young (ed), *Regime Interaction in International Law – Facing Fragmentation* (Cambridge University Press 2012).
[58] *Bosnian Genocide* (Dissenting Separate Opinion of Vice President Al Khasawneh) (n 3) 241 para 39.

1.4 Use of terms

A number of key terms are used in this work, such as "international crimes," "serious breaches of obligations arising under peremptory norms" and "mass atrocities." The thesis also refers to "regimes of responsibility," ie the regime of State responsibility, the regime of individual criminal responsibility, the human rights regime, modes of responsibility and "armed opposition groups". This section explains the meaning of these terms in this work.

International law has so far addressed questions of responsibility for participation in systemic, widespread and heinous acts by one defined social, political, ethnic or religious group against another from two perspectives: that of the individual perpetrator(s) and that of the State(s) which may be responsible for those atrocities. The relevant rules and principles concerning liability / responsibility for those acts are contained in two different "regimes of responsibility," namely the regime concerning individual criminal responsibility (ie international criminal law) and that concerning the international responsibility of States for internationally wrongful acts (ie the law of State responsibility). Separate from this is another regime that addresses State responsibility for violations of obligations owed towards individuals under the jurisdiction of the Convention or Treaty that supports human rights protection.

Within each regime, a specific term is used to describe conduct which amounts to mass atrocities. When they are being addressed through the regime relating to individual criminal responsibility, they are referred to as "international crimes". In relation to the same acts or omissions that give rise to these international crimes, in the regime of State responsibility there may exist an internationally wrongful act committed by a State, which may amount to a "serious breach of obligations arising under peremptory norms." Thus, when acts of genocide, crimes against humanity or war crimes are being addressed through the regime of State responsibility, they are

referred to as "serious breaches of obligations arising under peremptory norms".[59] Similarly, in the human rights regime, acts of genocide, crimes against humanity or war crimes may constitute a serious violation of human rights. Thus when they are being addressed under the human rights regime they are referred to in these terms.

When discussed generally in the thesis, the acts in question (aggression, genocide, war crimes or crimes against humanity) are sometimes referred to with a broad and non-legal term as "mass atrocities". While the terms "international crimes" and "serious breaches of obligations arising under peremptory norms" are used in a specific legal context, ie when the legal test for determination of responsibility in a particular regime is being analysed, "mass atrocities" is used broadly in discussion when no specific regime is being analysed.

The expression "international crimes" is used to refer to the "core crimes" under Article 5 of the Statute of the International Criminal Court (the "ICC Statute"), namely, aggression, genocide, crimes against humanity and war crimes.[60]

Within the specific regime of State responsibility, illicit conduct by States is termed an "internationally wrongful act". In this sense, commission, complicity in, endorsement, encouragement and failure to prevent the commission of acts of genocide, war crimes and crimes against humanity all amount to internationally wrongful acts.[61] In addition to being an "ordinary" internationally wrongful act,

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[59] There is a caveat to place here. While it is agreed that prohibitions against aggression, genocide and crimes against humanity are peremptory norms the same does not automatically apply to war crimes. In this regard see M Bassiouni, '*Jus Cogens* and *Oblgatio Erga Omnes*' (1996) 59(4) *Law and Contemporary Problems* 63, 65 noting "With respect to the consequences of recognizing an international crime as *jus cogens*, the threshold question is whether such a status places *obligations erga omnes* upon states or merely gives them certain rights to proceed against perpetrators of such crimes."

[60] Article 5 Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3.

[61] A de Hoogh, *Obligations Erga Omnes and International Crimes: A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States* (Kluwer International 1996) 60: "International crimes are just like peremptory norms, based on prohibitive primary rules of international law. Supporting views on this are also discussed in A Zimmerman and M Teichman 'State Responsibility for International Crimes' in H van der Wilt and A Nollkaemper (eds), *System Criminality in International Law* (Cambridge University Press 2009) 298-299; and I Scobbie, 'Assumptions and Presuppositions: state responsibility for system crimes' in H van der Wilt and A

these violations, as mentioned above, may be regarded as amounting to a "serious breach of obligations arising under peremptory norms of general international law".

Within the regime of individual responsibility, there are particular modes of participation through which responsibility could be assigned, eg joint criminal enterprise, co-perpetration, indirect perpetration, conspiracy or aiding and abetting. These are referred to as "modes of responsibility".

Lastly, the term "armed groups" refers to armed groups that do not form part of the regular forces of the State.

1.5 Methodology

As explained above, this thesis argues that, as currently defined in the jurisprudence of the ICJ, the generally accepted tests for attribution of conduct to States for the support of armed groups who go on to commit international crimes does not reflect the real role played by States in this context. While the thesis accepts that, under the current framework of responsibility, a State which supports armed groups can be held responsible for breach of other international obligations,[62] it argues that this result is unsatisfactory, as it leads to a reduction or a minimisation of the true role of the State, which is not fully called to account for its role in the commission of serious breaches of obligations owed under existing peremptory norms. Thus, the methodology used seeks to analyse the extent to which the true role of the State can be better understood.

This thesis adopts a traditional "legal scholarship" approach, insofar as it addresses the analysis of relevant case law, treaties, statutes, and engages with the relevant academic debate with a view to critically assessing the current status of the law and, as appropriate, then makes suggestions for modification of the legal

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Nollkaemper (eds), *System Criminality in International Law* (Cambridge University Press 2009) 277-280.

[62] Such as, for example, a breach of the duty to prevent or punish acts of genocide under Article 1 Genocide Convention (n 42) or the breach of the prohibition of intervention in the domestic affairs of another State under customary law and/or Article 2(7) UN Charter (n 44).

framework. However, the thesis, while in part relying on a positivist discussion of the *lex lata*, cannot simply pursue an exposition and analysis of this problem by relying solely on this approach to legal theory.

Law, by its very nature, is a dynamic discipline that is constantly looking forwards as it reflects and responds to the socio-political environment in which it operates. An examination of whether particular shifts in policy might be able to remedy limitations under the current *lex lata* in reference to a particular issue has been a mainstay of legal development.[63] Consequently, these proposed modifications to the current tests of attribution as prescribed by Articles 4 and 8 ARSIWA are part of that policy-oriented approach that seeks to determine enhanced accountability for the role of States in international crimes through support of armed groups.

This policy-oriented approach towards these proposed modifications is not without precedent. Scholars of the "New Haven School," most notably Laswell and McDougall in the 1960s,[64] suggested a policy-oriented approach towards legal scholarship so as to

> improve the performance of decision processes themselves and enhance their capacity to achieve outcomes more consonant with human dignity. This necessarily involves a careful assessment and critique of current processes, institutions and practices…[65]

The thesis thus critiques the current legal tests or practices for determination of attribution of conduct of individuals to States, so as to present a set of

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[63] H Thirlway, 'Reflections on Lex Ferenda' (2001) 32 *Netherlands Yearbook of International Law* 3, 13.

[64] S Wiessner and AR Willard, 'Policy-Oriented Jurisprudence and Human Rights Abuses in International Conflict: Toward a World Public Order of Human Dignity' in S Ratner and AM Slaughter (eds), *The Methods of International Law* (Studies in Transnational Legal Policy 2004) 48. The ideas are fully discussed in MS McDougall and WM Reisman, 'Theories of International Law: Prologue to a Configurative Jurisprudence' (1968) 8 *Virginia Journal of International Law* 188, 195-196.

[65] M Reismann, S Wiessner and A Willard, 'The New Haven School: A Brief Introduction' (Faculty Scholarship Series, Paper 959, Yale Law School) <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1996&context=fss_papers> [accessed 4 August 2016].

recommendations to vary these tests so that they give fuller recognition to the true role of States in the commission of international crimes by armed groups.

There have been examples in the jurisprudence of the ICJ where the Court took an interpretive stance and modified the approaches used in its past jurisprudence.[66] Further, some jurists have expressed that the ICJ should be open to this process of critique and reform.[67] It is on this basis that this thesis undertakes an analysis of the law with a view to suggesting improvements.

In this regard, this thesis explores these suggestions through discussion of the jurisprudence of the ICJ in which the tests for attribution of conduct of groups are analysed. It discusses the seminal Decision in the *Nicaragua* case[68] and subsequent Decisions in which the Court has addressed questions of attribution of conduct of private armed groups to the State, including the *Bosnian Genocide* case[69] as well as the judgment of the Court in *Armed Activities in the Territory of the Congo* (*DRC v Uganda*) (the "*Armed Activities Congo*" case).[70] The thesis does not examine the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (the "*Croatian Genocide*" case) as the Court specifically did not address the question of attribution of conduct to individuals in that case and thus it does not offer significant assistance to analysis of the research question. There is contemporary relevance to the material examined as these core cases are very recent. *Nicaragua* was decided in 1986, however the other cases have been decided in the last ten years.

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[66] *North Sea Continental Shelf* (n 46); *Competence of the General Assembly for the Admission of a State to the United Nations*: *Advisory Opinion* (n 46).
[67] See also dictum of J Alvarez in *Competence of the General Assembly for the Admission of a State to the United Nations*: *Advisory Opinion* (n 47) and the comments of R Higgins, *The Problems and Processes of International Law* (Oxford University Press 1994) 12.
[68] *Nicaragua* (Merits, Judgment) (n 3) para 109.
[69] *Bosnian Genocide* (Judgment) (n 3) 43 paras 385-395; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (Judgment) ICJ Reports 2015 (not yet reported) 1 para 442.
[70] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) ICJ Reports 2005, 168 para 160.

The thesis also examines the jurisprudence of different international courts and tribunals with a view to identifying and analysing the different ways in which they have addressed questions of assigning responsibility to individuals in situations of collective participation. The cases that are examined have been selected as they are the core cases that have considered the modes of responsibility under analysis. The cases have been selected from the International Criminal Tribunal of the Former Yugoslavia ("ICTY"),[71] the International Criminal Tribunal of Rwanda ("ICTR"),[72] and the International Criminal Court ("ICC")[73] because the defining principles have been established in these Courts and Tribunals. Only passing reference is made to the internationalised (or hybrid) criminal courts and tribunals (for example, the Extraordinary Chambers in the Courts in circumstances of Cambodia, "ECCC",[74] and the Special Court for Sierra Leone, "SCSL"[75]) just to note the circumstances where they have applied the jurisprudence of the aforementioned International Criminal Courts and Tribunals. Additionally, since the modes of responsibility applied by the international courts and tribunals derived from principles emanating out of the International Military Tribunal ("IMT")[76] and the Nuremberg Tribunals established under Control Council No. 10,[77] some of those early Decisions are

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[71] The ICTY was created pursuant to the Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed on the Territory of the Former Yugoslavia since 1991 (n 40).

[72] The ICTR was created pursuant to the Statute of the International Criminal Tribunal for Rwanda (n 40).

[73] The ICC was created pursuant to the ICC Statute (n 60).

[74] The ECCC was created pursuant to the Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Laws of Crimes Committed during the Period of Democratic Kampuchea (signed 6 June 2003, entered into force 29 April 2005) 2329 UNTS 117.

[75] The SCSL was created pursuant to the Statute of the Special Court for Sierra Leone, UNSC Res. 1315 (2002) 16 January 2002.

[76] The Agreement for the Prosecution and Punishment of the Major War Criminals of the Europena Axis Powers and the Charter of the International Military Tribunal in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis ("London Agreement") (signed 8 August 1945, entered into force 8 August 1945) 82 UNTS 280.

[77] Control Council No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against the Peace and Humanity (signed 7 May 1945, December 20 1945) 3 *Official Gazette Control Council For Germany* 50-55 (1946). The cases selected are more fully discussed in Chapter 5.

[77] The ICTY was created pursuant to the Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed on the Territory of the Former Yugoslavia since 1991; See UNSC Res.827 (1993) and last amended by UNSC Res.114 (2002).

looked at, in as much as they show the evolution of the concepts underpinning the modes of responsibility applied by the more contemporary International Criminal Courts and Tribunals. Thus the analysis of the modes of responsibility examines cases from the 1940's onwards to current day.

The modes of responsibility that have been examined with a view to suggesting approaches that can be useful in modifying the tests of attribution are Joint Criminal Enterprise ("JCE"), Co-perpetration and Indirect Perpetration.

The cases looked at during the examination of the JCE mode are the *Tadić* Appeals case[78], the *Brdjanin* Decisions from both the Trial Chamber and Appeals Chamber,[79] the *Kvočka* Appeal[80] and the *Kronjelac* Appeal[81] and the *Krstić* Appeals Decision[82] and the *Stakić* Trial Chamber Decision.[83] The *Tadić* Appeals Decision was selected because it was the first case to formally discuss JCE as a mode of responsibility and it outlined three categories of participation under this mode. It is the defining case that other cases have elaborated upon in discussion of the parameters of this mode. The subsequent cases represent elaborations to the tests outlined in the *Tadić* Appeal and have been consistently applied in the jurisprudence of the ICTY, ICTR and the hybrid courts that pattern their constitutive instruments on the ICTY and ICTR as regards cases that address the determination of responsibility of individuals under the respective categories of JCE. They thus represent the approaches used by these Tribunals that can usefully inform suggested improvements to the current tests of attribution of individuals to States.

The cases looked at for co-perpetration derive from both the ICTY and the ICC. Although co-perpetration was not applied in the jurisprudence of the ICTY or the ICTR, it was introduced into international criminal jurisprudence through the

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[78] *Prosecutor v Dusko Tadić* (Appeal Judgment) (the "*Tadić* Appeal") IT-94-1-A, ICTY, 15 July 1999.
[79] *Prosecutor v Radoslav Brdjanin* (Trial Judgment) IT-99-36-T, ICTY, 1 September 2004; *Prosecutor v Radoslav Brdjanin* (Appeal Judgment) IT-99-36-A, ICTY, 3 April 2007.
[80] *Prosecutor v Miroslav Kvočka et al* (Appeal Judgment) IT-98-30/1-A, ICTY, 28 February 2005.
[81] *Prosecutor v Milorad Krnojelac* (Appeal Judgment) IT-97-25-A, ICTY, 17 September 2003.
[82] *Prosecutor v Radislav Krstić* (Appeal Judgment) IT-98-33-A, ICTY, 19 April 2004.
[83] *Prosecutor v Milomir Stakić* (Trial Judgment) IT-97-24-T, ICTY, 31 July 2003.

Decision of the *Stakić* Trials Chamber.[84] Thus this Decision is examined to discuss that early consideration of that mode. Thereafter both the *Lubanga* Pre-Trial Confirmation of the Charges Decision[85] and the *Lubanga* Trial Chamber Decision[86] are examined as, to date, the two Decisions represent the most detailed consideration of co-perpetration in the jurisprudence of the ICC. With regard to indirect perpetration, the initial introduction of the doctrine into international criminal jurisprudence was in the jurisprudence of the ICTR in the Appeals Decision in the *Gacumbitsi* case.[87] Thus the early approaches were outlined here. Thereafter the Pre-Trial Confirmation of the Charges against Katanga and Chui[88] as well as the Pre-Trial Confirmation of the Charges against Kenyatta, Muthuara and Ali[89] are examined, and these cases represent the defining approaches used by the ICC in establishing tests for determination of whether an individual can be found responsible under this mode. There is an extensive breadth of jurisprudence coming out of the different international courts and tribunals and these selected cases seeks to represent the core approaches that have been applied with consistency in the jurisprudence to date.

In addition, the approaches from the human rights regime towards assessments of control for the purposes of establishing jurisdiction are examined. In this regard, there is also reference to selected jurisprudence from the European Court

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[84] Ibid.
[85] *Prosecutor v Thomas Lubanga Dyilo* (Trial Chamber I Judgment) Case No. ICC-01/04-01/06, ICC Judgment (14 March 2012).
[86] *Prosecutor v Thomas Lubanga Dyilo* (Decision on the Confirmation of the Charges) Case No. ICC-01/04-01/06, ICC Pre-Trial Chamber I (29 January 2007).
[87] *Sylvestre Gacumbitsi v The Prosecutor* (Appeal Judgment) ICTR-2001-64-A, ICTR, 7 July 2006.
[88] *Prosecutor v Germain Katanga and Mathieu Ngudololi Chui* (Decision of the Pre-Trial Chamber Decision on Confirmation of Charges) Case No. ICC-01/04-01/07 (30 September 2008); The trials proceeded separately after a severance on July 21 2012. Concerning the acquittal of Chui, *Prosecutor v Mathieu Ngudololi Chui* (Trial Chamber No.II Judgment) Case No. ICC-01/04-02/12 (18 December 2012) concerning the conviction of Katanga see *Prosecutor v Germain Katanga* (Trial Chamber No. II Judgment) Case No. ICC-01/04-01 (7 March 2014).
[89] In this regard see *Prosecutor v Muthuara, Kenyatta and Ali* (Decision of the Confirmation of Charges) Case No. ICC-01/09-02/11 (23 January 2012); *Prosecutor v Ruto, Kogsey and Sang* (Decision of the Confirmation of Charges) Case No. ICC-01/09-01/11 I (23 January 2012).

of Human Rights ("ECtHR")[90] and the Inter-American Court of Human Rights ("IACtHR")[91] with a view to analysing in a comparative manner how these different regimes address the question of apportioning responsibility to individuals who are involved, to a varying degree, in the commission of international crimes or violations of obligations arising under the jurisdiction of the respective Conventions. These two Courts have been selected because they have addressed issues of State responsibility in the context of State support of armed groups in their contemporary jurisprudence, ie cases from 1996 to 2007 and thus those key cases are examined. To this end, the ECtHR Decisions in *Ilaşcu v Moldova and Russia* ("*Ilaşcu v Moldova*"),[92] as well as *Loizidou v Turkey*[93] and *Cyprus v Turkey*[94] are examined as they specifically address the questions of attribution in the context of State support for non-State entities. Similarly, the jurisprudence of the IACtHR has been examined through three cases. Although, as with the ECtHR, the attribution of the conduct of individuals to States has been undertaken in relation to establishment of jurisdiction, again the approaches of the Court in arriving at its conclusions are examined. Thus the cases that have been selected address these questions of attribution in relation to State control over armed groups. The cases looked at are the *Paniagua Morales* case,[95] the *Pueblo Massacre* case[96] and the *Mapirpan Massacre* case.[97] In the next section a brief overview of the structure of this thesis so the context in which these cases are examined is presented.

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[90] European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention on Human Rights" [ECHR], as amended by Protocols Nos. 11 and 14 (adopted on 4 November 1950, entered into force 4 November 1950) ETS 5.
[91] The American Convention on Human Rights (adopted 2 November 1969, entered into force 18 July 1978) 1144 UNTS 123.
[92] *Ilaşcu and Others v Moldova and Russia*, App. No. 4878/99 (ECtHR 8 July 2004).
[93] *Loizidou v Turkey*, App. No. 15318/89 (ECtHR 18 December 1996).
[94] *Cyprus v Turkey*, App. No. 25781/94 (ECtHR 10 May 2001).
[95] *Paniagua Morales v Guatemala* (8 March 1998) Inter-American Court of Human Rights (Ser C) No. 37.
[96] *Case of the Pueblo Massacre v Colombia* (31 January 2006) Inter-American Court of Human Rights (Ser C) No. 40.
[97] *Case of the Mapiripan Massacre v Colombia* (15 September 2005) Inter-American Court of Human Rights, (Ser C) No. 134.

1.6 Overview of structure

After the present introductory chapter, the thesis is articulated into five substantive chapters. Chapter Two begins with a discussion of the separate regimes for determining State and individual responsibility and the rationale behind the distinction. That initial section sets the stage for the proposal for variation of the tests of attribution of conduct to States, by drawing attention to the current dichotomy in the law whereby each subject is found responsible under different regimes of responsibility. The chapter then briefly reviews the pitfalls of this distinction in addressing responsibility for international crimes, but more specifically international crimes committed by State agents and members of armed groups. It then discusses the existing literature which has tackled the issue of convergence between the two regimes of individual and State responsibility in the case of mass atrocities. It then moves on to discuss the current limitations of these proposals when it comes to addressing the role of States for support of groups whose members perpetrate international crimes.

The chapters which follow then set out, define and analyse the proposal to vary the tests of attribution of conduct to a State. Chapter Three identifies the principles of attribution in the law of State responsibility as a preliminary step. It pays attention to the development of these principles in international law and analyses the potential bases for attribution of the conduct of individuals to States as codified in the ARSIWA.[98] This chapter further discusses in detail the Decision of the ICJ in the *Nicaragua* case,[99] the *Bosnian Genocide* case[100] and the *Armed Activities Congo* case[101] as regards the circumstances where armed groups can be considered to be *de facto* State organs and the conduct of its membership attributed to the sponsoring State. The chapter then discusses the limitations of the tests of

[98] Although the ARSIWA (n 10) are not a binding set of legal norms, they "are considered by courts and commentators to be in whole or in large part an accurate codification of the customary international law of state responsibility"; see J Crawford, *State Responsibility: The General Part* (Cambridge University Press 2014) 43.
[99] *Nicaragua* (n 3).
[100] *Bosnian Genocide* (n 3).
[101] *Armed Activities Congo* (n 70) para 70.

attribution under the current law of State responsibility in dealing with partisan State support of groups whose members later commit international crimes. It further questions whether the test should be varied so as to sufficiently recognise the impact the support has on the commission of international crimes.

Chapter Four then considers the alternative approaches towards determining State responsibility for alleged violations to human rights on the basis of attribution of conduct of individuals to the State to those applied by the ICJ that have been discussed in international law so far. Chapter Four then considers the different circumstances in which armed groups have been considered to be *de facto* State organs, for instance in the ECtHR and the IACtHR. Although the questions of attribution of conduct in those instances were related to questions of "jurisdiction" for the purpose of applicability *rationae personae* of the relevant conventional obligations, the reasons for these Courts holding as they did in determining these armed groups were *de facto* State organs are examined. This is done with a view to assessing the distinction between their interpretation of the tests of "complete dependence" or "effective control". Further to this, consideration of the scholarly criticisms of the perceived limitations of these proposals for variation of the tests of attribution being implemented into the jurisprudence of the ICJ is undertaken.

Chapter Five explores the proposals for a variation of the tests of attribution of conduct from a different and more complex angle. It builds on the Dissenting Opinion of Vice President Al Khasawneh, where he noted that there were situations where State organs can direct or control other individuals in respect of committing international crimes where they were linked together by a common criminal purpose.[102] This chapter thus looks at cases that have come out of the international criminal jurisprudence which have substantially discussed the approaches towards the assigning of responsibility under these modes where State organs were linked to the acts of different paramilitary groups not under their express line or chain of command through a common or shared plan. Although there are some obvious

[102] *Bosnian Genocide* (Dissenting Separate Opinion of Vice President Al Khasawneh) (n 3) 241 para 39.

modes through which this can be accomplished such as planning or instigation, these are not examined because they will not offer any useful comparative approaches to the proposals for variation of the test for attribution of conduct to individuals. This is because, in circumstances where a State agent planned, instigated or ordered international crimes to be committed by armed groups, proof of direction and control over the individuals who committed those crimes is readily established and thus attribution of the conduct of those individuals to the State will be possible. Similarly, two other modes, ordering and superior responsibility, as they refer to situations where there are express relationships for command or assertion of authority, are not further examined as they cannot offer any useful comparative purposes. However, there are three primary modes of responsibility through which State agents can direct or control the acts of armed groups and that is where there is a common criminal purpose as alluded to by Judge Al Khasawneh. The approaches used by the courts under these modes of responsibility can suggest subtle changes *mutatis mutandis* towards the interpretation of "direction" and "control" by the ICJ. In so doing this chapter thus fully develops the relevant considerations put forwards by Judges Mahiou and Al Khasawneh in their Dissenting Opinions in the *Bosnian Genocide* case.[103]

Chapter Six concludes the thesis. It puts forwards the case for variation of the tests of attribution of conduct to States with the tests used in international criminal law and international human rights law for the purposes of determining individual liability for participation in international crimes. This proposal is tempered by a pragmatic discussion of the limitations of this thesis but nonetheless concludes with the argument it set out to complete. The extent to which the ICJ will be minded to implement the suggestions is the subject of a separate inquiry and will lead to further research into this most relevant area of increasing importance. This is because international laws continue to grapple with the emergence of this type of participant in international law, ie the armed group, and must look to determine which aspects of

[103] *Bosnian Genocide* (Dissenting Separate Opinion of Vice President Al Khasawneh) (n 3) 241 para 39 and *Bosnian Genocide* (Dissenting Opinion of Judge *ad hoc* Mahiou) (n 3) 381 para 116.

the regime of State responsibility can be adapted or revisited to deal with international crimes committed by the membership of such armed groups.

Chapter Two: Literature Review: Existing Proposals for Coordination between the Two Regimes

2.1 The rationale for coordination between the two regimes

There are recent developments in the literature whereby commentators have identified that responsibility for mass atrocities cannot be addressed by focussing solely on the regime of individual responsibility.[104] Thus, there have been proposals for a coordinated interaction between the separate regimes of individual and State responsibility in the academic commentary. These proposals aim to address the limitations created by the over-reliance on the principles of individual criminal responsibility to address responsibility for mass atrocities and suggest that the regime of State responsibility can provide a range of remedies that more effectively deals with the prevention and suppression of international crimes.[105] Notwithstanding this consideration of the benefits achieved from a coordinated approach to these questions of responsibility, a problem persists, as the current focus in the scholarly debates has been on the coordination of processes, as opposed to legal rules or tests for determining responsibility.

As discussed in Chapter One, the current tests used by the ICJ for attributing the conduct of individuals to States is far too under-inclusive and fails to capture the critical role of States in the atrocities committed by armed groups they support. This chapter suggests that this lacuna can be filled by expanding the proposals for coordinated interaction between the two regimes beyond coordination of process, into coordination of methods or legal tests for the assigning of responsibility. The proposal in this thesis is to modify the test for attribution of individual conduct to States by drawing on the tests used in the individual criminal law regime to deal with

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[104] M Spinedi, 'State Responsibility v Individual Responsibility for International Crimes: Tertium Non Datur?' (2002) 13(4) *European Journal of International Law* 895, 897; A Danner and J Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law' (2005) 93 *California Law Review* 77, 77-79; Drumbl, *Atrocity, Punishment and International Law* (n 1) 5, 10; M Osiel, 'Modes of Participation in Mass Atrocity' (2005) 38 *Cornell International Law Journal* 793, 793.

[105] Zimmerman and Teichman, 'State Responsibility for International Crimes' (n 61) 298-299; and Scobbie, 'Assumptions and Presuppositions: state responsibility for system crimes' (n 61) 277-280.

questions of collective participation. This chapter situates this proposal in the scholarly debates surrounding proposals for creating a relationship between the two regimes of responsibility. It firstly examines the limitations of each of the regimes of responsibility in addressing the role of State support in mass atrocities, which is the issue under consideration. Secondly, it examines the existing proposals which advocate a relationship between the two separate regimes of responsibility. Finally, it discusses the current limitations of these proposals as regards the issue under consideration, ie the responsibility of States for support of armed groups in the commission of international crimes and contextualises this thesis's contributions to this wider body of literature.

2.2 The limitations of the regimes of individual responsibility

Many commentators have identified the problematic aspects that result from attempting to deal with responsibility for international crimes solely at the individual level.[106] Among all of them is the criticism that this regime does not fully reflect the collective dimension involved in the commission of international crimes. This is because international crimes are not the product of random individual offenders but reflect systemic causes, "i.e. situations where collective entities such as States or organised armed groups order international crimes to be committed, or permit or tolerate the committing of international crimes."[107] Thus, the historic reliance on international trials of individuals does not fully reflect the collective or systemic

[106] M Spinedi, 'State Responsibility v Individual Responsibility for International Crimes: Tertium Non Datur?' (n 104) 895-899; A Nollkaemper, 'Concurrence between Individual Responsibility and State Responsibility in International Law' (2003) 52(3) *International and Comparative Law Quarterly* 615; and van der Wilt and Nollkaemper (eds), *System Criminality in International Law* (n 1).

[107] A Nollkaemper, 'Systemic Effects of International Responsibility for International Crimes' (2010) 8 *Santa Clara J. Int'l L.* 313, 316; note also that there are some commentators who have also addressed the role of corporations in international crimes; seminal work on this was done by C Wells, *Corporations and Criminal Responsibility* (Oxford University Press 2000) and B Fisse and J Braithwaite, *Corporations, Crimes and Accountability* (Cambridge University Press 1993). The role of corporations, however, is not discussed in this thesis.

nature of international crimes or pay attention to the complex historic tensions that motivate this collective or systemic criminality.[108]

International crimes do not represent the actions of criminal individuals acting in isolation, but instead represent criminal individual actions that are contextualised within the wider system of State-condoned criminality. As Vetlesen argues, there is an "internalisation of ideology,"[109] so there is a "communal engagement with violence."[110] The problem is that the individual regime of responsibility is individually focussed. Moreover, it revolves around Western liberal notions of prosecution and sanction, which may not be the most effective means of addressing the communal element in these crimes. Several authors have critiqued the regime of individual responsibility on this basis, finding that the prosecution of individuals simply does not fully reflect the context of collective participation in which this crime occurred. Alison Danner and Jenny Martinez go even further and critique whether the scale of mass atrocities can even be properly redressed through legal methods, since:

> the idea of applying legal rules and standards to the complex and chaotic backdrop of contemporary armed conflicts and episodes of mass atrocity is a bold and some would say futile effort to fix individual responsibility for history's violent march…[111]

Mark Drumbl, in a similar manner, takes issue with the regime of individual responsibility. He writes that international crimes could not have been accomplished were it not for the participation of the masses and part of the riddle of international criminal justice is to devise a way in which the law can implicate the complicit

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[108] For good discussion of the impact of these historic, social and psychological factors see Drumbl, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity' (n 4) 570; Osiel, *Making Sense of Mass Atrocity* 125 fn 30; Vetlesen, *Evil and Human Agency: Understanding Collective Evildoing* (n 4) particularly 32ff, and Arendt, *Eichmann in Jerusalem* (n 4) 262-264; Jain, *Perpetrators and Accessories in International Criminal Law: Individual Modes of Responsibility for Collective Crimes* (n 1) 4-5.

[109] Vetlesen, *Evil and Human Agency: Understanding Collective Evildoing* (n 4) 32; Drumbl, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity' (n 4) 576-577.

[110] Jain, *Perpetrators and Accessories in International Criminal Law: Individual Modes of Responsibility for Collective Crimes* (n 1) 5.

[111] Danner and Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law' (n 104) 77.

masses who are responsible even if not formally guilty.[112] His suggestion for this is integrating the norm as we currently know it with norms from other regimes of responsibility.[113]

Hans Kelman notes that these offences are usually part of State policy and whereas they are typically endemic to the autocratic security State, Western democracies are not invulnerable to it.[114] Maurice Punch supports this view, finding in his work that individuals "become absorbed in the group and within its solidarity" so that acts they would never contemplate of doing as individuals they will do within the group.[115] For these reasons they advocate the development of an improved system of accountability that addresses "system generated international crime, not only on the part of the individual at all levels of the system's hierarchy but on the part of the system itself."[116]

The core of the problem is that which was intimated in Chapter One. While prosecution and incarceration of an individual may satisfy the strong "retributive impulses in the face of monstrous wickedness"[117] after the Trial, all that will remain is an individual being made to serve a sentence. There is some measure of consideration being made for victim and prisoner rehabilitation and there is the catharsis offered by the narrative of the crime being given in court,[118] but this is insufficient.

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[112] Drumbl, *Atrocity, Punishment and International Law* (n 1) 195.
[113] Ibid 195. He finds tort, contract and restitution as being better capable of introducing more responsibility to the implicated masses. Beyond this he discusses use of non-Western adjudicatory mechanism such as Gaccaca in Rwanda or the Pashtunwali in Afghanistan. See 192-193 for the discussion of this. This use of tort and restitution and his suggestion for restorative forms of justice are not covered in this thesis.
[114] Kelman (n 1) 40.
[115] M Punch, 'Why Corporations Kill and Get Away With it: The Failure of Law to Cope with Crime in Organisations' in H van der Wilt and A Nollkaemper (eds), *System Criminality in International Law* (Cambridge University Press 2009) 42.
[116] Ibid 41.
[117] Osiel, 'Modes of Participation in Mass Atrocity' (n 104) 793.
[118] S Stolk, 'The Victim, the International Criminal Court and the Search for Truth' (2015) 13 *Journal of International Criminal Justice* 973, 986.

In addition to this, there are only so many prosecutions that can be undertaken and prosecutions are undertaken selectively. Robert Cryer writes that "State practice reveals a highly selective enforcement of international crimes,"[119] and this is a "critique that has plagued international criminal tribunals from their inception to date."[120] Prosecutions at Nuremberg and Tokyo were criticised as being victor's justice,[121] the prosecutions at the ICTY and ICTR, though not victor's justice, were nevertheless criticised as being selective on the basis of the temporal and territorial limits to its jurisdiction,[122] while the "ICC's writ does not run throughout the globe."[123] Thus prosecutions are reliant on political factors since States must agree to its jurisdiction under Article 12(3) ARSIWA and even where they have ratified, they can opt out of the war crimes jurisdiction for seven years under Article 12(4).[124]

Even though the principle of universal jurisdiction exists, national jurisdictions approach application of the principle in a selective manner as well. Some of the cases in which the principles have been invoked so far have been at the instance of old colonial powers such as Belgium and Spain,[125] or where national interests have been affected.[126] Moreover, even if prosecutions were not selected, the sheer volume of offenders that are involved, would make it impossible to call them all to account before their national courts, let alone the international courts and tribunals. In this regard, Phoebe Okowa has noted that a significant portion of the adult population in the Rwanda conflict was implicated but their prosecutions were

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[119] R Cryer, *Prosecuting International Crimes – Selectivity in the International Criminal Law Regime* (Cambridge University Press 2005) 203.
[120] Ibid 206.
[121] Ibid.
[122] Ibid 209.
[123] Ibid 222.
[124] Ibid 223.
[125] For example, *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium* (Judgment) ICJ, 14 February 2002; *R v Bow Street Metropolitan Stipendiary Magistrate*, Ex Parte Pinochet Ugarte 3 WLR 1, 456. The initial warrant was taken out by the Kingdom of Spain.
[126] L Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford University Press 2003) 223-224.

neither realistic nor feasible,[127] since estimates were that if each person were to face prosecution for the genocide, the trials would take over two hundred years to be completed.[128]

Where selectivity is not at an issue there is a further issue identified in the literature. Prosecutions are impossible where immunities operate as a bar to further proceedings. According to Dapo Akande, history suggests that international crimes are the work of State agents.[129] The issue here is that if a State agent is either a Head of State or serving Foreign Affairs Minister during the conflict, he will be immune from prosecution in the courts of a foreign territory by virtue of the office he holds,[130] and it is unlikely that he, as a high-level member of society, will be prosecuted nationally. It is only if these individuals have agreed to the jurisdiction of the ICC (or other international criminal tribunal) that immunities will not operate as a bar to prosecution.[131] Therefore, even if a State official has been complicit with members of armed groups who commit international crimes, unless his country is a State party to the ICC[132] or another international court or tribunal, even if the member of the armed group is prosecuted, he may not be.

There may be an even further issue. In long-term conflicts where there is repetitive commission of international crimes by multiple individuals on a long-term basis, it may be impossible to hold any one individual accountable. For instance, David Kretzmer writes that there has been illegal occupation of parts of Palestinian territory,[133] since the end of the Six Day War in 1967. According to him, there has been an active pursuit by governments of the day since then to effect a policy of

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[127] P Okowa, 'State and Individual Criminal Responsibility in Internal Conflicts: Contours of an Evolving Relationship' (2009) 20 *Finnish Yearbook of International Law* 143, 145.
[128] Ibid 145.
[129] D Akande, 'International Law, Immunities and the International Court' (2004) 98 *American Journal of International Law* 407, 433.
[130] *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (n 125) paras 54-55, 58.
[131] Ibid paras 60-61.
[132] A good example is Kenya whose President stood trial at the ICC for international crimes committed by the Mungiki and other armed groups. Further discussion in Chapter Five.
[133] D Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (State University of New York Press 2002) 75.

settlements in the Occupied Palestinian Territory.[134] In these circumstances, individuals are clearly settling in response to overall policy objectives of the Israeli State and thus the connection between the individual commission of breaches of Article 49 of the Fourth Geneva Convention to the Occupied Palestinian Territory[135] and the State instruction is blurred, and further the scale of participation in the settlements precludes the possibility of individual prosecutions.[136]

In all these numerous instances discussed in the literature, the scope of prosecution is thus limited and if the regime of individual criminal responsibility is premised on this, it cannot address the participation of multiple actors acting together, especially where the scale of participation is significant. Moreover, if States are using individuals to carry out broader ideological objectives, even if attempts are made to prosecute them on whatever basis, they can be easily substituted. There is thus a need to look to the regime of State responsibility.

2.3 The potentials and limitations of the regime of State responsibility

The regime of State responsibility looks beyond prosecution and sanction and addresses the collective dimension in international crimes in a far more sophisticated manner and there are several strengths to the regime. Yet, nevertheless, even here there are limitations.

By its very nature the regime of State responsibility has the capacity to address the collective dimension involved in the commission of international crimes as it locates the role of the State in the context of the alleged breach of obligations. Simon Olleson and James Crawford write that owing to the "historical development

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[134] Ibid.
[135] Although there are arguments as to the customary status of this Provision, the Provision is not recognised by Israel, however they have recognised the humanitarian provisions of the Convention. See Y Blum, 'The Missing Reversioner: Reflections on the Status of Judea and Samaria' (1968) 3 *Israel Law Review* 279, 279.
[136] S Bannoura, 'UNHRC: "Israel Fails to Prosecute Soldiers, Settlers Who Attack Palestinians"' (*IMEMCnews* 25 September 2012) <http://imemc.org/article/64290/> [accessed July 13 2016].

of international law, its primary subjects are States."[137] Although there is limited involvement of individuals in the field of human rights and international criminal law, at the end of the day only States can bring claims against each other and this includes situations where they bring actions under the *Mavrommatis* principle.[138] Even then the cause is taken up on behalf of the State. Additionally, since the underlying concepts of attribution, breach, excuse and consequences are general in character,[139] they are a constant. This suggests that question of responsibility thus addresses the collective dimension of mass atrocities, because the regime addresses the injury to the State as a whole and indivisible collective entity.

Moreover, they write that where there is an internationally wrongful act, there are two sets of secondary obligations that arise by law – cessation and reparation – both of which are codified in Chapter I ARSIWA.[140]

Additionally, these secondary obligations are forward-looking. Thus, if an order for reparation is made, it does not mean that once the reparation is made that the obligation ends.[141] The responsible State must continue to observe the obligation and thus the responsible State, according to these commentators, often must support their future obligations by giving assurances as to cessation or non-repetition.[142] They also address that in some instances where compensation is not possible, as with the Srebrenica massacre, and the finding that there was a breach of the obligation to prevent genocide, a declaration of the breach may be sufficient as supportive remedies, for example, the order to Serbia to immediately offer up for transfer to the

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[137] J Crawford and S Olleson, 'The Character and Form of International Responsibility' in M Evans (eds), *International Law* (Oxford University Press 2010) 444.
[138] *Mavrommatis Palestine Concessions (Greece v UK)* 1924 PCIJ (ser. A) No.2 (Aug. 30 1924) para 12 .The principles states: "It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law."
[139] Crawford and Olleson, 'The Character and Form of International Responsibility' (n 137) 447.
[140] Ibid 467.
[141] Ibid 468.
[142] Ibid. In this regard Art 30(b) ARSIWA (n 10) supports their conclusion.

ICTY individuals who were charged under that Statute, and who were still on Serbian territory.[143]

These secondary obligations thus move well beyond the limitations of individual sentencing to address multiple areas for prevention and suppression of atrocities or breaches of international obligations as they will be considered under this regime. Okowa finds that this is not to be understated. According to her,

> it is the case that in cases of mass atrocities, criminal law processes are placed under considerable strain, making them in such cases a partial solution in a continuum of accountability processes. State responsibility either directly or for the acts of insurgents is an important part of that continuum. Moreover, reparation for loss of property, surrender of suspects, redressing unacceptable forms of property transfer, as well as the repatriation of missing persons and their remains are distinctly state obligations, enforceable through the medium of state responsibility even in situations where successful individual prosecutions have been carried out…[144]

There is a further gain to the use of this regime to address mass atrocities committed by armed groups. In the context of this regime, prohibition of these atrocities are, as noted before, peremptory norms. Bearing in mind Olleson and Crawford's observation that reparation duties remain forward-looking, the responsible State will have to monitor its activities. According to Okowa, this has an intrinsic value when addressing State support of armed groups. If a finding of responsibility is made and there are consequent orders for reparation, this can be further used as a "monitoring or policing tool"[145] given the "frequency of government involvement in internal conflicts" and the threats to public order created by insurgent activity.[146] This, to a greater extent, allows for more effective deterrence and suppression of breaches that give rise to international crimes.

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[143] Ibid 470.
[144] Okowa, 'State and Individual Criminal Responsibility in Internal Conflicts: Contours of an Evolving Relationship' (n 127) 187.
[145] Ibid 188.
[146] Ibid.

Additionally, due to the special consequences which the modern law of State responsibility envisages for serious breaches of peremptory norms and obligations *erga omnes*,[147] several authors advocate that there is an advantage to using the regime of State responsibility to address international crimes as opposed to maintaining a narrow concentration on individual criminal responsibility.[148]

The rationale underscoring the proposals from commentators advocating that responsibility for international crimes might be better addressed through the State responsibility regime is thus heavily centred on accessing these remedies. However, in order to access these remedies, a right of invocation must be preliminarily established, and a substantial part of the literature discusses the different ways in which this can be achieved. Zimmerman and Teichman[149] and Scobbie[150] argue that the prohibitions against international crimes are peremptory norms, creating *erga omnes* obligations; thus the commission of international crimes in turn creates a right of standing for non-directly injured States.[151] Non-injured States can thus invoke these remedies and this can work in some part to assist with prevention and suppression of these international crimes. Some writers, de Hoogh, White and Nollkaemper, for instance, have gone further to suggest that, in the case of a serious breach of this category of obligations, the United Nations Security Council may also have standing to invoke the responsibility of the wrongdoing State, thereby engaging the range of political responses available to the Security Council, independent of its mandate for the maintenance of peace and security and its powers under Chapter VII

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[147] In this regard, see section 1.1.

[148] Several authors, in recent and less recent times, have commented upon the inherent shortcomings of the international criminal law system in addressing so called "system criminality" and advocated the advantages of addressing international crimes through the regime of State responsibility. For review of the relevant academic literature, see section 2.3.

[149] Zimmerman and Teichman, 'State Responsibility for International Crimes' (n 61) 298-299.

[150] Scobbie, 'Assumptions and Presuppositions: state responsibility for system crimes' (n 61) 277-280.

[151] de Hoogh, *Obligations Erga Omnes and International Crimes: A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States* (n 61) 60; Okowa, 'State and Individual Criminal Responsibility in Internal Conflicts: Contours of an Evolving Relationship' (n 127) 157; C Bassiouni, 'Crimes: *Jus Cogens and Obligatio Erga Omnes'* (1996) 59(4) *Law and Contemporary Problems* 67; C Bassiouni, 'A Functional Approach to General Principles of International Law' (1990) 11 *Michigan Journal of International Law* 801; Scobbie, 'Assumptions and Presuppositions: state responsibility for system crimes' (n 61) 270-271.

of the UN Charter.[152] This, according to some writers, allows for greater suppression of international crimes because States and the Security Council as the representative of the international community,[153] can intervene to bring to an end these international crimes if they present a threat to peace.[154] To put it differently, the regime offers a more communitarian approach towards obtaining remedies for international crimes.[155] Furthermore, some writers suggested that the State responsibility regime also allows for interested States to coerce responsible States into performance of their obligations to make reparations, through both non-military and military countermeasures.[156]

Critically some have noted that, with international crimes, exceptional use of force under the UN Charter is authorised.[157] According to de Hoogh, for instance, unlike the prohibition on the territorial integrity or political independence of States, "the rule prohibiting the use of force to settle disputes does not constitute a peremptory norm".[158] His argument was that Articles 42 and 51 of the UN Charter allows for this. Therefore there can be an acceptable use of force.

However, in cases where there is an unacceptable use of force, the matter can be taken to the ICJ, but, as he noted, the main obstacles to achieving these remedies

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[152] de Hoogh, *Obligations Erga Omnes and International Crimes: A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States* (n 61) 221; N White, 'Responses of Political Organs to Crimes by States' in H van der Wilt and A Nollkaemper (eds), *System Criminality in International Law* (Cambridge University Press 2009) 314; A Nollkaemper, 'Attribution of Forcible Acts to States: Connections Between the Law on the Use of Force and the Law on State Responsibility' in N Blokker and N Schriver (eds), *The Security Council and the Use of Force – Theory and Reality Dash – A need for change?* (Martinus Nijhoff 2005) 153-156.

[153] This is based on de Hoogh's description of the United Nations as the "personified international community" in de Hoogh, *Obligations Erga Omnes and International Crimes: A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States* (n 61) 96.

[154] Ibid 115-116, 126.

[155] Scobbie, 'Assumptions and Presuppositions: state responsibility for system crimes' (n 61) 271. Article 48(1) ARSIWA (n 10) provides: "Any state other than an injured state is entitled to invoke the responsibility of another state in accordance with paragraph 2 if: (a) The obligation breached is owed to a group of states, including that state, and is established for the protection of a collective interest of the group; or (b) The obligation breached is to the international community as a whole".

[156] de Hoogh, *Obligations Erga Omnes and International Crimes: A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States* (n 61) Ch 4, especially 269-271.

[157] Ibid 337.

[158] Ibid.

is that it is unlikely in most instances that the wrongdoing State responsible for the international crime, in the absence of special agreement or some form of *forum prorogatum*, will accept adjudication by the Court.[159] Moreover, he suggests that the remedies might themselves be unjusticiable.[160] For instance, non-repetition would necessarily involve change of government and initiating process against relevant individuals.[161] Additionally, it may mean reorganisation of the State, police, armed forces and paramilitaries and the calling of elections. This may not be an area of organisation the Court can become involved in, but it is an area where the Security Council and the United Nations might be better placed to act.[162]

Other writers also see the importance of political cooperation. Nigel White and Vera Gowland-Debbas, for instance, see the Security Council as an enforcement body for the State responsibility regime because they view the measures undertaken by the Security Council on behalf of the injured State as being part of the State responsibility mechanisms.[163] This means that there may be need for greater politico-legal cooperation to give effect to these remedies.

Further limitations of the regime have also been identified. Some commentators note that the resort to State responsibility as a process of accountability could have the unintended consequence of creating collective guilt and a tarnishing of the innocent alongside the guilty. Tom Erskine, in discussing this objection, outlined that with collective accountability there may be an unfair laying of blame and punishment upon many for the misdeeds of a few.[164] This reasoning, according to him, extends responsibility to all members of a group because of the shared aspect of identity that allows for those not directly party to a specific action to

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[159] Ibid 381.
[160] Ibid 383.
[161] Ibid.
[162] Ibid 384.
[163] White, 'Responses of Political Organs to Crimes by States' (n 152) 316-317; V Gowland-Debbas, 'Security Council Enforcement Action and Issues of State Responsibility' (1994) 43 *International and Comparative Law Quarterly* 55, 73.
[164] T Erskine, 'Kicking Bodies and Damning Souls' in T Isaacs and R Vernon (eds), *Accountability for Collective Wrongdoing* (Cambridge University Press 2011) 275.

be morally blamed for the criminal actions of the agents of the group.[165] This critique of the process had garnered attention since the question was asked after the Second World War of whether the "German people are collectively responsible for the Holocaust."[166] This is guilt by association and it forfeits the traditions of due process and ultimately, has the potential to harm individuals in an attempt to punish or deal with the collective.[167]

Avia Pasternak in part agreed with this. According to her, where a group is collectively sanctioned then there is some measure of distribution of collective punishment; however she opined that notwithstanding this, there may be ways in which the punishment, as she puts it, can be distributed such that disproportionate harm could be alleviated by justifying the degree of punishment based on the level of associative obligations born by the group member.[168] Similarly, Drumbl speaks of a "crude-careful" approach whereby individual members could exclude themselves from membership of a group.[169] This is distinguishable from the purely "crude" approach, according to Drumbl, which simply glosses over moral differentiations and excuses and thus has an indiscriminate reach, and it is this approach that veers into collective guilt.[170]

However, apart from these suggested approaches to delimit responsibility as far as possible, it is important to note the framework in which the State responsibility regime aims to be used for the prevention or suppression of international crimes or as it is referred to in that regime serious breaches of peremptory norms. In the main, the remedies afforded by the regime aim to work towards prevention and suppression by triggering the special consequences that ensure cessation, non-repetition and obstructs a third State from cooperating to facilitate the serious breach. In this

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[165] Ibid.
[166] Ibid.
[167] Ibid 276.
[168] A Pasternak, 'The Distributive Effect of Collective Punishment' in T Isaacs and R Vernon (eds), *Accountability for Collective Wrongdoing* (Cambridge University Press 2011) 218-220.
[169] M Drumbl, 'Collective Responsibility and Post-Conflict Justice' in T Isaacs and R Vernon (eds), *Accountability for Collective Wrongdoing* (Cambridge University Press 2011) 27.
[170] Drumbl, *Atrocity, Punishment and International Law* (n 1) 197.

regard, the remedies are not calculated to criminalise the innocent or tar an entire society with the stigma that attaches to criminalisation, but merely to identify the role of the State which through its agents have supported others in commission of international crimes and to prevent that role from being replayed by imposing limits on the collective capacity to commit international crimes.

Moreover, there is a political aspect to punishing a State that avoids collective punishment against the whole of society.[171] For instance, punishment could mean imposing limits on a State's political and military capacity – such as the limits imposed on German rearmament in the Treaty of Versailles[172] – or it could mean minor restrictions on sovereignty such as enforced no-fly zones, or monitored guarantees to minorities or international inspection regimes.[173] Even if reparations are ordered, "given the fungible nature of money, reparations amount to replacements for other uses" that might be of greater assistance to taxpayers.[174] At the more extreme level, it may involve institution of a regime change. Thus the argument that collective responsibility is guilt by association obscures what Isaacs argues is the true nature of the sanctions, which is to examine the best way in which members can justly be made to bear a share of responsibility.[175] In this way, there is an intrinsically valuable role for the State responsibility regime to play in the wider issues of accountability for mass atrocities. The question however remains as to how this can be done.

Against this are the further limitations imposed by the juridical nature of the State. Under the secondary rules of attribution, a State can only be responsible up to the point that the conduct of individuals can be attributed to it and these circumstances are set out in Chapter Three. Moreover, in the case of support or facilitation of crimes (discussed in Chapter Three), the relationship is between

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[171] R Vernon, 'Punishing Collectives: States or Nations?' in T Isaacs and R Vernon (eds), *Accountability for Collective Wrongdoing* (Cambridge University Press 2011) 304.
[172] Ibid.
[173] Ibid 305.
[174] Ibid.
[175] Ibid 288.

States, so that assistance or facilitating an international wrong by a non-State actor will not render that assisting State responsible in international law.[176] So the system is very tightly drawn.

Due to the limitations of each of these regimes towards addressing responsibility for mass atrocities a body of literature has developed that addresses possible regime interaction with a view to eliminating the barriers created in each independent regime through greater coordination and harmonisation.

2.4 Existing proposals for creating a relationship between the two separate regimes of international law

The proposals for creating a relationship between the two independent regimes attempt to remedy some of the limitations of the individual-focussed international criminal law regime. In the main, they perceive an identifiable role for the State responsibility regime to provide a corrective to the narrow concentration on individual responsibility,[177] by providing different tools that could more properly deal with the systemic nature of international crimes,[178] and consequently capture the role of States in the commission of these crimes by armed groups who operate within the same system.

Within these proposals, some academic commentators have gone further to identify certain doctrinal approaches within the individual criminal responsibility regime that could usefully be applied to address the problems of collective criminality because they offer "several leads to dealing with the problems of system criminality,"[179] particularly as regards the use of common purpose liability doctrines from Anglo-American and German legal traditions,[180] because these doctrines were

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[176] Article 16 ARSIWA (n 10).
[177] Okowa, 'State and Individual Criminal Responsibility in Internal Conflicts: Contours of an Evolving Relationship' (n 127) 143.
[178] Nollkaemper, 'Systemic Effects of International Responsibility for International Crimes' (n 107) 335.
[179] Ibid 326.
[180] Discussion on these doctrines in Jain, *Perpetrators and Accessories in International Criminal Law: Individual Modes of Responsibility for Collective Crimes* (n 1) 4-5.

designed specifically to deal with collective criminal conduct. It is this suggestion that has influenced the proposal in this thesis for modification of the tests of attribution. Each of these areas of commentary are now discussed with a view to integrating the proposal of this thesis within the larger body of academic debates surrounding the questions of responsibility for international crimes.

2.4.1 The systemic nature of international crimes – the Röling thesis

The term systemic is used in this thesis consistently. The systemic nature and causes of international crimes have been a recurrent theme in discussions surrounding questions of responsibility after the Second World War.[181] Initially a point of philosophical discourse by Hannah Arendt in her seminal work on the trial of Eichmann, her repeated questioning of whether the trial of Eichmann was simply a failure to recognise that he could only have been a criminal in these circumstances because he was the product of a criminal State,[182] paying credence to the early notion that it was not individuals so much that were criminal but the State in which they operated. This notion of the "criminal State" was softened somewhat by the introduction of discussion as to the "systemic nature of international crimes."

This description of the nature of international crimes as "systemic," however, was first introduced by Justice Röling in 1975.[183] With it began a search for a more holistic approach to the question of international criminal accountability by addressing the root causes or motivations behind them.

Justice Röling questioned whether all post-conflict prosecutions were the same. To this end, in discussing the criminal responsibility of individuals for war crimes, he made a distinction between war crimes that were incidental or committed by individuals "for personal or selfish reasons in disregard of national regulations and superior orders"[184] from "crimes committed in the national interest, as a

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[181] The term "systemic causes" derives from Nollkaemper, 'Systemic Effects of International Responsibility for International Crimes' (n 107) 314.
[182] Arendt, *Eichmann in Jerusalem* (n 4) 289.
[183] BVA Röling, 'Criminal Responsibility for the Laws of War' (1976) 12 *Rev. BDI* 8, 11.
[184] Ibid.

consequence of a general policy or in accord with the official attitude; crimes committed to serve national military goals, or illegal means used in furtherance of victory."[185] According to him, the former group were examples of "individual criminality" while the latter were examples of "system criminality because they expressed the tendencies of the existing system."[186] He further opined that this type of criminality is the most "important kind of war criminality"[187] because it did not result from individual criminality but depended on societal forces, the effect of which ranged from "direct orders, through official favour, to conspicuous indifference."[188] The crime, in other words is caused by the "structure of the situation and the system."[189] He found that while national authorities may prosecute their own soldiers, they do so to address individual criminality not system criminality.

However, in contrast, when prosecutions are undertaken before enemy or international courts, these are in relation to system criminality because "governments order crimes to be committed, or encourage the commitment, or favour and permit or tolerate the committing of crimes."[190] Thus, in discussing the effectiveness of prosecutions to enforce deterrence in these circumstances, he critiqued whether the laws regulating the conduct of hostilities as it obtained then was sufficient to address the system of overall criminality in which the violations occurred. He concluded that the laws were insufficient and that the ultimate solution rested with humanity's common efforts towards elimination of war itself.[191]

Justice Röling's thesis that a war crime "serves the system and is caused by the system"[192] because "governments order crimes to be committed or encourage the

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[185] Ibid.
[186] Ibid.
[187] Ibid 12.
[188] Ibid.
[189] Ibid.
[190] Ibid.
[191] Ibid 26.
[192] BVA Röling, 'The Significance of the Laws of War' in A Cassese (ed), *Current Problems of International law: Essays on UN Law and on the Law of Armed Conflict* (Giuffre Editore 1975) 138.

commitment, or favour and permit or tolerate the committing of crimes"[193] continued in his writings directed towards implementation of changes in the then current laws of war.[194] In his publications on this area, he suggested that broadly system criminality was best addressed through duties being imposed on States to comply with the laws of war.[195]

In addition, even as early as 1975, he noted that there were more than one hundred civil wars and that the scope of international humanitarian laws did not legally create duties or obligations on rebel groups.[196] However, Justice Röling found that this "asymmetry in the obligations was justifiable" since they did "not take away all the power from the weak,"[197] and ultimately left some power available to unorganised groups to stage an uprising.[198] In other words, in considering systemic criminality, it appears that Röling either did not contemplate the possibility that members of an armed group might, in the course of its struggle, commit international crimes or that there would be a State element to this in terms of fundamental support, or if he did, he found this an area of potential impunity tolerable in the given circumstances. It is important to note that at the time he was writing, the level of criminality perpetrated by armed groups in the context of conflict were not as substantial as they are today, as the face of conflict was different.

2.4.2 Development of the Röling thesis among contemporary commentators

The description and analysis of this systemic element in the commission of war crimes developed initially by Röling proved influential to a body of academic literature that has developed since 2010.

Profoundly influenced by Röling's thesis, André Nollkaemper has been writing extensively on the topic and has sought to develop the discussion that

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[193] Ibid.
[194] Ibid.
[195] Ibid 154-155.
[196] Ibid 25.
[197] Ibid 26.
[198] BVA Röling, 'Criminal Responsibility for the Laws of War' (n 183) 26.

international crimes and not only war crimes maintain this distinguishable systemic element. In a 2010 article, Nollkaemper delimited his discussion of this thesis by noting that the involvement of States in international crimes does not mean that a State commits an international crime, since that concept of State crimes does not exist in positive international law.[199] However, he discussed that there are "a variety of ways in which a wrongful act by a state can involve international crimes," for instance, when they fail to prevent or punish individual perpetrators as held in the ICJ's Decision in *Bosnian Genocide*.[200] He goes further to note that during the Balkan wars in the 1990s, both States and organised groups maintained dominant roles in the atrocities committed and that this was also observed in the international crimes occurring in Darfur in Sudan.[201]

In discussing the Balkan wars and the so-called "war on terror" post-9/11 specifically, Nollkaemper wrote compellingly of circumstances in which the State furthered international crimes. According to him,

> In situations where state authorities consider that the security of the state is under severe threat or fear they may lose power, when they have powerful apparatus at their disposal charged with protecting the security of the state, and when they have identified groups that are defined as enemies of the state, collective entities themselves can turn into actors that commit or further the commission of international crimes. This was what happened, for instance, in relation to the criminal acts orchestrated or supported by Belgrade during the Balkan wars and also what happened during the Bush administration in response to the war on terror…[202]

He further noted that international crimes maintained that systemic nature because the crimes are "systematic" in that it is part of a plan or policy that remains even if the individual authors of the crimes are removed, and it is this plan or policy that routinizes acts of violence and gives them either an express condonation through

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[199] Nollkaemper, 'Systemic Effects of International Responsibility for International Crimes' (n 107) 314.
[200] Ibid 314 noting *Bosnian Genocide* (n 3) para 450.
[201] Ibid 317 noting generally the findings of the United Nations' International Commission of Inquiry on Darfur; see UNSC, 'Report of the Commission of Inquiry on Darfur to the United Nations Secretary General, Pursuant to SC Res 1564' of 18 September 2005 (25 January 2005) available at <www.un.org/news/dh/sudan/com_inq_darfur.pdf> [accessed 8 August 2016].
[202] Ibid 319.

legislation that perhaps will systemize discriminatory policies or allow for torture in particular situations.[203] He cited an even more dangerous aspect of this systemic nature whereby governments remain impassive and systematically acquiesce while individuals commit international crimes to further the objectives of the State.[204] This occurred, for instance, in Rwanda where governmental acquiescence to widespread commission of international crimes by citizens in churches, schools and among neighbours was met with chilling lack of response by the police or army because the State itself motivated the hateful rage that spawned these terrible acts.[205] It could also be argued that Nollkaemper's thesis is further evidenced by the subsequent events of the Balkan wars. Here, while paramilitary groups effected the massacre at Srebrenica, there was impassive and systematic acquiescence of the Serbian State in the face of these groups eliminating non-Serbs from the self-proclaimed Serbian Republic of Bosnia–Herzegovina.

In sum, Nollkaemper acknowledged that the concept of a "State crime" does not exist. However, both States and organised groups have had dominant roles in international crimes. The concept of "systematic crime" therefore emerged, because even though aware of international crimes, States remained impassive or acquiesced to them.

According to Nollkaemper, even further recognition of the systemic nature of international crimes is also evident in the definitions of some of the crimes themselves.[206] For instance, under the Rome Statute Article 1(7) crimes against humanity refers to an exhaustive list of inhumane acts ranging from murder to apartheid that is committed as part of a widespread or systematic attack directed at the population.[207] Critically, under Article 7(2) the clause "attack directed against

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[203] Ibid.
[204] Ibid 319-320.
[205] J Alvarez, 'Crimes of States/ Crimes of Hate: Lessons from Rwanda' (1999) 24 *Yale Journal of International Law* 365, 367; G Christenson, 'Attributing Acts of Omission to the State' (1991) 12 *Michigan Journal of International Law* 312, 316.
[206] Nollkaemper, 'Systemic Effects of International Responsibility for International Crimes' (n 107) 316.
[207] Article 7(1) ICC Statute (n 60).

any civilian population" refers to multiple commissions of acts described in Article 7(1) that are directed "against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack."[208] So too with war crimes, under Article 8(1) of the same instrument, the Court has jurisdiction where the crimes are committed as "part of a plan or policy or as part of a large scale commission of such crimes."[209] Although genocide does not specifically retain the widespread or systematic requirement, it is hard to see how the elements of the offence could be made out without some level of State involvement.[210] According to Nollkaemper, although, in theory, a lone genocidaire may be theoretically possible, genocide as such does not seem possible without the involvement of a wider collectivity.[211] Nollkaemper is not isolated in this opinion. Other commentators, both academic[212] and judicial,[213] have similarly noted the clear role for States in these crimes.

Herbert Kelman in expressing similar views wrote that the

> "essence of international crimes, such as war crimes and crimes against humanity… is that they are generally not ordinary crimes but *crimes of obedience*: crimes that take place not in opposition to the authorities, but

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[208] Article 7(2) ICC Statute (n 60).
[209] Article 8(1) ICC Statute (n 60).
[210] Article 6 ICC Statute (n 60) provides that for the purposes of the Statute "genocide" means any of the following acts committed with the intention to destroy in whole or in part, a national, ethnical, racial, or religious group as such
a) Killing members of the group;
b) Causing serious bodily harm or mental harm to members of the group;
c) Deliberately inflicting on the group conditions of life calculate to bring about its physical destruction in whole or in part;
d) Imposing measures intended to prevent births within the group;
e) Forcibly transferring children of the group to another group.

[211] Nollkaemper, 'Systemic Effects of International Responsibility for International Crimes' (n 107) 317. Here, Nollkaemper further agrees with the views of William Schabas that during the negotiations on the Genocide Convention the United States of America specifically advocated that the Convention be directed towards States because it was impossible to blame individuals for acts for which governments or States were responsible; on this point, see W Schabas, *Genocide in International Law* (Cambridge University Press 2000) 419.
[212] O Triffterer, 'Prosecution of States for Crimes of States' (1996) 67 *International Review of Penal Law* 341, 341 and 346 noting "as long as states are supporting crimes in one way or another..., their prosecution is an indispensable part of measures to effectively prevent such crimes."
[213] *Bosnian Genocide* (Dissenting Separate Opinion of Judge Al Khasawneh) (n 3) para 21.

> under explicit instructions from the authorities to engage in these acts, or in an environment in which such acts are implicitly sponsored, expected or at least tolerated by the authorities…"[214]

He, like Nollkaemper and Judge Röling, drew that critical distinction between these crimes and "crimes committed in violation of the expectations and instructions of authority."[215] The former have to be understood in the context of the "policy process" that gave rise to them so that either the acts are caused or justified by the explicit or implicit orders from superiors because the criminal action is supported by the authority structure in place.[216] According to Kelman, the actual systemic causes cannot be addressed simply through the traditional individual-focussed prosecution and sanction models, although this is contrary to the dominant response by the international community to deal with atrocities since the Second World War.[217] Here he advocates that the better approach would be to address the systemic cause of international crimes through the State responsibility regime.

This point has been taken further by other academic commentators as well. Drumbl,[218] Osiel,[219] Luban[220] and Goldhagen[221] see the systemic influence of the State on international crimes from a policy level. To them, it is the State that establishes policies of discrimination and hate mongering, and this impacts on the citizenry. They, like Kelman, refer to this as "collective obedience."[222]

This notion is by no means new. In the immediate aftermath of the Second World War, Raphael Lemkin, in lobbying for an international treaty to deal specifically with genocide, commented on the absolute willingness of the German

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[214] Kelman (n 1) 27.
[215] Ibid 26.
[216] Ibid 27.
[217] Nollkaemper, 'Systemic Effects of International Responsibility for International Crimes' (n 107) 314.
[218] Drumbl, *Atrocity, Punishment and International Law* (n 1) 23-46; DJ Goldhagen, *Hitler's Willing Executioners: Ordinary Germans and the Holocaust* (Knopf 1996) 49.
[219] Osiel, 'Modes of Participation in Mass Atrocity' (n 104) 809.
[220] D Luban, 'State Criminality and the Ambition of International Criminal Law' in T Isaacs and R Vernon (eds), *Accountability for Collective Wrongdoing* (Cambridge University Press 2011) 62-64.
[221] Goldhagen, *Hitler's Willing Executioners: Ordinary Germans and the Holocaust* (n 218).
[222] Drumbl, 'Collective Responsibility and Post-Conflict Justice' (n 169) 25-28, 173.

citizenry to give effect to the policies propounded by Hitler as leader of the Third Reich.[223]

Often when there is the systemic element the citizenry becomes malleable and there are what Drumbl describes as "punitive dilemmas" as

> the border between victim and victimizers is not always firm… In episodic bouts of mass atrocity, victims may in fact become victimizers; persecuted individuals or groups may in turn persecute their persecutors or innocent third parties...[224]

What remains key in these international crimes is that the individual perpetrators are not fundamental to the commission of the international crimes per se, but are mere cogs in a lager criminal system, so that they can be replaced and the commission of these crimes remain supported.[225] In sum, these commentators suggest that reliance on individual prosecutions is reductive because it shifts attention away from the systemic motivation or cause of the crime. They thus make a morally convincing argument that justifies turning to the State responsibility regime to address responsibility for international crimes because they see the State as the criminal system that supports international crimes.

2.5 The Major categories of interaction between State and individual regimes of responsibility in addressing support of armed groups

There is a further thread in the commentary that discusses different ways in which the two regimes could interact with each other with a view to addressing State support of armed groups involved in mass atrocities. The interaction can occur if the State and the groups with which they associate can be seen as a common criminal organisation. Alternatively, the State can be seen to be existing in a corporate structure with these groups. Another way of viewing the relationship between the

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[223] R Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Carnegie Endowment for International Peace 1944) ix.
[224] Drumbl, *Atrocity, Punishment and International Law* (n 1) 44.
[225] Nollkaemper, 'Systemic Effects of International Responsibility for International Crimes' (n 107) 320.

State and group, or individuals in the group, is through the interaction of their processes, whereby a finding of responsibility in one regime supports a finding in the other as a form of "parasitic" liability, or alternatively responsibility is assigned separately in different regimes based on common facts.

2.5.1 The State as a criminal organisation

For the most part, the means by which widespread and collective crime has been brought to account has been through targeting the individual members of the group through individual prosecutions based on their role within the group. This has evolved to a broader scope whereby the group can be viewed as a criminal organisation or a criminal corporation.

Nina Jørgensen, for instance, in her seminal work written in 2000, well before the ICJ's Decision on the Merits in the *Bosnian Genocide* case, argued that the role of the State in international crimes could be analysed in terms of a criminal organisation model or alternatively, a corporate crime model.[226] According to Jørgensen, the criminal organisation model was demonstrated at Nuremberg with the inclusion of Articles 9 to 11 in the Charter of the International Military Tribunal.[227] Under these provisions, once an individual member of any group was tried, the International Military Tribunal would be able to declare the organisation criminal[228] and where such a declaration was made, the IMT would have the "right to bring individuals to trial for membership therein before national, military or occupation courts."[229] There was therefore no attribution of responsibility to the group in the strict legal sense but a declaration of criminality against the group. Persons were

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[226] N Jørgensen, *The Responsibility of States for International Crimes* (Oxford University Press 2000) 69; See also similar suggestion for an organisational mode of responsibility in Nollkaemper, 'Concurrence between Individual Responsibility and State Responsibility in International Law' (n 106) 329.
[227] London Agreement (n 76). For discussion of those provisions and their application by the IMT, see section 5.3.
[228] Article 9 London Agreement.
[229] Article 10 London Agreement.

charged under the Indictment as either individuals or as members of a particular organisation.[230]

Applying this model to the State, she concluded in her evaluation that the "declaration of criminality against an organisation such as a State need not expose the entire population to the threat of punishment, but enables members of the government and significant numbers of key criminals to be tried individually, preferably by an international tribunal."[231] Her argument suggests that this model, like the criminal organisation model used at Nuremberg, dealt with collective responsibility by criminalising a group and sanctioning the membership.[232] The role of the State thus would be addressed in terms of isolating the government as a criminal group and holding that membership to account by trials before appropriate tribunals.[233] In essence it would still be individual prosecutions, but critically, this early model suggested a means, albeit imperfect, through which the collective role of the State could be addressed through identification of organisations that had an impact on the commission of international crimes.

According to Jørgensen, the major criticism that was levelled against use of these declarations related to accusations of collective criminality.[234] This, to her, was in part averted by the requirement that membership in the group had to be voluntary and also the declaration created a rebuttable presumption of guilt with a reversal of the onus of proof,[235] thereby suggesting a defence for individuals seeking to distance themselves from the criminal acts of the group.

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[230] Judgment of the *International Military Tribunal of The United States of America, The French Republic, The United Kingdom and Northern Ireland and the Union of Soviet Socialist Republics - against- Herman Wilhelm Goering, Rudolf Hess and others Individually and as Members of Any of the Following Groups or Organizations to which They Respectively Belonged, Namely: the Reich Cabinet; the Leadership Corps of the Nazi Party; the SS, SD, Gestapo, SA, The General Staff and High Command of the German Armed Forces*, all as defined in Appendix B available at <http://avalon.law.yale.edu/subject_menus/judcont.asp> [accessed 1 July 2016].
[231] Jørgensen, *The Responsibility of States for International Crimes* (n 226) 69.
[232] Ibid 71.
[233] Ibid.
[234] Ibid 63.
[235] Ibid.

Jørgensen's alternative model, that of the corporate structure, suggested State responsibility along the lines of the principles of identification and imputation. She argued that under the identification theory, "the basis for liability is that the acts of certain natural persons are actually the acts of the corporation."[236] This is because these individuals are the very person of the company and thus their guilt is the guilt of the company.[237] According to her, this theory limits the scope of responsibility to those who represent the corporation and thus if this theory were to be transported into international law, it would be the equivalent of holding the government collectively liable for the international crimes committed in the State.[238] Again under this model, the question of responsibility would revolve around the prosecution of the leadership or government as to who will be individually answerable for international crimes committed in its State, notwithstanding the declaration of criminality made against it.

2.5.2 Dual attribution

Apart from this, Jørgensen found that with maturation of the law relating to *erga omnes* obligations, States will be able to determine the interplay between individual prosecutions and State responsibility for international crimes, because as prohibitions of international crimes were affirmed in some municipal courts as *jus cogens* norms, municipal courts can prosecute individuals who embody the State without immunity being pleaded in bar, because these crimes could never be seen as official acts.[239] This interplay works both ways. In some instances, the decision to prosecute individuals is dependent on a finding of responsibility in the State responsibility regime. This is very evident in the prosecution of the crime of aggression, except here the prosecution is dependent on an initial finding of State responsibility.[240] In this regard, some commentators have noted that, with regard to the crime of aggression, the course of individual prosecutions can be described as

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[236] Ibid 75.
[237] J Andrews, 'Reform in the law of Corporate Liability' (1973) *Crim Law Rev* 91, 93.
[238] Jørgensen, *The Responsibility of States for International Crimes* (n 226) 75.
[239] Ibid 225.
[240] C Kreß, 'Some reflections on the International Legal Framework Governing Transnational Armed Conflicts' (2010) 51 *Journal of Conflict and Security Law* 245, 270.

being "parasitic" on a finding of State responsibility.[241] She nevertheless identified a point of regime interaction that other commentators have discussed further and that is attribution of responsibility in different regimes concurrently: thus there is a dual attribution.

Nollkaemper[242] has developed this idea of regime interaction through concurrent initiation of process substantially. This has been further supported in the work of Beatrice Bonafé.[243] Nollkaemper initially wrote in 2003 that there was already a concurrence between State and individual responsibility as the two regimes exist alongside each other and mutually support each other.[244] However, he acknowledges that State responsibility does not depend on individual responsibility: in "factual terms states act through individuals."[245] Consequently, there is dual attribution of both State and individual responsibility for a limited number of acts, such as genocide, aggression, crimes against humanity or killing of protected persons in armed conflict. For example, Germany and Japan were both declared liable in international law, notwithstanding that individual prosecutions against the major war criminals were taking place,[246] and more recently Libya was declared liable following the Lockerbie incident, notwithstanding the prosecution of the individuals responsible.[247] Additionally, the fact that the State acts through individuals is reflected in the nature of obligations for third States falling within the scope of Article 40 ARSIWA and also in the consequences that flow from the breach of these special obligations. Where the acts of an individual who is relatively low level and

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[241] Okowa, 'State and Individual Criminal Responsibility in Internal Conflicts: Contours of an Evolving Relationship' (n 127) 149.
[242] Nollkaemper, 'Concurrence between Individual Responsibility and State Responsibility in International Law' (n 106).
[243] B Bonafé, *The Relationship between State and Individual Responsibility for International Crimes* (Martinus Nijhoff 2009).
[244] Nollkaemper, 'Concurrence between Individual Responsibility and State Responsibility in International Law' (n 106) 617.
[245] Ibid 616, referencing the dicta of the Court in *Case of Certain Questions relating to settlers of German Origin in the territory ceded by Germany to Poland*, Advisory Opinion PCIJ [1923] Series B, No. 6, 22 that "states can only act by and through their representatives."
[246] Nollkaemper, 'Concurrence between Individual Responsibility and State Responsibility in International Law' (n 106) 619.
[247] Ibid.

who has committed a breach of an obligation arising under a peremptory norm, this is to be distinguished from acts of high-level individuals or an individual whose conduct was systematic. The meeting of the seriousness threshold is important as Nollkaemper argues that this will trigger special consequences under Article 41 ARSIWA, in addition to targeted remedies such as sanctions against a group, coercion to restore rights, or imposed arms control.[248] While in the former case where the acts of an individual acting of his own volition, the latter case may trigger aggravated State responsibility.[249] There is thus a linkage between the individual and the State for either "ordinary" or "enforcement of aggravated "responsibility".[250]

The linkage also exists when addressing simply the implementation of international responsibility for States. For instance, some primary norms, eg those existing under Article 1 of the Genocide Convention, require that intent of the State correspond with that of the individual since it is the only way that genocide could be proven. This may not apply to all primary obligations, but will be crucial in cases where primary obligations are dependent on questions of intent.[251] This also holds true for implantation of the principles of attribution. He argued that it was clear that where the acts of individuals of high status or rank were attributed to the State, this should mean the special consequences under the serious breaches regime should follow, but he questioned whether in cases of command responsibility it would be equally fair to trigger the same consequences, since the commander in question did not commit the crimes but failed to prevent them.[252]

Further, there may be cases as mentioned above where the finding in one regime is parasitic on the other. An example of this occurs in the prosecution of crimes for aggression under the Rome Statute as noted earlier. Under Art 8bis of the ICC Statute (inserted pursuant to Resolution RC/Res. 6 of 11 June 2010), the crime of aggression is defined as the "planning, preparation, initiation or execution, by a

[248] Ibid 626.
[249] Ibid 627.
[250] Ibid 626.
[251] Ibid 634.
[252] Ibid 633.

person in a position effectively to exercise control over or to direct the political, or military action of a State, of an act of aggression, which by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations". According to some writers, "the collective act of aggression by a State is the point of reference for the act of the individual perpetrator."[253] The ICC Statute defines this act as the "use of armed force by a State against the territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations". The provision allows for dual attribution in that a criminal conviction under this provision before the ICC is parasitic on a finding of State responsibility.[254] In order for a finding of State responsibility to be made there must be an unlawful use of force. While this finding is in turn is dependent on the *jus ad bellum*, there has been some effort to make a non-exhaustive list of acts outlined in the ICC Statute.[255] The acts that constitute acts of aggression are those detailed previously in General Assembly Resolution 3314 (XXIX) of 1974. These are invasion, bombardment, blockades, attack on another State's armed forces, and "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein."[256]

The "substantial involvement" indicates a lower threshold of involvement on part of the State to engage responsibility for the support of armed groups than the interpretation of control under Article 8 ARSIWA. According to Ruys,

> In most cases, states involved in the 'sending of armed groups' will have effective control and the conduct concerned will be attributable to the state pursuant to article 8 … [ARSIWA] 2001. However, if a state is only 'substantially involved' this is not likely, yet the state as such will have

[253] R Cryer, H Friman, D Robinson and E Wilmhurst, *An Introduction to International Criminal Law and Procedure* (3rd edn, Cambridge University Press 2014) 313.
[254] Okowa, 'State and Individual Criminal Responsibility in Internal Conflicts: Contours of an Evolving Relationship' (n 127) 150.
[255] Cryer et al, *An Introduction to International Criminal Law and Procedure* (n 253) 316.
[256] Article 8bis(2)(g) ICC Statute (n 60).

committed an act of aggression, which breaches the prohibition of the use of force…[257]

As a matter of concurrent application of processes for attribution then the inclusion of the definition of aggression demonstrates regime interaction, but only up to a point. The provision is clearly addressed to one class of perpetrator, ie high-level individuals who have the authority to direct the military action of the State. However, although the acts of armed groups cannot be attributed to a State unless it satisfies the thresholds of command under Article 8 ARSIWA, if a State substantially becomes involved in the activities of an armed group that commits aggressive acts against another State, the involved State has committed an act of aggression and responsibility of the State is engaged.[258] However, owing to a differentiated approach in the ICC Statute, only those in a position of leadership can be held responsible, thus it is not possible for lower-order officers to be guilty of aggression as an aider or abettor under a proposed Article 25(3)bis.[259]

2.5.3 Increased use of joint criminal enterprise and command responsibility to charge high-level individuals

In the preceding section the evolution of dual attribution was discussed. Initially, individuals were held to account but over a period of time, a method evolved that defined instances whereby a State can be held accountable concurrently with a finding of individual responsibility. This evolved further with the settling of the provisions on aggression at the ICC whereby a finding of aggression on the part of a State supported a later finding of responsibility on the individual.

These ideas were carried further in the commentary. In a later article, Nollkaemper formulated a further fresh proposal to remove the systemic cause of criminality. While his 2003 work centred on looking towards the State responsibility

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[257] T Ruys, 'Attacks by Private Actors and the Right of Self-Defence' (2005) 10(3) *Journal of Conflict and Security Law* 289, 302.
[258] Ibid.
[259] C Kreß, 'The Kampala Compromise on the Crime of Aggression' (2010) 8(5) *Journal of International Criminal Justice* 1179, 1189.

regime to remove the causes of egregious violations of peremptory norms,[260] he suggested in 2010 that the individual responsibility regime was capable of uprooting the systemic causes of international crime through application of the doctrines of command responsibility and joint criminal enterprise as well as the modes of liability such as co-perpetration and indirect perpetration provided for in Article 25(3) of the Rome Statute.[261] He considered that if the systemic causes of international crimes were motivated by leaders, then these causes could be uprooted in part, by prosecution of these leaders.[262] He considered that if there is a climate tolerating abuses, then removal of the military commander who fails to control this will be of assistance. So too, he noted that the liberal and expansive interpretation given to JCE by international courts and tribunals can connect the individual with the different collective entities he associated or participated with in the commission of international crimes.[263] Moreover, he argued that the doctrine could allow for prosecution of the main participants and thus their removal would put an end to the systemic criminality.[264].

Bonafé, also writing in 2009, also put forwards a similar argument. According to Bonafé, international crimes are committed at the collective level. In other words, the individual participates in a collective crime and thus international criminal law has relied heavily on modes of responsibility that reflect this collective dimension, such as JCE, "command responsibility," and earlier on the concept of criminal organisations.[265] She has suggested that the "particular methodology in the judicial establishment of individual criminal liability inevitably resembles that used

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[260] Nollkaemper, 'Concurrence between Individual Responsibility and State Responsibility in International Law' (n 106) 633.
[261] Nollkaemper, 'Systemic Effects of International Responsibility for International Crimes' (n 107) 325-327.
[262] Ibid 327.
[263] Ibid 329.
[264] Ibid.
[265] Bonafé, *The Relationship between State and Individual Responsibility for International Crimes* (n 243) 190. The discussion on dual attribution has also been used in relation to State and organisational responsibility. In this regard, see A Nollkaemper, 'Dual Attribution: Liability of the Netherlands for Conduct of DUTCHBAT in Srebrenica' (2011) 9 *Journal International Criminal Justice* 1143, 1152-1154.

to ascertain aggravated State responsibility,"[266] because the same "context of collective criminality is at the basis of both kinds of international accountability."[267] This is true because in most instances there is dual attribution to States and individuals for atrocities emanating out of the same events.[268] She continues that once the assessment of the collective commission of the international crimes is carried out, the regimes further require "the application of specific rules on attribution to an individual or State."[269] She herself did not discuss what the rules should be, but considered that the *Tadić* Decision by the ICTY proved to be an important contact in creating a relationship between State and individual responsibility.[270] In her closing summaries to her thesis she suggested that

> aggravated state responsibility and individual criminal liability are to be seen under a unitary framework. State and individual responsibility for international crimes could have been conceived in (almost) perfect isolation at a time when international criminal law was applied episodically under exceptional circumstances. But the rapid development of international criminal law and its increasing focus on mass atrocities and state leaders' liability have significantly brought to the surface the problems associated with the overlap between the state and individual responsibility for the same crimes…[271]

It is this suggestion that State and individual responsibility are part of a unitary framework that resonates with this thesis. To put it more dramatically, David Luban describes the situation as re-labelling acts of State violence as crimes and in this way a curious drama is played out: not "Hamlet without the Prince of Denmark, but rather a Prince without Denmark."[272] In other words, the individual bears responsibility, but his role in the State system is ignored for the purpose of responsibility. For instance, Milošević is responsible for international crimes and yet

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[266] Bonafé, *The Relationship between State and Individual Responsibility for International Crimes* (n 243) 190.
[267] Ibid 190.
[268] Ibid 44.
[269] Ibid 190.
[270] Ibid 203-204.
[271] Ibid 253.
[272] Luban, 'State Criminality and the Ambition of International Criminal Law' (n 220) 77.

the State apparatus implicated in the crimes is untouched.[273] The isolation of international criminal law from State responsibility is artificial because there is a clear connection between a State's responsibility in international law and the State leader's liability. Since both regimes address responsibility for different actors arising from the same facts, the manner in which attribution of conduct to States and also the assigning of responsibility to individuals is important. The tests of attribution should be reviewed, so that the that modes of responsibility that are used to address the complicity of State leaders with armed groups for the purposes of criminal responsibility can likewise be considered when addressing the issues of State responsibility that derive from the same relationship between State leaders and members of armed groups who go on to commit international crimes. There is room for this progression in the law on State responsibility. Liesbeth Zegveld has advanced a further proposal for addressing this through a consideration of interactions between the two regimes of responsibility.

2.5.4 Triple attribution

Zegveld in her thesis incorporated a discussion of the full range of these interactions in her discussion as to the possible ways in which responsibility for the commission of international crimes by armed groups could be addressed in international law from both the State and individual regimes as a matter of positive law.[274] Like Nollkaemper and Bonafé, she argued that this could happen concurrently. Through asking the question "who is accountable under international law for the acts committed by armed opposition groups or for the failure to prevent or repress these acts,"[275] she suggested that accountability applied at three levels – that of the individual, the group and the State. According to Zegveld,

> At the first and lowest level, individuals who actually committed the crime can be held accountable. At the second level, superiors are potentially accountable on the basis of command responsibility. At the third level, the

[273] Ibid.
[274] L Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge University Press 2002) 3, 12, 152-155, 207.
[275] Ibid 3.

> state itself may be accountable, in that it is responsible for the acts of its agents…[276]

She has argued that there are customary obligations under Common Article 3 of the Geneva Conventions[277] and under the provisions to Additional Protocol II[278] and because there is strong case law from the jurisprudence of the ICTY and ICTR that shows that individuals have been prosecuted for breaches of these provisions.[279]

While Nollkaemper and Bonafé had suggested command responsibility as being appropriate to address systemic perpetration of international crimes, she went further and identified two strands of command responsibility for group leaders – direct responsibility for the international crime in cases where the group leader ordered or incited the crime and "command responsibility properly speaking"[280] for failure to exercise due diligence to prevent or repress unlawful conduct.[281]

Beyond this, a State is responsible where there is an adoption of the acts of armed groups by the State or where the armed group later becomes the government of the day.[282] Thus in circumstances where neither of these occur, there will be no responsibility. Her focus on the third level of responsibility, ie State responsibility for international crimes committed by armed groups, was based on the nexus between control over the territory in which the crimes occurred and focussed on the duties of prevention.[283] She suggested that States could be responsible in their own capacity, ie for breach of their duties to take preventative actions on their territory.[284]

As with the dual attribution model, there is still a gap in accountability. Zegveld has defended this position by stating that "the [S]tate is not an all powerful entity, it cannot give an absolute guarantee at the international level that no harmful

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[276] Ibid.
[277] The four Geneva Conventions (n 43).
[278] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) 8 June 1977, 1125 UNTS 609
[279] Zegveld, *Accountability of Armed Opposition Groups in International Law* (n 274) 4.
[280] Ibid 111.
[281] Ibid.
[282] Ibid 152-153.
[283] Ibid 194.
[284] Ibid 182.

actions will be committed on its territory."[285] However, the events of the past two decades have shown an escalation of commission of armed groups in international crimes. In addition, often these groups are being supported by State patrons outside their territory of operation. Thus the proposals from Zegveld, although they go a long way in addressing the responsibility of different actors, still leave a gap in accountability.

In a recent publication, Cedric Ryangaert reinforces Zegveld's thesis in his conclusions on the question of State responsibility for the conduct of non-State actors. According to him, there are a limited number of scenarios that allow for attribution of non-State actor conduct to the State under the ARSIWA.[286] Where this is not possible, the States that had the "capacity to influence the non-State actor" is not so much responsible for the acts of the non-State actor, but for its own failure to exercise due diligence.[287] However, the question that results from this is whether this positivist focus in the academic commentaries properly considers the impact that some levels of State influence or whether they minimise the impact this influence may have had on the members of the armed group being later able to commit international crimes. Thus the limits of these proposals in examining the role of partisan States in the commission of international crimes by armed groups needs further probing.

2.5.5 Modifying the test of attribution of conduct of individuals to States

In total, the literature suggests that the way forwards in identifying State responsibility for criminal acts of armed groups derives from an interaction between the two separate regimes. So far the literature has suggested that interaction to be best with concurrent application of legal process or through viewing the activities of the State through particular lens, ie as an organisation or corporation, upon which acts are imputed on the basis of systemic or structural relationships.

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[285] Ibid.
[286] C Ryangaert, 'State Responsibility and Non State Actors' in M Noortman, A Reinsich and C Ryangaert (eds), *Non State Actors in International Law* (Hart 2015) 181.
[287] Ibid 181.

However, in his Dissenting Judgment in the *Bosnian Genocide* case, Vice President Al Khasawneh suggested a further means of addressing State responsibility for the criminal acts of armed groups. Instead of simply suggesting the possible means of locating responsibility for States through a concurrent initiation of process between the two regimes, there was the further suggestion to actually vary the test of attribution that was defined in *Nicaragua*.[288] His proposed variation derived from the fact that there was a common set of objectives between the Serbian State and the paramilitary groups they supported.

This was a distinguishable situation from *Nicaragua*,[289] as based on the activities during that conflict, the objectives there plainly was to replace the government. He opined that those

> objectives, however, were achievable without the commission of war crimes or crimes against humanity. The *Contras* could indeed have limited themselves to military targets in the accomplishment of their objectives. As such, in order to attribute crimes against humanity in furtherance of the common objective, the Court *held that the crimes* themselves should be the object of control…[290]

However, where the activities during the conflict indicated that the criminal acts of the group were in fact based on a shared objective in the commission of international crimes the situation should be assessed differently. In those circumstances he opined to require

> both control over the non-State actors and the specific operations in the context of which international crimes were committed is too high a threshold…[291]

According to him, the "inherent danger in such an approach is that it gives States the opportunity to carry out criminal policies through non-State actors or surrogates without incurring direct responsibility".[292] Consequently, he advocated

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[288] *Nicaragua* (n 3).
[289] Ibid.
[290] *Bosnian Genocide* (Al Khasawneh Dissent) (n 46) para 39.
[291] Ibid.
[292] Ibid.

the crucial issues raised in the *Tadić* Appeals Decision, "different types of activities, particularly in the ever-evolving nature of armed conflict, may call for subtle variations in the rules of attribution."[293]

Since the overall control test may not always be "proximate enough to trigger State responsibility,"[294] he has proposed a solution in these circumstances by enlarging the space for interaction between the two separate regimes of responsibility by modification of the tests of attribution.

2.6 Alternatives to modifying the test of attribution of conduct of individuals to States

There is a separate area in the commentary that has proposed an alternative solution to the issues raised in this thesis in relation to States' involvement with armed groups and the current gap in their accountability before positive international law.[295] In his 2015 publication, Miles Jackson similarly addressed the role States in the commission of international crimes.[296] In his work he accepted that as a "baseline,"[297] "it is foundational in international law that state responsibility requires the attribution of conduct to the state."[298] Noting that the tests of attribution are based on the principles of agency whereby it is the nature of the relationship that had to be assessed, so that only where a non-State entity was a *de facto* organ because the tests of complete dependence or strict control was observed could the State be found responsible for the acts of these individuals.[299] According to him, both of these tests denoted the search for a relationship of principle to the agent.

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[293] Ibid.
[294] Ibid.
[295] M Jackson, *Complicity in International Law* (Oxford University Press 2015) 1-2.
[296] Ibid.
[297] Ibid 177.
[298] Ibid, noting principle applied in *Certain Questions Relating Settlers of German Origin in the Territory Ceded by Germany to Poland* (Advisory Opinion) (n 245) para 34.
[299] Ibid 178.

In his thesis he noted that the essentially bilateral origins of international law considered States as the primary bearer of rights and obligations.[300] As a result, there was no regulation for the wrongful conduct of non-State actors and consequently this meant that States could never be responsible for complicity with such actors under international law "because there was no wrong to which a State might be linked by the complicity rule".[301] This view is supported on the provisions of Article 16 ARSIWA which identifies responsibility for aid and assistance in internationally wrongful acts, only in State-to-State relationships.

However he argued that there is has been a development of a *lex specialis* regime of "attribution based on complicity [that] has developed in the Inter-American Court System,"[302] whereby breach of a State's territorial obligations under international law, whereby the State failed in its duty to prevent violations would constitute a breach of the State's positive obligations.[303] Under the developing *lex specialis* in that legal system he found that the *lex specialis* rule was an attempt by this court "to supplement in cases of culpable state participation, state responsibility for violations of a positive obligation with attribution of the non-State actor's conduct to the state."[304]

Here his critique is that the approach of the Inter-American Court denies the coherence of the current framework of attribution that separates primary rules from secondary and thus the *lex specialis* suggests that the secondary rules are "primary rule dependent" and this creates confusion in the law.[305] Moreover, the *lex specialis* account is simply sweeping complicit conduct into the broader due diligence obligations as obtains within the Inter-American System.[306]

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[300] Ibid 128.
[301] Ibid.
[302] Jackson, *Complicity in International Law* (n 295) 190.
[303] Ibid 191.
[304] Ibid.
[305] Ibid 197.
[306] Ibid.

He further notes another alternative whereby a further *lex specialis* has arisen in cases related to armed attacks in the context of terrorism and aggression generally. According to Jackson, there is in an emerging principle in State practice whereby the rules of attribution are defined by complicity as opposed to agency.[307] Here he argues that, for instance, the comments of George Bush who stated that "by aiding and abetting murder, the Taliban is committing murder… and we make no distinction between terrorists and those who harbour them,"[308] points to a *lex specialis* that these acts are attributable to the State and in these instances can be seen to be capable of triggering a right to self-defence under the UN Charter.[309]

His argument that in these rare situations, although a "clearly expressed l*ex specialis*" can give rise to a varying of the tests of attribution, it is necessary "to apply the same rules across different substantive areas of international law,"[310] but his fear is that "responsibility of this kind does not fit easily with the historical structure of international law."[311] In this way, Jackson, like the earlier commentators, has detected the lacuna in the law relating to State responsibility for this powerful new entity that has emerged on the international scene. This thesis, like his, seeks to fill that gap in accountability but through different suggestions as it challenges the putative rules of attribution, and this is discussed in the next section.

2.7 Situation of this thesis within the existing literature

As this thesis has indicated, States supporting armed groups who commit international crimes are not caught under the current under-inclusive tests of attribution in the regime of State responsibility. In order to revise this position, an enhanced model of attribution could be designed. It can draw on the models used in international law, but this can only be done if there is an expansion of the different ways in which the separate regimes of responsibility interact with each other.

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[307] Ibid 186.
[308] Ibid 187.
[309] Ibid.
[310] Ibid.
[311] Ibid 200.

As the literature has highlighted, the interaction between the two regimes is based on the development of a body of commentary that has advocated that a relationship be created between the two regimes of State and individual responsibility. As has been discussed in the preceding sections there have been five major categories of interaction identified in the literature so far which provide a more harmonised approach towards the question of responsibility by drawing together the two fragmented, disparate regimes together. Each of these in some measure also addresses the question of State involvement with armed groups in international crimes.

If the five categories were to be viewed along a continuum, at the earliest, most rudimentary stage is the proposal that was that found in Jørgensen's commentary[312] and in some of Nollkaemper's early proposals,[313] to consider the State as an organisation, so that the acts of its membership would be imputed to it on the basis of that voluntary association and also because the Heads of State would be the embodiment of the organisation. If armed groups' operations were to be brought within these models, then the State would be responsible for their acts through the simple act of imputation. The limitations on these models are that they would require some clear legislative or treaty enactment to enable the model to work. The model was created by the IMT, but it was done in the formative stages of post-Second World War reckoning and similar State consensus might now be lacking. Furthermore, the nature of the commission of international crimes has since changed and international relations as they now stand, may be averse to such harsh and blanket imputations of responsibility.

Moving forwards are the proposals for concurrent initiation of legal process or dual attribution in the two separate regimes of individual and State responsibility.

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[312] Jørgensen, *The Responsibility of States for International Crimes* (n 226).
[313] Nollkaemper, 'Systemic Effects of International Responsibility for International Crimes' (n 107); Nollkaemper, 'Concurrence between Individual Responsibility and State Responsibility in International Law' (n 106).

Here commentators such as Okowa[314] suggest either parasitic processes whereby process and sanction under one regime should ground process being initiated in another. Alternatively, Nollkaemper[315] suggests that sometimes there could be a concurrent approach as the determination of issues in one regime is required to support a finding being made in the other. Thus if aggression were to be examined, for example, a State may not be responsible for participating in an international crime committed by an armed group, but it may well be responsible for an act of aggression because the test of substantial involvement, as Ruys[316] has suggested, is far lower to determine if an act of aggression has occurred. This way high-level individuals may be found personally responsible and thus this may be related to their interaction with the armed group as that finding is derived from the finding in the State responsibility regime. This way, although high-level individuals may be found responsible, it is an individually focussed approach that does not address questions of responsibility in the context of State responsibility. This is because the declaration of an act of aggression simply grounds the conviction of an individual and there are no sanctions that can be attached to the State as a result such as cessation, reparation, orders for surrender of fugitives or the like. The parasitic finding of responsibility reinforces the individual criminal regime, it does not *strictu sensu* address State responsibility for supporting armed groups when those groups commit international crimes.

Moving along the continuum, the proposals from Nollakamper[317] and Bonafé[318] suggest that enhanced use of the modes of responsibility such as joint enterprise or command responsibility would expand the range of prosecutions of high-level actors who are complicit to varying degrees in the actions of the physical

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[314] Okowa, 'State and Individual Criminal Responsibility in Internal Conflicts: Contours of an Evolving Relationship' (n 127).
[315] Nollkaemper, 'Concurrence between Individual Responsibility and State Responsibility in International Law' (n 106).
[316] Ruys, 'Attacks by Private Actors and the Right of Self-Defence' (n 257).
[317] Nollkaemper, 'Concurrence between Individual Responsibility and State Responsibility in International Law' (n 106).
[318] Bonafé, *The Relationship between State and Individual Responsibility for International Crimes* (n 243).

perpetrators. This would have a knock-on effect by removing high-level controlling figures from the State machinery and destabilising its capacity for continued crimes. Again, there is a limitation on this as if the systemic element is deeply engrained and there is infrastructure in the State to continue to support armed groups, then the removal of an individual is not final as individuals can be replaced, no matter how instructive they are in the policy of the crimes.

Moving even further ahead, is the use of triple methods of attribution. Independent of each other, individuals or States can be considered responsible in each regime and thus the systems work in tandem. Proposals such as those put forwards by Zegveld[319] are that individuals, groups and States can each be considered responsible based on their breach of positive obligations under international law. However even here there are limitations. While individuals can be prosecuted either on the basis of their own acts of for their complicity as commanders in failing to prevent the commission of crimes, States can only have the acts of individuals attributed to them in limited circumstances. Finally, the last point on the continuum is the broad proposal put forwards by dissenting Judge, Vice President Al Khasawneh in the *Bosnian Genocide* case.[320] While the proposals so far suggest coordination of the two regimes, Judge Al Khasawneh proposes that the interaction be a point of fusion. The test of attribution of conduct of individuals can be modified by drawing on the concepts and principles from the individual criminal regime. Since both regimes are premised on the same shared facts and the crimes result from the same system, there is a common ground that can support this proposed interaction by cross-fertilisation of tests.

It is at this point along the continuum that this thesis is situated. The tests of attribution should be reviewed, so that the approaches considered in assigning criminal responsibility under the modes of responsibility that are used to address State leaders' participation with armed groups for the purposes of criminal responsibility can likewise be considered when addressing the issues of State

[319] Zegveld, *Accountability of Armed Opposition Groups in International Law* (n 274).
[320] *Bosnian Genocide* (n 3).

responsibility that derive from the same relationship between State leaders and members of armed groups. There has been no rigorous examination as to what this modified test of attribution should factor in, what elements it should incorporate or what doctrines it could draw on and whether there is a common rationale between the two regimes of responsibility to support this proposal or whether further cross-fertilisation from the human rights regime could also assist.

The thesis aims to start the conversation about this change. This is something further commentators could continue to examine and critique so that proposed meaningful suggestions from those new debates could pass to the *lex lata*.

The subsequent chapters systematically develop this model for enhanced accountability and thus move the continuum further along in the quest to address the pivotal role of States in systems where armed groups integrate with them and then effect international crimes.

Chapter Three: Attribution of Conduct of Non-State Armed Groups to States under the Current Regime of State Responsibility

3.1 The key role of attribution in the State responsibility regime and the early debate on attribution

In developing this model of enhanced accountability through modifications to the positive tests for attribution, the first port of call is to examine the fundamental role of attribution and discuss the early debates as to its inclusion in the overall framework of international responsibility. It is no exaggeration to say that the system of State responsibility turns on the tests for attribution. It is the fulcrum of the process through which a State will be held responsible for violations of international law. Since the State is an abstraction, it can only be found responsible for violations of international law to the extent that acts of individuals can be attributed to it. A critical aspect in the development of the law in relation to attribution was the recognition of different categories of individuals whose acts could properly be classed as acts of State. The development of the law is indicative that the prescription of the legal test for attribution has been part of an evolutionary process, in which the rationale and objectives have adapted to the ever-changing politico-legal context, so that as inter-State relationships have evolved and responded to new dynamics, so have the tests of attribution. The proposals put forwards for variation are thus set against this continuum of development, whereby the modifications are placed against the current face of armed conflict and the roles States may play in them.

3.1.1 The early debates on attribution

According to early natural law scholars, a State was a complete entity made up by the collection of persons who associated within it.[321] According to Hobbes, a

[321] The principles of attribution under consideration are based on the development of law in the Western liberal legal tradition. Thus the development of the law is reviewed from that legal tradition only.

State was a "multitude of men, united as one person by a common power."[322] This common power was initially the sovereign. However, over a period of time the political structures began to shift and sovereign States started to proliferate.[323] Thus, the way in which a sovereign or later the sovereign State was considered responsible to other States for the conduct of individuals within the State became a relevant field for scholarly discourse in the development of ideas that helped shape the law of international responsibility.

Belli and Gentili, both writing in the late sixteenth century, proposed circumstances whereby acts of citizens would be imputed to the sovereign.[324] So, for instance, Belli found that a sovereign was responsible to other States for losses inflicted by his own soldiers and Gentili suggested that a sovereign was responsible for injuries to the envoy of another State, so that the envoy's sending State also retained a right to take countermeasures against the host State.[325] Discussion of circumstances as to which acts of citizens could be imputed to their sovereign continued through the works of Zouche,[326] Pufendorf[327] and, later Wolff.[328]

Wolff considered the circumstances in which the conduct of a private individual could be imputed to the State. According to him, if an individual injures the citizen of another State of his own volition, then the situation would be distinguishable from a situation where he causes injury on the instruction of the

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[322] JCA Gaskin (ed), *Thomas Hobbes: The Elements of Law, Natural and Politic Part I Human Nature and Part II De Corpore Politico* (Oxford University Press 1999) 107.
[323] J Crawford, *The Creation of States in International Law* (2nd edn, Oxford University Press 2006) 6.
[324] See Crawford, *State Responsibility: The General Part* (n 98) 3-4, citing P Belli *De Re Militari et Bello Tractactus* (1563) Pt X, Ch. II (transl Nutting 1936) 296-8; A Gentili, *De Legationbus* (1594) Bk II, Ch. VI (transl Laing 1924) 72, 76; A Gentili *De Jure Belli* (1612) BK III, Chs. XXIII-XXIV (transl Rolfe 1933) 421-9.
[325] Crawford, *State Responsibility: The General Part* (n 98) 5.
[326] R Zouche, *Juris et judicii fecialis* (1650) Pt I, ss V, X (27, 53) Pt II s V (106-11) (transl JL Brierly, Carnegie Institution of Washington, DC 1911) 106-111, cited in Crawford, *State Responsibility: The General Part* (n 98) 11-12.
[327] S Pufendorf, *Elementorum Jurisprudentiae Universalis*, Bk II Axiom I s 9 (215-216) (transl WA Oldfather, Clarendon Press 1938) 103-104, cited in Crawford, *State Responsibility: The General Part* (n 98) 14-15.
[328] C Wolff, *Jus Gentium Methodo Scientifica Pertractatum* (1764) Ch III, 140ff (transl JH Drake, Clarendon Press 1934) 161-162, 195, cited in Crawford, *State Responsibility: The General Part* (n 98) 17-19.

sovereign or in circumstances where the sovereign later approves the deed.[329] In the latter case, Wolff found that the injury is not only to the injured citizen, but also to the State to which he belongs.[330] Vattel developed these ideas further by including wide duties to make reparation in these circumstances.[331] So that in addition to being held responsible, States would also be under a duty to punish the offender or relinquish him.[332]

Moving forwards into the twentieth century, Anzilotti further contributed to this corpus of work by stipulating that imputation is a process of law within itself and, as such, carries its own rules that are distinguishable from the cause of the injury to the State.[333] Crawford noted that Anzilotti's work introduced State responsibility as a distinct topic and though his treatment was generalised, other writers such as Clyde Eagleton and Edwin Borchard did further work on systematizing it.[334]

Borchard, writing in the immediate aftermath of the First World War, focussed his work on a consideration of the injuries suffered by foreign nationals as a result of the conflict.[335] Commenting on the substantial body of nineteenth-century case law coming out of the Mixed Claims Commissions and in particular the *Alabama*[336] Arbitration Decision, he observed that up to that point the law was such that governments were responsible for injuries suffered by aliens, because they failed to protect the foreign persons on their territory.[337] He noted that the Mixed Claims Commission found that this protection could extend to foreign nationals against

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[329] Ibid Ch III s 316(161).
[330] C Wolff, *Jus Gentium Methodo Scientifica Pertractatum* (1764) Ch III s 316(161) (8th edn, eds Kapossy and Whatmore, transl T Nugent 2008) 271-272.
[331] E Vattel, *Le Droit de Gens* (1758) BK III, Ch. VI, s 71(298) (transl T Nugent 2008), cited in Crawford, *State Responsibility: The General Part* (n 98) 19.
[332] Ibid.
[333] D Anzilotti, *Corso di Diritto internazionale: Vol I: Introduzione e teorie generali* (3rd edn, Athenaeum 1928), cited in Crawford, *State Responsibility: The General Part* (n 98) 22.
[334] Crawford, *State Responsibility: The General Part* (n 98) 24.
[335] E Borchard, *The Diplomatic Protection of Citizens Abroad: or the Law of International Claims* (Banks Law 1919) 233-244, 117-122.
[336] *Alabama Claims Arbitration* (1872) 1 Moore Intl Arbitrations 495.
[337] Borchard, *The Diplomatic Protection of Citizens Abroad: or the Law of International Claims* (n 335) 217.

wrongful acts committed by individuals belonging to mobs[338] and insurgents.[339] Thus the Commission suggested that even where individual conduct could not be attributed to the State, because it was a private act, the State would still be responsible because it failed in its obligation to protect the foreign nationals. Interestingly, at this point the language of the commentators changed from one of "imputation" of conduct to the State to that of "attribution".

These ideas were also considered by the sub-committee created to report on State responsibility at the 1924 meeting of the Assembly of the League of Nations.[340] According to the sub-committee, since the State is an abstract entity, it must provide itself with organs to exercise its powers.[341] Thus, while the illegal acts of officials were clearly attributable to the State, the same did not hold true for the acts of private individuals.[342] This was distinguishable from the concept of State responsibility discussed by Borchard.[343] While Borchard concentrated on the primary obligations of States to keep foreign nationals safe, the sub-committee raised a different idea that international responsibility is the responsibility of States for the acts of their organs.[344] There was thus a distinction between international responsibility based on the attribution of conduct of State organs and international responsibility arising from failure by the State to protect aliens from injury caused by mobs or insurgents.

Later, Eagleton, in the first discrete treatise on State responsibility, discussed this further and dedicated separate chapters to four classes of persons whose illegal

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[338] Ibid 228.
[339] Ibid 220.
[340] Crawford, *State Responsibility: The General Part* (n 98) 28.
[341] LN Doc. C.44.M.21.1926.V 'Responsibility of States for Damage Done in Their Territories'.
[342] Ibid.
[343] Borchard, *The Diplomatic Protection of Citizens Abroad: or the Law of International Claims* (n 335) 220.
[344] 'Responsibility of States for Damage Done in Their Territories' (n 341).

conduct could be attributed to the State, namely agents of the State,[345] individuals,[346] mobs or insurgents[347] and a further group he described as "responsible persons".[348]

In all four classes, Eagleton identified the establishment of the "criterion of control" as the key basis for finding a State responsible for the acts of individuals. According to him, one of the foundation stones of the international system was that, where a State has control within its territorial limits, it was to be assumed to protect the alien from injury committed by its nationals.[349] This then translated into duties to prevent injuries to the alien by providing domestic laws in line with international obligations that ensured the protection of the alien and his property.[350] This in turn was measured by a standard of due diligence, the observance of which was assessed on a practical basis.[351] Failure to exercise this created obligations upon the State to provide redress, so that the injured alien was entitled to reparation for injuries suffered.[352]

However, with agents the same rights for reparation arose, but only if the injury was caused by a person who was regarded as an organ of the State. According to Eagleton, "[s]ince the state is an abstract entity, it must in order to find expression, provide itself with organs wherewith to exercise its powers."[353] Eagleton noted that, when a State provides an individual with the authority to act on its behalf, the acts of that individual become the acts of the State itself, which is then responsible for the act of any of these agents.[354] Eagleton concentrated on *de jure* organs; in addition, he was clear that attribution of illegal conduct could only occur where there was control

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[345] C Eagleton, *Responsibility of States in International Law* (New York University Press 1928) 44-73.
[346] Ibid 76-93.
[347] Ibid 125-153.
[348] Ibid 26-41.
[349] Ibid 77; see also operation of this principle in *Mavrommatis Palestine Concessions* (n 138).
[350] Eagleton, *Responsibility of States in International Law* (n 345) 148-149.
[351] Ibid 88.
[352] Ibid 92-93.
[353] League of Nations, *Committee of Experts for the Progressive Codification of International Law, Questionnaire No. 4*, 'Responsibility of States for Damage Done in Their Territories' (cf n 341), referenced in Eagleton, *Responsibility of States in International Law* (n 345) 44, fn 1.
[354] Ibid 44.

over the agent, either through authorisation of the act or through negligence in the supervision of him.[355] Thus, for instance, he classed soldiers who were acting outside their instructions as being personally responsible and not incurring the responsibility of the State.[356] Beyond this with other groups such as mobs or insurrectionists and "responsible persons," ie colonies under the British rule, "the slide rule upon which responsibility must always be calculated is the rule of due diligence."[357]

Taken as a whole, the period from Belli to Eagleton introduced a duty on States to protect aliens and their property on their territory and as well the separate process for attributing breach of those obligations to States, in circumstances where breach of these obligations was the result of actions from individuals that were recognised as organs of the State or where there was a failure to supervise such individuals. These ideas further evolved with the codification of the law that culminated, in 2001, with the adoption ARSIWA, and their associated Commentaries.[358]

3.2 Attribution in the work of the ILC

The work by the ILC on what was to become the ARSIWA was part of its mandate of "encouraging the progressive development of international law and its codification."[359] The Articles benefitted from two phases of reading, the first from 1969 to 1996 and second from 1996 to 2001 before their final implementation. The Articles benefitted from the input of four different Rapporteurs who worked on

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[355] Ibid 62.
[356] Ibid 62.
[357] Ibid 148.
[358] The text of the ARSIWA was adopted by the ILC in its Fifty-third Session and submitted to the United Nations General Assembly. The Articles were annexed to United Nations General Assembly Resolution 56/83, 12 December 2001, ss 3-4; The text from UNGA Resolution 56/83 is reproduced in *ILC Yearbook of the International Law Commission* 2001 Vol II Part Two 26ff and these are the provisions that are referred to in this work.
[359] Crawford, *The International Law Commission's Articles on State Responsibility* (n 24) 1.

them: Roberto Ago (1963–1979), Willem Riphagen (1979–1986), Gaetano Arangio-Ruiz (1987–1996) and James Crawford (1997–2001).[360]

Concerted work on defining the rules regarding attribution was carried out during Roberto Ago's tenure as Special Rapporteur, particularly as regards the treatment of entities which are not organs of the State. While the thrust of emerging law on attribution had previously focussed on attribution of conduct of State organs only, Ago's draft presented eleven provisions relating to the circumstances in which conduct of individuals, not immediately classed as organs of the State, could nevertheless be attributed to the State.[361] In the Report of the ILC to the General Assembly, it was observed that it was a fundamental rule that acts of individuals or collective entities which have the status of organs under the internal law of the State are acts of the State and are therefore attributable to it for the purpose of establishing its international responsibility.[362] This rule was codified in Draft Article 5. In this regard, the ILC noted that this rule was not absolute and it should not be considered that all acts of *de jure* organs were automatically attributable to the State.[363] In its Commentary to Draft Article 5, the ILC further commented that there were cases which indicated that, since organs are individuals, in each case it would be necessary to understand whether the individual acted as an organ or as a private individual.[364]

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[360] FV Garcia-Amador (1955–1961), although formally working on the codification of State responsibility concentrated exclusively on the substantive law relating to injuries to aliens.

[361] International Law Commission's Draft Articles on State Responsibility (1977) *Yearbook of the International Law Commission* Vol. 11 Part Two Doc A/32/10 Report of the International Law Commission on the Work of its Twenty-ninth Session, particularly the provisions on attribution: [1975 Report]

Article 10. Attribution to the State of conduct of organs acting outside their competence or contrary to instructions concerning their activity

Article 11. Conduct of persons not acting on behalf of the State

Article 12. Conduct of organs of another State

Article 13. Conduct of organs of an international organisation

Article 14. Conduct of organs of an insurrectional movement

Article 15. Attribution to the State of the act of an insurrectional movement which becomes the new government of a State or which results in the formation of a new State.

[362] *Yearbook of the International Law Commission* 1973 Vol II A /9010/Rev. I Report of the Commission to the General Assembly on the Work of its Twenty-fifth Session 61.

[363] Ibid.

[364] Ibid 62.

Likewise, the ILC noted that "certain acts of individuals who do not have the status of organs of the State may likewise be attributed to the State in international law and thus become a source of responsibility to be borne by that State."[365] This was the case with regard to the actions of individuals or entities which exercised elements of governmental authority, even though they were not *de jure* organs of the State.[366] The rationale for this was that these entities perform specific services for the community and thereby exercise functions which constitute elements of government authority.[367]

The ILC also discussed another possible basis of attribution, which had not been considered meaningfully up to that point. Draft Article 8 discussed responsibility of the State based on attribution of responsibility for persons acting on its behalf.[368] The provision in question covered individuals who were not formally organs under the internal law of the State, but nonetheless acted on behalf of the State in particular circumstances. This was a limited area. The ILC considered that an example of this would be in the context of an armed conflict, where private citizens take up arms to defend themselves or assumed administrative roles because the *de jure* organs of the State are no longer able to act.[369] It further contemplated that this attribution could also occur in cases where States supplement their action by utilising private persons who act as "auxiliaries" while remaining outside the structure of the State.[370]

In these circumstances, the ILC found that it was necessary to look for a "real link" between the person performing the act and the State machinery rather than a "lack of formal legal nexus between them."[371] The ILC found that there were two situations where this had occurred in State practice: where auxiliaries were deployed in armies or the police or where persons were employed to carry out particular

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[365] Ibid 61.
[366] Ibid 79.
[367] Ibid.
[368] Ibid 85.
[369] Ibid 87.
[370] Ibid.
[371] Ibid 85.

missions in foreign territory.[372] However, the scope of responsibility was limited only to circumstances where proof was established that the private individuals were actually appointed and "performed a given task at the instigation of those organs."[373]

Further, Draft Article 11 provided that in some instances a State could be responsible depending on the level of participation or complicity of its organs in the acts or omissions committed by the private entities by failing to protect against the acts these individuals committed.[374] The ILC included within the ambit of this Article situations where the State may incur responsibility for the acts of armed bands or groups.[375] According to the Commentary to Draft Article 11, they are *de facto* State organs where an armed band maintains links with the government of the country where they are based and the government is known to

> encourage and even promote the organisation of such groups, to provide them with financial assistance, training and weapons, to co-ordinate their activities with those of its own forces to the point that they are acting in concert with and at the instigation of the State and perform missions authorised by or even entrusted to them by that State.[376]

It is important to note that the Commentary to the Article noted that these are by no means clear situations.[377]

Under Crawford, consideration of the circumstances for attribution was further developed and the relevant Articles finalised. However, some of the proposals put forwards by Ago were not included in the final set. In the adopted set of Articles there are eight provisions which address the circumstances in which conduct may be attributed to the State, some of which are most directly relevant to the question of State responsibility for support of armed groups.

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[372] Ibid.
[373] Ibid 87.
[374] *Yearbook of the International Law Commission* 1975 Vol II A/10010/Rev. I Report of the Commission to the General Assembly on the Work of its Twenty-seventh Session, 116.
[375] Ibid 124.
[376] Ibid.
[377] Ibid.

Article 4 codifies the basic principle that the conduct of "any State organ shall be considered an act of that State under international law".[378] It specifies that an organ is any person or entity that has that status under internal law whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organisation of the State and whatever its character as an organ of the central government or of a territorial unit of the State.[379] The Commentary to the Article indicates that this is the first principle of attribution for the purposes of State responsibility and that the term "State organ" covers all the individual or collective entities which make up the organisation of the State and act on its behalf.[380] The definition of organ further includes organs of "any territorial government entity as within the State on the same basis as the central governmental organs of that State."[381] This particularly addressed the situation of federal States which had no separate legal personality of its own. This was distinguishable from situations where constituent units could enter into treaty relations independently.[382]

In its 2007 Decision in the *Bosnian Genocide* case, the ICJ described Article 4 as reflecting existing customary rules.[383] The ICJ has interpreted the phrase "State organs" in the Decision in the *Bosnian Genocide* case along the same lines as the previous Decision in the *Nicaragua* case, that acts of persons or entities may be attributed to the State for the purposes of international responsibility, "provided that in fact the persons, groups or entities act in 'complete dependence' on the State."[384] The ICJ noted that this was the case where the persons or entities do not have status as organs under the internal law of the State.[385] In these circumstances, these persons

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[378] Article 4(1) ARSIWA (n 10).
[379] Ibid.
[380] Commentary to Article 4(1) para (1) in Crawford, *The International Law Commission's Articles on State Responsibility* (n 24) 94.
[381] Ibid.
[382] Ibid paras 1, 10.
[383] *Bosnian Genocide* (n 3) para 385.
[384] Ibid para 392, quoting *Nicaragua* (n 3) para 109.
[385] Ibid.

or entities can be "equated with state organs."[386] They are, in other words, *de facto* State organs.[387]

Further, Article 5 ARSIWA provides that where persons or entities exercise elements of governmental authority, their acts are similarly attributable to the State.[388] In this way a State cannot avoid responsibility by privatising or delegating particular acts.[389] The acts of these person or entities will continue to engage the responsibility of the State, even in circumstances where their acts were committed *ultra vires*.[390] Further, where individuals form part of an organ that was placed at the disposal of one State by another, then the responsibility of the former State would be engaged under Article 6.[391] The Articles also provided that State responsibility will be engaged in circumstances where persons or groups of persons exercise elements of governmental authority in the absence or default of the regular governmental authorities.[392]

Separately, Article 10 also provided for circumstances whereby acts were committed by private individuals such as insurgents could be attributable to the State.[393] These acts do not engage State responsibility unless the insurgent later becomes the government of the State or succeeds in establishing a new State.[394] If the insurgents are unsuccessful then their acts cannot be attributed to the State.[395] Apart from these provisions, Article 11 provides that where conduct which is not attributable to the State, it can nevertheless be considered an act of that State if the State acknowledges the acts and adopts it as their own.[396] A good example of this occurred in the *Diplomatic and Consular Staff* case cited in the Commentary to the

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[386] Ibid.
[387] Ibid para 390.
[388] Article 5 ARSIWA (n 10).
[389] Crawford and Olleson, 'The Character and Form of International Responsibility' (n 137) 455.
[390] Article 5 ARSIWA (n 10).
[391] Article 6 ARSIWA (n 10).
[392] Article 9 ARSIWA (n 10).
[393] Article 10 ARSIWA (n 10).
[394] Commentary to ARSIWA Article 10, in Crawford, *The International Law Commission's Articles on State Responsibility* (n 24) 117 para 4.
[395] Ibid para 2.
[396] Article 11 ARSIWA (n 10).

Article.[397] Here militants seized the United States embassy in Iran and held the personnel hostage. The Ayatollah later announced that he authorised a policy that would maintain the occupation and detention of the hostages.[398] This was sufficient for the ICJ to attribute the conduct of those individuals to the State.

Of these Articles, 4, 10 and 11 thus identify three clear categories where conduct of armed groups can potentially be attributed to the State. Under Article 4, according to the interpretation of State organs by the ICJ as including persons, groups or entities act in "complete dependence" on the State,[399] if these armed groups as the later section will discuss, are completely dependent the State will be responsible in international law. Additionally, where insurgents are successful in their conquest and establish a new State or replace the regime they were in opposition to, then the actions of the insurgent group can be attributed to the new State. Alternatively, under Article 11, if the State adopts or acknowledges the acts of the armed group then State responsibility is patently made out. While the latter two examples are fairly straightforward matters, the former is not as determining "complete dependence" is a question of fact and the concept is subject to interpretation by the ICJ.

Beyond this there is another category under which the acts of armed groups can be attributed to States identified in the ARSIWA. Under Article 8, the conduct of a person or group shall be considered an act of State under international law, if the person or group of persons are in fact acting under the instructions of, or under the direction or control of that State in carrying out the conduct.[400] In its 2007 Decision in the *Bosnian Genocide* case, the ICJ noted that Article 8 reflects existing customary rules.[401] This interpretation was based on an acceptance of the approach

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[397] *United States Diplomatic and Consular Staff in Tehran (United States of American v Iran* (Judgment) ICJ Reports 1979, 3, referred to in Commentary to Article 11 para 4 in Crawford, *The International Law Commission's Articles on State Responsibility* (n 24) 121.
[398] *United States Diplomatic and Consular Staff in Tehran (United States of American v Iran)* (n 397) para 74.
[399] *Bosnian Genocide* (n 3) para 392.
[400] Article 8 ARSIWA (n 10).
[401] *Bosnian Genocide* (n 3) para 407.

used by the ICJ in the earlier *Nicaragua* case.[402] There the ICJ opined that for the United States to be found responsible for violations of international law[403] committed by the Contra rebels which the USA were funding and assisting, it would have to be proven that the USA had "effective control over the military operations in the course of which the violations were committed."[404]

The principles of attribution under Articles 4 and 8 are crucial as they directly address the assessment of the level of State support that will be necessary to establish State responsibility. The ICJ were very focussed on the *Nicaragua* standards of control and dependence. These adopted Articles furthermore have also been interpreted and applied in a very strict and somewhat literal manner. This is notwithstanding that the earlier Ago drafts commented that the situations of attribution where armed bands maintain links with the State are by no means clear.[405] The issue then is whether the ICJ is placing an overly strict and literal interpretation of Articles 4 and 8 that is masking the real link between the supporting State and the armed group. This is explored in the next section.

3.3 The ICJ's approach to attribution to a State of the conduct of non-State armed groups

The ICJ has discussed the questions of attribution of conduct under Articles 4 and 8 in three seminal Decisions – the *Nicaragua* Decision[406], the *Armed Activities Congo* Decision[407] and the *Bosnian Genocide* Decision.[408] In all, conduct was attributed on an assessment of whether the individuals committing serious breaches of peremptory norms were either *de jure* or *de facto* State organs. These cases function as studies which underscore the systemic weaknesses of the rules of attribution. They are discussed in the next sections.

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[402] *Nicaragua* (n 3) para 115.
[403] Ibid.
[404] Ibid para 109.
[405] *Yearbook of the International Law Commission* 1975 Vol II A /10010/Rev. I Report of the Commission to the General Assembly on the Work of its Twenty-seventh Session 124.
[406] *Nicaragua* (n 3).
[407] *Armed Activities Congo* (n 70).
[408] *Bosnian Genocide* (n 3).

3.3.1 The *Nicaragua* Decision

The current tests applied by the ICJ for attribution of conduct to States for support of non-State armed groups derive from the ICJ's judgment in the *Nicaragua* case which was later confirmed in the *Armed Activities Congo* case of 2005[409] and the 2007 Decision in the *Bosnian Genocide* case.[410] This test attributes conduct to States on a narrow basis, requiring proof that at the time the internationally wrongful acts occurred, these groups were operating as either *de jure* or *de facto* organs of the Respondent State. For this to happen, it would have to be proven that at the time the internationally wrongful act occurred, the group was acting as an organ of the State or was completely dependent on it.[411] Alternatively, it would have to be shown that at the time the internationally wrongful act occurred, the operations conducted by the group were under the direction and control of the State, or as the Court described it "effectively controlled by" the State.[412]

On the facts in *Nicaragua*, Nicaragua alleged that the United States were supporting military and paramilitary actions of rebel guerrilla fighters, loosely described as the Contras who were opposing the government of the day.[413] As found by the Court, there was clear support of the groups by the United States. It further held that it was a "fully established fact" that the United States financially supported them, a fact to which the USA "openly admitted the nature, volume and frequency of this support."[414] Although there was no evidence that the United States "created" the Contras, there was evidence that they "largely financed, trained, equipped, armed and organised" them.[415]

One of the key pieces of evidence that was considered in relation to the question of the degree of control exercised over the group was a publication that disclosed no author or publisher but was referred to as a manual titled *Psychological*

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[409] *Armed Activities Congo* (n 70).
[410] *Bosnian Genocide* (n 3).
[411] Ibid para 392.
[412] Ibid para 413.
[413] *Nicaragua* (n 3) para 20.
[414] Ibid para 107.
[415] Ibid para 108.

Operations in Guerrilla Warfare ("the Manual").[416] The Manual was severely criticised and rejected in a report from the US Intelligence Committee and this rejection was further reiterated by the President of the United States in late 1981, and the Contras advised to ignore it.[417]

The ICJ found that

> [w]hen considering whether the publication of such a manual, encouraging the commission of acts contrary to general principles of humanitarian law, is unlawful, it is material to consider whether that encouragement was offered to persons in circumstances where the commission of such acts was likely or foreseeable. The Court has however found …[t]he publication and dissemination of a manual in fact containing the advice quoted above must therefore be regarded as an encouragement, which was likely to be effective, to commit acts contrary to general principles of international humanitarian law reflected in treaties.[418]

In this regard then the ICJ found that, although the dissemination of the Manual could be regarded as "encouragement, which "was likely to be effective,"[419] they stopped short of attributing the conduct of the Contras to the United States on the basis of that foreseeability.[420]

The Court held, however, that the United States participation "in the financing, organizing, training, supplying and equipping of the Contras**,** the selection of its military or paramilitary targets, and the planning of the whole of its operation,"[421] even if "preponderant or decisive"[422]

> [was] still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua…[423]

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[416] Ibid para 117.
[417] Ibid para 120.
[418] Ibid para 256.
[419] Ibid para 256.
[420] Ibid para 266.
[421] Ibid para 115.
[422] Ibid.
[423] Ibid.

According to the Court, such a finding would require proof that the United States "directed or enforced" the perpetration of the unlawful acts which were in violation of existing human rights and humanitarian law.[424] Any evidence falling short of this could leave the possibility open that the Contra rebels had carried out these acts without United States control.[425] In principle, for the acts of the Contras to be attributed to the United States, the Applicant State would have to provide evidence that the State had "effective control of the military and paramilitary operations in the course of which the violations were committed."[426]

According to the principles established in *Nicaragua*, the conduct of the Contra rebels could only be attributed to the State in circumstances where

> the relationship of the contras was so much one of dependence on the one side and control on the other that it would be right to equate the contras, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government…. the United States having actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf.[427]

According to the Court, it will only be right to do so, "to the extent to which the United States made use of the potential for control inherent in that dependence…"[428] This translated into the establishment of a very rigid test for control whereby no matter how "preponderant or decisive" the financing and training offered by the State was over the groups involved in the conflict,[429] it would not be enough to attribute the acts of the group to that State. For the Court to attribute unlawful acts of the Contras, there must be proof that the State "effectively controlled" the operations during which the unlawful acts occurred or prove that they were in a relationship of complete dependence.[430]

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[424] Ibid.
[425] Ibid.
[426] Ibid.
[427] *Nicaragua* (n 3) 109.
[428] Ibid para 110.
[429] Ibid para 115.
[430] Ibid.

The principle of effectiveness in international law has always played an important role,[431] but unfortunately has no precise definition, and its proof very much turns on how the word is interpreted and this in turn impacts on how evidence is appreciated in the case. The ICJ in *Nicaragua* was clear as to what evidence it would reject as falling short of meeting this threshold of "effectiveness," but nowhere did it define what "effectiveness" meant.

In requiring proof of "effective control" over the operations during which the violations of human rights and humanitarian law occurred, the ICJ gave States the leeway to support the non-State entity and covertly engineer, or at the very least suggest, the form of tactical operations on the field, while at the same time escaping responsibility for criminal acts carried out by the group. Although the fact of providing support might breach other obligations incumbent upon the State, for instance, the prohibition of intervention under the UN Charter, the threshold of control as established in *Nicaragua* is unsuitable to address the practicalities of modern-day conflict. This is because the threshold suggested in *Nicaragua* is very high. Moreover, the test as defined did not factor in considerations of knowledge or foreseeability of the crimes by the Contras in its assessment of control. An act can be effective because it has accomplished a desired result and thus an interpretation of effective at these exacting standards is under-inclusive and fails to capture the range of military tactics that can be employed to effectively control an operation. These principles were later applied in the *Armed Activities Congo* Decision.

3.3.2 *Armed Activities on the Territory of the Congo* Decision

In this case, there were complex factual events that revolved around the overthrowing of President Mobutu by Laurent Kabila in the Democratic Republic of the Congo ("DRC"). In order to facilitate this overthrow, the DRC utilised Rwandan and Ugandan military support to sustain the coup. These States, according to the DRC, were rewarded with substantial economic and military rewards. Eventually, once installed, Kabila sought to reduce these ties. This led to an invasion and a series

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[431] Crawford, *The International Law Commission's Articles on State Responsibility* (n 24) 110.

of battles ensued until there was a summit convened among key African nations to end hostilities. This culminated in the signing of the Lusaka Peace Accords, which agreed to the cessation of hostilities and disarmament of these groups. These accords also allowed for the deployment of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo into the DRC and Organisation of African Unity verifiers. This accord was supplemented by the later Kampala and Harare accords, which further supported the disengagement process. The DRC intimated that following this agreement, Uganda still engaged in hostile conduct and continued to arm rebel groups, in particular the Congo Liberation Movement ("MLC").

Pursuant to this, the DRC filed an application in 1999 against Uganda at the ICJ alleging that acts of armed aggression were perpetrated by Uganda on its territory.[432] The DRC claimed that Uganda both created and controlled the MLC led by Jean Bemba.[433] Uganda asserted that they gave "just enough" support to Bemba and the MLC to drive out Sudanese and Chadian troops from the MLC as this facilitated protection of the Ugandan border.[434] Bemba, however, as the Court noted, both in his book and verbal accounts, claimed that although he received support from Uganda, he created and controlled the MLC.[435]

In assessing whether the acts of the MLC could be attributed to Uganda, the ICJ applied the *Nicaragua*[436] test in determining the claim brought by the DRC as to whether Uganda controlled the MLC. Here, the Court held that there was no probative evidence that the MLC was an organ of Uganda under Article the ARSIWA, or that the MLC was an entity exercising elements of governmental control under Article 5.

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[432] *Armed Activities Congo* (n 70) 168. para 1.
[433] Ibid para 155. Jean Claude Bemba was also convicted at the ICC on 21 March 2016 for crimes against humanity, and war crimes. See *Prosecutor v Jean Claude Bemba Gombo* Case No. ICC-05-01-08 (Trial Chamber Judgment) 21 March 2016.
[434] Ibid para 157.
[435] Ibid para 158.
[436] *Nicaragua* (n 3).

The ICJ further found under Article 8, that although Uganda provided assistance to the MLC, "there is no credible evidence to suggest that Uganda created the MLC… [nor] controlled or could control the manner in which Mr. Bemba could put such assistance to use."[437] This level of control fell short of the degree described in the *Nicaragua* Decision. As Uganda said, they gave "just enough" support to protect their borders.

Although the ICJ found that there were violations of obligations under international law,[438] and that Uganda was an occupying power in the Ituri district and thus responsible for failing to be vigilant to prevent violations by the MLC rebel groups in the area,[439] on the separate issues of attribution, there could be no finding of State responsibility. The discussion on the questions of attribution was limited, and it was only in the later *Bosnian Genocide* Decision[440] that a more substantial inquiry into the question of attribution of the acts of individuals to States.

3.3.3 The *Bosnian Genocide* Decision

This case concerned the Application by Bosnia–Herzegovina against Serbia–Montenegro before the ICJ alleging, among other things, that Serbia–Montenegro, the continuator State of the Former Republic of Yugoslavia ("FRY") committed acts of genocide on its territory in July 1995. The acts in question occurred in the Srebrenica enclave in the north-eastern province of Bosnia–Herzegovina. Here, acts of genocide were alleged to have been committed by members of different paramilitary formations that received substantial State support in many fields – arms, financing, logistics and administration. However, the acts of these armed groups were not attributable to Serbia–Montenegro ("Serbia"), ie the Respondent State and thus Serbia was not responsible for the genocide that occurred in Srebrenica.

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[437] *Armed Activities Congo* (n 70) 160.
[438] Ibid paras 157, 160-161.
[439] Ibid para 179.
[440] *Bosnian Genocide* (Decision) (n 3).

The ICJ similarly applied the tests for attribution outlined in *Nicaragua*[441] but provided a more detailed explanation of its rationale.[442] The Separate Dissenting Opinions of Judges Al Khasawneh and Mahiou differed critically from the finding of the Court on the stipulation of the legal test for attribution.[443] This in turn impacted on their respective assessments as to the level of direction and control that was required to justify attribution of genocidal conduct of armed groups to the Respondent State.[444] The Majority and these Separate Dissents also differed on the level of proof required to show that armed groups were in complete dependence of the Respondent State to the point that they could be considered *de facto* organs of that State.[445]

In arriving at its conclusion that acts of genocide were committed in Srebrenica[446] by different paramilitary entities, namely the Vojska Republike Srpske ("VRS"), the Red Berets and the Scorpions,[447] the Court concluded that those acts could not be attributed to the Respondent State. The Applicant argued that the VRS and the Scorpions could be considered *de jure* organs of the Respondent State on the basis that the VRS officers, including General Mladić, had their salaries, promotions and affairs administered by Belgrade.[448] The Court, although it accepted that there was "no doubt" that the Serbia had provided "substantial support," *inter alia* financial support, to the Republika Srspka, it "still felt that there was insufficient proof that the VRS was an organ of the Respondent State.[449] So, too, the Court attributed no weight to two intercepted documents that referred to the Scorpions as "MUP of Serbia"[450] ("MUP": Ministry of Internal Affairs) and as a "unit of the

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[441] *Nicaragua* (n 3) para 109.
[442] *Bosnian Genocide* (n 3) paras 392-395.
[443] Ibid para 394; cf ibid, Dissenting Opinion of Judge *ad hoc* Mahiou para 111; and Dissenting Opinion of Judge Al Khasawneh para 39.
[444] Cf ibid.
[445] Cf *Bosnian Genocide* (n 3) para 412; ibid (Dissenting Opinion of Judge *ad hoc* Mahiou) paras 112, 117; and (Dissenting Opinion of Judge Al Khasawneh) para 54.
[446] *Bosnian Genocide* (n 3) para 370.
[447] Ibid para 289.
[448] Ibid para 388.
[449] Ibid.
[450] Ibid para 389.

Ministry of the Interiors of Serbia".[451] These documents confirmed that the senders were officials of the Republika Srspka, but since there was no clear address to Belgrade, they were not able to view the document as evidence that the Republika Srpska and VRS were incorporated into the forces of the Respondent.[452]

The Court further held that these groups could not be considered *de facto* State organs because they were not completely dependent on the State such that it could be stated that they were merely its instrument.[453] In arriving at its conclusion, the Court found that the Respondent State had powerful political, military and logistical relations but they were insufficient because the groups maintained a qualified "but real" margin of independence, notwithstanding that there was evidence the VRS would have been unable to carry out its most crucial and significant military and paramilitary activities,[454] but for the support of the Respondent State.

This high threshold of control was also reflected in the evaluation of the level of control required to prove direction and control under customary law as reflected in Article 8 ARSIWA. The Court rejected the test of "overall control" that was put forwards by the ICTY in *Tadić* in favour of its own settled jurisprudence, and instead, applied the test for attribution on the basis of direction and control outlined in *Nicaragu*a.[455]

In the *Tadić*[456] case before the ICTY, the Appeals Chamber was required to consider whether the conflict in Serbia was international in character since the status of the conflict directly impacted on the issue of whether the charges of grave breaches of the Geneva Conventions would be sustainable against Tadić.[457] In rendering judgment on the issue, the Appeals Chamber found that

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[451] Ibid.
[452] Ibid.
[453] Ibid para 392.
[454] Ibid para 394.
[455] Ibid para 407.
[456] *Tadić* Appeal (n 78).
[457] Ibid paras 68-69, 170-171.

> international rules do not always require the same degree of control over armed groups or private individuals for the purpose of determining whether an individual not having the status of a State official under internal legislation can be regarded as a *de facto* organ of the State…[458]

As such, it found that Serbia exercised "overall control" over these paramilitary groups and that this was sufficient to recognise them as *de facto* organs of Serbia.[459] The Appeals Chamber further opined that

> control by a State over subordinate *armed forces or militias or paramilitary units* may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training).[460]

They further noted that under international law, it was not necessary for each operation to be planned by the controlling authority so that they "choose their targets, or give specific instructions concerning the conduct of military operations and any alleged violations of international humanitarian law."[461] Instead the control can be established where the controlling authority simply "*has a role in organising, coordinating or planning the military actions* of the military group, in addition to financing, training and equipping or providing operational support to that group…".[462]

This test was rejected by the ICJ in the *Bosnian Genocide* case, where it found that the ICTY had not been called upon to make such pronouncements on the law of State responsibility. The ICJ reaffirmed the tests outlined in *Nicaragua*, requiring proof that the Respondent State had effective control over the operation during which the unlawful acts occurred.[463]

What remained after that was an assessment of whether the evidence brought against the Respondent State could meet that threshold. The Court held the evidence was not sufficient to establish direction and control and rejected the evidence

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[458] Ibid para 137.
[459] Ibid para 137, 162.
[460] Ibid para 137.
[461] Ibid.
[462] Ibid.
[463] *Bosnian Genocide* (n 3) para 406.

adduced by the Applicant that aimed to demonstrate the VRS and its paramilitary's dependence on the Respondent State and also the evidence used to support the latter's control over them. Thus, all of the evidence that was adduced was considered too remote as it stretched too far the connection that was required to have existed.

The interpretation of the word "effective" was very literal and so the threshold for proving it was very high. To elaborate, the Court was referred to a meeting that took place among three men: the European Union Negotiator, Carl Bildt, Milošević and General Mladić,[464] and, more controversially to two reports, one prepared by the Netherlands Institute for War Documentation in 2002, entitled *Srebrenica – a 'safe' area*,[465] and the other, entitled *Balkan Battlegrounds*, published by the United States Central Intelligence Agency.[466]

Bildt gave evidence of the level of connection between General Mladić and Milošević. Milošević was seen to have maintained a strong position of control over Mladić after the massacre, so much so, the brokering and honouring of post-massacre agreements maintained a strong level of control from Belgrade, despite Belgrade's protests to the contrary. Moreover, by 19 July 1995, when the Special Representative of the Secretary General arrived to finalise the negotiations, it was on the basis that both Mladić and Milošević would be able to show flexibility and finalise the military details for humanitarian aid and access into the enclaves, return of ammunition to Dutchbat (the Dutch Battalion Protection Force) and for transfer of Dutchbat out of that enclave.[467] Critically, the Court noted that while the United Nations Protection Force commander met with Mladić, Bildt held parallel negotiations with Milošević. They also noted that throughout the meeting both groups were in communication with each other.[468] Even at the end of negotiations the UN Special Representative had to communicate with Milošević in order for the

[464] Ibid para 408.
[465] Ibid para 410.
[466] Ibid para 412.
[467] Ibid para 409.
[468] Ibid.

negotiations to be honoured.[469] While this showed influence, it could not prove effective control by Serbia.

Additionally, one of the reports, *Srebrenica – a 'safe' area*, did not find any "hard evidence" to suggest that the Yugoslav Army provided assistance to the VRS or that there was any liaison between the Yugoslav Army and Belgrade.[470] It did however observe that Dutch and Western intelligence concluded that the "July 1995 operations were co-ordinated with Belgrade."[471] In the separate *Balkan Battlegrounds* report, it was found that the Yugoslav Army and Serbian Security may have contributed to the massacre at Srebrenica.[472]

None of the evidence could meet the threshold of effective control because although they showed determinative and compelling levels of influence, it could not cross the threshold of control. The bar set in *Nicaragua* was so high that anything falling short of direct "hard evidence" or express directives of control by the Respondent State would fall short. As the evidence came forwards, the Majority found that the Respondent maintained a strong influence over the Bosnian-Serb rebel groups rather than control.[473] The question that neither *Nicaragua* nor the *Bosnian Genocide* case explored was what was the distinction between strong levels of influence and "effective control" or whether there may be circumstances when the former is proof of the latter.

While the facts in *Nicaragua* demonstrated strong financial and tactical support and training, the United States was not operating at a parallel level of influence in the decision-making of the Contras. The level of coordination and organisation between the supporting State and the entity was different in the *Bosnian Genocide* case. This was especially so in light of the history of the disintegration of the Socialist Federal Republic of Yugoslavia ("SFRY") and the role the FRY took in

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[469] Ibid.
[470] Ibid para 410.
[471] Ibid para 411.
[472] Ibid para 412.
[473] Ibid.

overseeing and promulgating its vision for protection of the Serbian peoples within the newly created ex-SFRY States. Moreover, since the 1930s there had been strong ethnic tensions between the different ethnic groups in the Kingdom of Yugoslavia that were only contained from the mid-1940s by the Tito regime. In addition to the social chaos during the disintegration, there was also a history to that level of hostility. The adherence to the *Nicaragua* principle thus did not allow for a critical look at the conflict or provide for an assessment that grasped the reality of the "relationship between the person taking action and the State to which he is so closely attached."[474]

The ICTY in the *Tadić* case had taken these matters into account. This "grasp of reality" was accomplished with the standard used in *Tadić*, which was later advocated in the two Dissenting Separate Opinions as discussed below, because it allowed for such critical levels of influence to be viewed in the context of their effect in the course of conflict.

3.3.4 The Dissenting Views in the *Bosnian Genocide* Decision

There were Dissenting Views to their Decision. This questioning of the nature of the relationship between the Respondent State and the paramilitary groups operating in Bosnia–Herzegovina was evident in the Dissenting Opinion of Judge Al Khasawneh. He took exception to several aspects of the Court's Judgment, one of which was the stipulation for the legal tests for control. According to Judge Al Khasawneh,

> the Court's rejection of the standard in the Tadić´ case fail[ed] to address the crucial issue raised therein — namely that different types of activities, particularly in the ever-evolving nature of armed conflict, may call for subtle variations in the rules of attribution.[475]

He continued to highlight the distinction by noting that while the USA and the Contra rebels had a shared objective that was limited to the overthrow of the government, those objectives could very easily have been achieved without the

[474] Ibid para 392.
[475] *Bosnian Genocide* (Separate Dissenting Opinion of Judge Al Khasawneh) (n 3) para 39.

commission of international crimes. This is why the Court held that to hold the USA responsible would require" that the crimes themselves should be the object of control".[476]

He distinguished this position from cases where the shared objective is the commission of international crimes. According to him,

> [w]hen, however, the shared objective is the commission of international crimes, to require both control over the non-State actors and the specific operations in the context of which international crimes were committed is too high a threshold. The inherent danger in such an approach is that it gives States the opportunity to carry out criminal policies through non-State actors or surrogates without incurring direct responsibility therefore. The statement in paragraph 406 of the Judgment to the effect that the "'overall control' test is unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility" is, with respect, singularly unconvincing …[477]

From this dictum, there is a questioning of whether the requirement for separate proof of control over the specific operations in which the crime occurred as opposed to the history of support and control over all the operations in the conflict, creates an artificial disconnection. His Dissenting Opinion identifies that ultimately this blanket application of the *Nicaragua* test allows the more subtle and insidious roles of States in these internecine conflicts to fall outside the net of responsibility. With a variation of the attribution of conduct test, the threshold of proof required to create that critical nexus of control could be reconsidered so that these critical items of evidence that show strong and determinative influence will be cogent proof of not mere influence, but control sufficient to ground international responsibility for these heinous crimes. As a consequence, different areas of evidence reconsidered in light of this test would yield different conclusions.

The acts of the VRS in Srebrenica would become attributable to Serbia because there was sufficient evidence to prove that Serbia–Montenegro had a role in

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[476] Ibid.
[477] Ibid.

organising, coordinating or planning the military actions of the groups in addition to financing, training, or equipping and providing operational support to that group and that is all that is required under the *Tadić* standard. According to Al Khasawneh, it was self-evident that the overall control test as identified in *Tadić* could be sufficient to trigger responsibility.[478]

So, for example, his consideration of Bildt's evidence indicated that Bildt met twice with both Mladić and Milošević in the "midst of the takeover of Srebrenica and the subsequent massacre."[479] In his evidence, President Karadžić revealed that knew nothing of the meetings with Bildt, Mladić and Milošević, which occurred at the time when the Court agreed that the decision to eliminate the adult male population in Srebrenica was made,[480] thereby putting forwards the integration of Belgrade into the decision-making processes regarding Srebrenica. He further noted that even after the fall of Srebrenica that the negotiations continued between Bildt and these two men at all times. The inference that arises based on these facts was that, notwithstanding Milošević's statements that distanced him from the massacre, Serbia at all times was present when the plan to carry out the massacre was made, even when the president of the self-proclaimed Republika Srpska was absent.[481]

This, coupled with evidence that promotions, salaries and other administrative roles for the VRS were completed by Belgrade through the 30th Personnel Division, would have been sufficient evidence under the overall control test to have triggered State responsibility because the lower threshold has allowed for a different evaluation of the evidence. Judge Al Khasawneh described this as being a more context-specific approach that prevents partisan States from veiling international responsibility by diffusing chains of command and both operational and

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[478] Ibid.
[479] Ibid para 49.
[480] Ibid.
[481] Ibid.

tactical missions at strategically opportune times to carry out terrible breaches of obligations without incurring responsibility for them.[482]

His suggestions for a reconsideration of the tests for control was further reinforced by Judge Mahiou in his Separate Dissenting Opinion.[483] Central to this Dissent was a firm conviction that the facts surrounding the judgment in the *Nicaragua* case were distinguishable from those in the *Bosnian Genocide* case and that this merited reconsideration of the tests for attribution of conduct of individuals to States.[484] Whereas there were common views between Serbia–Montenegro and the Republika Srpska on the initiative for "Greater Serbia" in that there was the goal of uniting all "Serbian Peoples" under the two entities,[485] this similarity of views did not arise on the facts in *Nicaragua*. To the contrary, the United States was not seeking to enlarge its territory or to exert any control over the Central American area. It collaborated with the Contra rebels with the aim of "destabilizing and overthrowing the government in place in Nicaragua".[486] According to Judge Mahiou, "it was difficult to demonstrate the involvement of the United States by way of some vague and uncertain general control, and very precise evidence therefore needed to be found to show that the United States exerted effective control over the activities of the Contras."[487]

The relationship between Serbia–Montenegro and the Republika Srpska was distinguishable. It was an enduring relationship which, for Judge Mahiou, required a different assessment of control as suggested in the jurisprudence of the ICTY. For instance, many officers were seconded from the Yugoslav's People's Army ("JNA") into the VRS. Additionally, Mladić was appointed commander of the Second District of the JNA by Belgrade after the recognition of Bosnia–Herzegovina by the international community. Moreover, even after the JNA withdrew its troops, he

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[482] Ibid 37.
[483] Ibid Dissenting Opinion of Judge *ad hoc* Mahiou.
[484] Ibid para 115.
[485] Ibid para 117.
[486] Ibid para 117.
[487] Ibid para 115.

remained on that territory without being recalled by Belgrade and continued to serve under the JNA, which was renamed the VRS.[488] This, for Judge Mahiou, together with strong administrative links required a reconsideration of the tests applied in *Nicaragua*. Noting that the control exerted by the Serbia seemed pervasive, Judge Mahiou accepted the reasoning of the ICTY that such control existed notwithstanding any "autonomous choices of means and tactics although participating in a common strategy along with the 'controlling State'".[489]

Like Judge Al Khasawneh, Judge Mahiou's opinions on a reconsideration of the tests for attribution of conduct are worthy of fresh consideration. This is especially so when the Dissent is compared to the jurisprudence of ECtHR in cases that similarly addressed questions of attribution of conduct of individuals to States for the purposes of assessing State responsibility, as the next chapter discusses.

3.4 The limitations of the current ICJ approach

The current interpretation of the tests of attribution by the ICJ as defined in the *lex lata* is limited and this has in turn limited the scope of international law to address State support for non-State armed groups engaging in international crimes. To address the role of States in this regard, there must be a considered look at whether there should be change of the underlying policy towards interpretation of the test of attribution that pays credence to modern-day realities of conflict support and partisanship and also to the nature of the law on attribution itself. Modification of the current tests of attribution would go a long way in identifying the responsibility of the State, and while adjudication before the ICJ is not a panacea for all the problems associated with the rise of paramilitary roles in current conflict, an enhanced model of attribution will serve as a deterrent to future commission.

There is a need to review. So far the law on attribution has been slow to develop moving from a continuum of development from the sixteenth century to the present day. Even now, the law on attribution has been described by some as being

[488] Ibid para 107.
[489] Ibid para 116.

not fully developed,[490] thereby suggesting that the law is still moving along that development continuum as it slowly evolves and responds to the socio-political context in which it operates.

As this chapter has discussed, there is some discord in the manner in which the *Nicaragua* principles were applied in the *Bosnian Genocide* case, in view of the difference in relationship between the State and the non-State armed groups. Most critical is that the application and indeed the interpretation of the *Nicaragua* principle has placed a limitation on international law in terms of how it addresses State support of these non-State armed groups for commission of international crimes, particularly in terms of the potential for control that is inherent in relationships founded on support by the State over the non-State group. This limitation is in part founded by a commitment to a particular ratio that sees the test of attribution as being unwavering. This is problematic. This was evident on the ILC Commentaries to Article 8 where it has been noted that

> it is clear that a state may either by specific directions or by exercising control over a group, in effect assume responsibility for their conduct. Each case will depend on its own facts, in particular those concerning the relationship between the instructions given or the direction or control exercised and the specific conduct complained of…[491]

On this basis it is useful to examine how other courts have approached the question of attribution of acts of individuals from non-State armed groups in particular circumstances and analyse the rationale behind their approaches.

Cassese argued that "it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it."[492] According to Cassese, it was legally correct because the ILC in its Commentaries urged that each

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[490] K Ambos, 'Remarks on the General Part of International Criminal Law' (2006) 4(4) *Journal of International Criminal Justice* 660, 660

[491] Crawford, *The International Law Commission's Articles on State Responsibility* (n 24) 113.

[492] Cassese, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment in Bosnia' (n 18) 665.

case be approached on a case-by-case basis,[493] and the Court was also bound to consider all rules belonging to other bodies of law with the purpose of construing a part of a corpus of rules it must consider.[494] In light of the context in which the course of the conflict operated, this may have been the only way to perceive the true effects of the support rendered and help assess if that support was of such influence to be considered as control over the armed opposition group. In the words of the Judge Cassese, in an Independent Commentary he prepared after the Decision, he noted that

> extensive support that states provide to military or paramilitary groups or armed bands fighting abroad against other states or at home against rebellious or secessionist groups… is a frequent and dangerous occurrence in the world community. It may lead to full-blown international armed conflicts or at any rate to serious threats to peace and security if international law does not have the means available for making the supporting state answerable for violations of international law by the armed groups – at least where the support goes so far as to involve coordinating or helping in the general planning of the military activities of those groups. I submit that the 'overall control' test is a valid legal standard for making those states accountable…[495]

This proposed broader test of attribution was rejected by the ICJ in the *Bosnian Genocide* case, in which the Court noted that the ICTY had not been called upon to make such pronouncements and that

> logic does not require the same test to be adopted in resolving the two issues, which are very different in nature: the degree and nature of a State's involvement in an armed conflict on another State's territory which is required for the conflict to be characterized as international, can very well, and without logical inconsistency, differ from the degree and nature of involvement required to give rise to that State's responsibility for a specific act committed in the course of the conflict"[496]

The Court instead reaffirmed the tests outlined in *Nicaragua*, requiring proof that the Respondent State had effective control over the operation during which the

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[493] Ibid 665.
[494] Ibid 663.
[495] Ibid 666.
[496] *Bosnian Genocide* (n 3) para 405.

unlawful acts occurred.[497] However, as Cassese noted, should there be more willingness by the ICJ to probe and consider other proposals?[498]

According to Judge Cassese, the intrinsic value of this case is that it could prove "helpful in legally appraising new trends in the use by States and International Organisations of armed military units".[499] His argument in this regard was three-fold. Firstly, State support of armed groups is now a "frequent and dangerous occurrence in the world community."[500] He further argued that international law does not have the means available to make States answerable for general planning and coordination or support of armed groups.[501] The "overall control" test as he defined it, would go a long way to stymieing the tide of impunity. Secondly, the test can also be used to assess whether States who are aiding and abetting terrorism can be caught under the rules of attribution as the test as suggested would not require proof of control over each and every terrorist attack.[502] Thirdly, it will be of use when considering cases where international organisations use large national contingents.[503] Thus from a policy perspective it was seen by him to be a necessary widening of the rule.

There have not been many supporters for this approach launched by Judge Cassese. Marko Milanović, for instance, advocated a pure positivist approach towards the assessment of control.[504] According to him, the rules of State responsibility should not be conflated with the rules concerning, the rules concerning characterisation of conflict and humanitarian and human rights law.[505] State responsibility has a distinct purpose as "it arose from the muddied waters of diplomatic protection and treatment of aliens and should now try to resist being dragged back into the methodological mud made up of different substantive primary

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[497] Ibid para 406, in particular fn. 61.
[498] Cassese, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment in Bosnia' (n 18) 652.
[499] Ibid 666.
[500] Ibid.
[501] Ibid.
[502] Ibid.
[503] Ibid.
[504] Milanović, 'State Responsibility for Genocide' (n 17) 583.
[505] Ibid.

rules."[506] According to him, a State can be responsible for acts of individuals to the extent that they are properly characterised as *de facto* organs because they are completely dependent on it, and, apart from that, only if effective control is proven because that is how State practice has defined it thus far.

However, in a modified manner Judge Al Khasawneh, suggested that there may be circumstances which call for subtle variations to the current tests of attribution, and that the ICJ was remiss to so easily dismiss the suggestions put forwards by Judge Cassese in the *Tadić* Appeals.[507] However, if Al Khasawneh's proposal is investigated deeply, it is evident that, he has in fact suggested a modified approach towards the assessment or the setting of the tests for control where the "the shared objective" identified in the relationship between the State and the armed group "is the commission of international crimes."[508] According to him, "to require both control over the non-State actors and the specific operations in the context of which international crimes were committed is too high a threshold".[509]

He did not amplify further in this regard, but both his Dissent and the Decision of Judge Cassese have influenced the unique proposal suggested in this thesis to accept the suggestion that the tests of attribution should be subtly varied and to suggest the variation.

The next chapter explores whether there can be a variation to the current tests for attribution of conduct of individuals who are members of non-State armed groups to the State or States which provide support to them, by approaching the interpretation of "direction," "control" and "complete dependence" in a similar manner to international human rights courts.

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[506] Ibid 585.
[507] *Bosnian Genocide* (Separate Dissenting Opinion of Judge Al Khasawneh) (n 3) para 39.
[508] Ibid.
[509] Ibid.

Chapter Four: The Tests of Attribution of Conduct of Individuals Applied in International Human Rights Courts

4.1 The circumstances in which other international courts and tribunals have attributed the conduct of individuals affiliated to non-State armed groups to States

This chapter questions the extent to which the application of approaches from the international human rights law regime can be used in a similar manner when considering the critical concepts of control within the regime of State responsibility, and in particular how they can be used to the vary the current tests of attribution of conduct applied by the ICJ.

There are circumstances in which other international courts and tribunals have attributed the conduct of individuals belonging to armed groups to States. Broadly, these circumstances are where there has been a provision of funding, logistic support, administration or provision of weapons and other equipment.[510] In some instances, international courts have also attributed the conduct of individuals belonging to armed groups to States where it has been shown that the State was the parent entity that sponsored or created the group in question.[511]

Within the field of international human rights protection, a State incurs responsibility for failure to protect individuals from arbitrary actions by the State on its territory or with regard to individuals who are otherwise found to be under the State's "jurisdiction".[512] Although the questions of attribution of conduct of individuals to States are done in the context of determining whether alleged violations of human rights have occurred, under the jurisdiction of the State party to

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[510] *Ilaşcu v Moldova* (n 92); Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation) Preliminary Objections, Judgment, ICJ Reports 2011, 70.
[511] *Loizidou v Turkey* (n 93); *Cyprus v Turkey* (n 94).
[512] Article 2 International Covenant on Civil and Political Rights (New York, 16 December 1966, entered into force 23 March 1976, 999 UNTS 171); Article 2 ECHR (n 90); Article 1 ACHR (n 91) 144 UNTS 123).

a human rights treaty, the approaches used by the ECtHR for example has adopted a lower test of "overall" control similar to that used in the *Tadić* Appeal. This chapter focuses on the jurisprudence of the ECtHR and the IACtHR because both Courts have adopted particular methodologies towards the question of attribution of conduct of armed groups and created non-State entities to States.

4.2 The approach of the European Court of Human Rights to questions of "jurisdiction" for the purpose of application of ECHR obligations

The concept of territory under Article 1 the European Convention on Human Rights ("ECHR") is expansive.[513] The ECtHR has moved away from the more formalistic notions of jurisdiction that are primarily territorial and which can only be applied extra-territorially in limited circumstances, ie where there is some form of connection to the State either through passive or active personality, the universality principle or the protective principle.[514] According to Sarah Miller, the ECHR has an expanded notion of jurisdiction that is now more "functional than formal:"[515] functional, in that it addresses a range of circumstances in which jurisdiction of the State is established. Thus under this instrument, jurisdiction can be established both territorially and extraterritorially. According to Sarah Miller,

> At present, the European Court has identified four primary bases for extraterritorial jurisdiction: cases where a signatory state exercises 'effective overall control' over another territory; cases where either state authorities act abroad or their actions produce extraterritorial effects; extradition or expulsion cases involving the risk that an individual's rights

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[513] *Banković v Belgium*, App. No. 52207/99 (ECtHR 12 December 2001); *Öcalan v Turkey*, App. No. 46221/99 (ECtHR 12 May 2005); See also *Al-Skeini and Others v Secretary of State for Defence* [2007] UKHL 26; *Al-Skeini v UK*, App. No. 55721/07 (ECtHR 7 July 2011); *Al-Jedda v UK*, App. No. 27021/08 (ECtHR 7 July 2011).

[514] S Miller, 'Revisiting Extra Territorial Jurisdictional Justification for Extra Territorial Jurisdiction Under the European Convention' 20 *European Journal of International Law* 1223, 1225. See the "*SS Lotus Case" (France v Turkey*) 1927 PCIJ Series A no 10 for the identification of the principle in the jurisprudence.

[515] Ibid.

> will be violated once he leaves the territory of the signatory state; and diplomatic, consular, and flag jurisdiction cases…[516]

These human rights protections thus operate within a wide jurisdictional space.[517] While the processes of determining attribution are distinct, the approaches by the ECtHR with regard to the determination of whether a State is exercising jurisdiction over particular individuals and/or portions of territory outside its borders can be used to clarify the scope of principles on attribution of acts of non-State actors to the State.

This is examined through some selected case studies, *Ilaşcu v Moldova*[518] and the cases brought against Turkey, *Loizidou v Turkey*[519] and *Cyprus v Turkey*.[520] These cases have been selected to illustrate the approach used by the ECtHR to determine "effective overall control" over another territory, through consideration of whether particular conduct qualified as "control".

4.2.1 *Ilaşcu v Moldova*

The case of *Ilaşcu v Moldova*[521] originated from an application before the ECtHR concerning acts committed by authorities of the Moldovan Republic of Transdniestria" (the "MRT"), "a region of Moldova which proclaimed its independence in 1991 but is not yet recognised by the international community".[522]

On 18 December 1991, Belarus, Russia and Ukraine signed the Minsk Protocol formally creating the Commonwealth of Independent States ("CIS") of which the Republic of Moldova subsequently became a member.[523] In the months that followed there were clashes between Moldovan police and Transdniestria separatists until eventually fully armed Transdniestrian paramilitary units were

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[516] Ibid.
[517] M Milanović, 'Al-Skeini and Al-Jedda in Strasbourg' (2012) 23 *European Journal of International Law* 121, 126: "Jurisdiction either means control of a territory or it does not, and people either are within the state's jurisdiction or they are not."
[518] *Ilaşcu v Moldova* (n 92).
[519] *Loizidou v Turkey* (n 93).
[520] *Cyprus v Turkey* (n 94).
[521] *Ilaşcu v Moldova* (n 92).
[522] Ibid para 2.
[523] Ibid para 32.

formed and maintained engagements. The Russian Federation armed and supported these groups, justifying their position by alleging that the area was "Russian Territory,"[524] and made available to the Transdniestria separatists munitions and stores from the 14th Army (ie the Russian army) that was still on the territory despite an earlier agreement for withdrawal.[525] Moreover, even after the CIS agreement, the Russian Federation continued to support and maintain relations with the MRT.[526]

The Applicants complained of a variety of violations, including contending that their right to a fair trial had been violated by convictions against them rendered by a Transdniestrian Court which they argued was not competent for the purposes of Article 6 of the ECHR[527] and that the conditions of their detention separately violated Articles 3, 5 and 8 of the ECHR.[528] With regard to Ilaşcu, he further argued that the death sentence passed against him by the Transdniestrian courts further violated Article 2 of the ECHR.[529]

The Applicants argued that responsibility of Moldova was engaged for their illegal arrest, detention and sentencing by the MRT authorities, because the relevant acts had occurred on Moldovan territory (albeit territory occupied by the separatist MRT), and that the Moldovan authorities had not taken any appropriate steps to put an end to any of the violations resulting from these acts.[530]

They further asserted that the responsibility of the Russian Federation was also engaged since the "territory of Transdniestria was… under *de facto* Russian control on account of the Russian troops and military equipment stationed there and

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[524] Ibid paras 46-48.
[525] Ibid para 49.
[526] Ibid para 390 where the ECtHR listed evidence of the support as "….the agreement of 20th March 1998 between the Russian Federation and the representative of the MRT which provides for the division between the MRT and the Russian Federation of part of the income from the sale of ROG'S (Russian equipment); the agreement of 15th June 2010which concerned the joint work with a view to using armaments, military technology and ammunition; the Russian Federation's reduction by one hundred million USD of the debt to it by the MRT; and the supply of Russian gas to Transdiniestria on more advantageous financial terms to those given to the rest of Moldova."
[527] Ibid para 3.
[528] Ibid.
[529] Ibid.
[530] Ibid.

the support allegedly given to the separatist regime by the Russian Federation."[531] The Applicants noted that the Moldovan authorities had appealed to the international community, including the UN Security Council, to sanction the Russian Federation, whose support of the MRT separatists, they argued, amounted to an act of aggression within the meaning of the UN Charter.[532] This was denied by the Russian Federation, which countered that its role in the territory was more of a peacekeeping nature geared towards ensuring peace and stability in the region.[533]The Applicants further argued that Russia had assisted in the arrest and transfer of the Applicants to premises of the 14th Army and the Tiraspol police headquarters which was possibly also the premises of the MRT Ministry of Security.[534]

This level of control and influence was not taken lightly by the ECtHR, which summarised the situation noting that the MRT had been

> set up in 1991-92 with the support of the Russian Federation, vested with organs of power and its own administration, remains under the effective authority, or at the very least under the decisive influence, of the Russian Federation, and in any event that it survives by virtue of the military, economic, financial and political support given to it by the Russian Federation.[535]

As a result, the ECtHR held that, due to the support provided to the MRT by the Russian Federation, and the collaboration, there was a "continuous and uninterrupted link of responsibility on the part of the Russian Federation for the Applicant's fate"[536] and therefore the Applicants were within Russia's jurisdiction within the meaning of Article 1 ECHR.[537] It then went on to find that, as the Russian Federation had done nothing to prevent the violations carried out by the Transdnestrian authorities, it was responsible for the violations they had suffered.

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[531] Ibid.
[532] Ibid para 325.
[533] Ibid para 355.
[534] Ibid para 194.
[535] Ibid para 392.
[536] Ibid para 393.
[537] Ibid paras 393-394.

While that finding was clear insofar as members of the 14th Army had transferred the Applicants to the authorities in Tiraspol, insofar as the Court also found that Russia was responsible for acts carried out by officials of the MRT, including actual ill treatment of the Applicants, one could argue that the violations of the ECHR were in effect attributed to the Russian Federation on the basis that it had the ability to prevent or stop the violations by the entity it supported, because it had the power to control the decisions and affairs of that entity.

The implication here is that due to the level of support rendered to the MRT by the Russian Federation, the acts of the MRT could be attributed to it. In arriving at its conclusion that the Russian Federation was responsible for the violations found in respect of Ilaşcu and the other Applicants on the basis that the Russian Federation had maintained jurisdiction over the MRT, it is arguable that, implicitly, the Court must necessarily also have found that the level of control over the territory and authorities of the MRT meant that the MRT was functioning as a *de facto* authority of the Russian Federation.

This reasoning was not new to the ECtHR. In a series of cases concerning alleged violations of the ECHR in Northern Cyprus, in arriving at the conclusion that the acts at issue, while having taken place outside Turkish territory, fell under jurisdiction of Turkey within the meaning of Article 1, and therefore engaged its responsibility under responsibility under the ECHR the Court had utilised a similar rationale in arriving at its conclusions.

4.2.2 The cases brought against Turkey

The two key cases in this regard are *Loizidou v Turkey*[538] and the inter-State case of *Cyprus v Turkey*.[539]

The facts of *Loizidou* were that the Applicant was the owner of several plots of land in Kyrenia, located in the northern part of Cyprus.[540] Kyrenia, and indeed the

[538] *Loizidou v Turkey* (n 93).
[539] *Cyprus v Turkey* (n 94).
[540] *Loizidou v Turkey* (n 93) para 12.

whole of Northern Cyprus, was under the administration of a so-called separate constitutional entity, the Turkish Republic of Northern Cyprus ("TRNC"), as well as hosting the headquarters of the Turkish Army in the area.[541] The Applicant alleged she had been prevented from enjoying her property in Kyrenia.[542] In addition, she complained of a breach of her right to liberty, as on 19 March 1998, she, together with a group of women, participated in a march to "assert the right" of Greek Cypriot refugees to return to their homes, and had been detained by Turkish soldiers and released only ten hours later.[543]

Loizidou argued that her detention should be attributed to Turkey because the TRNC was an entity that Turkey sponsored.[544] The ECtHR held that Turkey was potentially responsible under the Convention for the violations alleged on the basis that

> the relevant principles of international law governing State responsibility, that the responsibility of a Contracting Party could also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration…[545]

According to the ECtHR, it was patently clear on the facts that such control existed. In its findings it noted that in this case this was "obvious from the large number of troops engaged in active duties in Northern Cyprus. Such control, according to the relevant test and in the circumstances of the case, entails her responsibility for the policies and actions of the TRNC."[546]

A similar finding of control was also made in the subsequent Decision in *Cyprus v Turkey*.[547] Notwithstanding the proclamation of the TRNC in November

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[541] Ibid para 16.
[542] Ibid para 12.
[543] Ibid paras 13-14.
[544] Ibid para 52.
[545] Ibid.
[546] Ibid para 56.
[547] *Cyprus v Turkey* (n 94).

1983 and the subsequent enactment of the TRNC Constitution in May 1985,[548] Cyprus maintained that the TRNC was an illegal entity from the standpoint of international law and pointed to the international community's condemnation of the establishment of the TRNC. Turkey, on the other hand, maintained that the TRNC was a democratic and constitutional State, which was politically independent of all other sovereign States, including Turkey. On that basis, Turkey stressed that the allegations made by Cyprus were attributable exclusively to the TRNC and that Turkey could not be held responsible under the Convention for them.[549]

In its Decision, in finding that Turkey was responsible for the actions of the authorities of the TRNC, the ECtHR considered that this was consistent with its earlier statements in *Loizidou v Turkey* (Merits Judgment).[550] In *Loizidou*, the Court had noted that Turkey exercised "effective control" over Northern Cyprus through its military presence there, with the result that its responsibility under the Convention was engaged for the policies and actions of the TRNC authorities.[551] In *Loizidiou*, the Court stressed that Turkey's responsibility under the Convention could not be confined to the acts of its own soldiers and officials operating in Northern Cyprus, but "was also engaged by virtue of the acts of the local administration … which survived by virtue of military and other support".[552]

These cases indicate that the ECtHR is willing to probe behind the façade of appearances and consider the question of control as one of fact, at least for the purpose of determining whether a State exercises Article 1 jurisdiction over a situation potentially raising issues under the Convention.

4.2.3 Suggestions from these case studies

In these case studies, the *Ilaşcu v Moldova* case and the cases brought against Turkey, the use of this test of control allowed the ECtHR to engage the responsibility

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[548] Ibid para 14.
[549] Ibid para 69.
[550] *Loizidou v Turkey* (n 93).
[551] Ibid paras 52-56. See also, in similar terms, *Cyprus v Turkey* (n 94) para 76.
[552] *Cyprus v Turkey* (n 94) para 77.

of the Respondent States by establishing that the Respondent States had jurisdiction over the individuals due to the level of support rendered to the relevant entity. The ECtHR interpreted control as a factual assessment of degree of support provided by the Respondent States. Where that degree of support or State connivance is substantial, the entity ceases to be a non-State entity but instead is operating as a *de facto* State organ. The approach was thus distinguishable from that articulated by the ICJ in the *Bosnian Genocide* case. It is not so much that the entity would not survive without the assistance given but that the entity cannot function without State assistance. The test as articulated in the ECtHR is far more purposive as it considers the question of survival of the entity, by virtue of State assistance in a more pragmatic way. This approach can be further looked at by examining the jurisprudence of the IACtHR.

4.3 The approach of the Inter-American Court of Human Rights to questions of "jurisdiction" for the purpose of application of ACHR obligations

The American Convention on Human Rights ("ACHR")[553] also takes account of the impact of State support provided to non-State actors who later go on to commit widespread violations of human rights. Similar to the ECHR, State responsibility for support of armed groups is addressed by the question of whether acts committed by them fall under the "jurisdiction" of State Parties to the ACHR.

The ACHR establishes jurisdiction differently to the ECHR. The ACHR mandates State Parties to respect the rights and freedoms outlined in its text.[554] In this regard, the Inter-American System "follows the basic structure of negative and positive obligations common to international human rights law."[555] Jurisdiction is

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[553] ACHR (n 91).
[554] In this regard see Article 1 which provides that: "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."
[555] Jackson, *Complicity in International Law* (n 295) 190.

applied through these obligations as State Parties are charged with the duty to both respect the rights outlined in the American Convention and ensure that all persons can have a full and free exercise of those rights.[556] This was detailed by the Court in its Decision in the *Velasquez Rodriguez* case[557] in which it stated that the first obligation on States under Article 1(1) is to respect the rights and freedoms outlined in the Convention. According to the Court, there are

> individual domains that are beyond the reach of the State or to which the State has but limited access. Thus, the protection of human rights must necessarily comprise the concept of the restriction of the exercise of state power…[558]

The Court further noted that the second obligation under Article 1(1) is to enjoy the full and free exercise of rights under the Convention. In this regard they noted that

> the free and full exercise of the rights recognized by the Convention to every person subject to its jurisdiction. This obligation implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation…[559]

Thus, where there have been violations within the territory due to the conduct of non-State actors, this could "constitute a breach of the State's positive obligations to take measures to prevent violations committed by non-State actors, an obligation [that is] conditioned by a due diligence standard."[560] Thus jurisdiction in these circumstances results from the fact that in circumstances where the State either created or supported the armed groups, they are considered to have failed to act

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[556] Article 1 ACHR (n 91).
[557] *Velasquez Rodriguez v Honduras* (29 July 1988) Inter-American Court of Human Rights, Series C No.4 (1988).
[558] Ibid para 165.
[559] Ibid para 166.
[560] Jackson, *Complicity in International Law* (n 295) and also see application of this principle in *Velasquez Rodriguez* (n 557) 90.

diligently to prevent the non-State actors from committing the violations,[561] by "supporting or tolerating the infringement of the rights recognized in the Convention."[562] There is no dearth of precedent in the Inter-American Court system that addresses the responsibility of States for violations of human rights in connection with mass atrocities committed by members of paramilitary groups, ie armed groups.[563] Several Latin American States utilised paramilitary operations to achieve political agendas and thus forced disappearances and massacres were not unusual during periods in which there were volatile struggles for power.[564] With a view to highlighting the discussion of the approaches used by the IACtHR towards determining the attribution of conduct of individuals, three cases are now discussed.

They have been selected as they represent the typical factual matrix through which mass atrocities were committed by armed groups whose existence depended on the support they received from States and who in some instances worked in conjunction with the regular State forces, thereby blurring the lines of command during particular operations. The cases selected are the *Paniagua Morales* case,[565] the *Pueblo Massacre* case[566] and the *Mapirpan Massacre* case.[567]

The *Paniagua Morales* case was selected because it established an operative principle in the jurisprudence of the IACtHR, whereby support or tolerance of armed groups would be sufficient to engage the responsibility of the State as the acts of those individuals can be attributed to the State on the basis of this tolerance or support.[568] The case concerned State agents as opposed to armed groups. Miles Jackson notes that the assessment of the law in this case was wider than it should

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[561] Jackson, *Complicity in International Law* (n 295) 191.
[562] *Paniagua Morales* (n 95).
[563] Other cases where similar issues and approaches are discussed are *Case of Goiburu et al v Paraguay* (22 September 2006) Inter-American Court of Human Rights (Ser C) No. 153; *Paniagua Morales* (n 95); *Case of the Rochela Massacre v Colombia* (11 May 2007) Inter-American Court of Human Rights (Ser C) No. 163.
[564] See, for example, (n 3) concerning the situation in Colombia.
[565] *Paniagua Morales* (n 95).
[566] *Pueblo Massacre* (n 96).
[567] *Mapiripan Massacre* (n 97).
[568] *Paniagua Morales* (n 95) para 48. This view is also supported by Jackson, *Complicity in International Law* (n 295) 192.

have been,[569] but this broad assessment is why it was selected as it identified for the first time in the IACtHR jurisprudence, the effect of toleration or support on questions of attribution of conduct.

The *Pueblo Massacre* case was selected because it details the tests for attribution of conduct of individuals under the ACHR and sets out a clear rationale as to its approaches in the determination of these tests concerning the effect of toleration or support of armed groups on questions of attribution of conduct as well.

The *Mapiripan Massacre* case further details these approaches but presents a particularly complex model that applied the findings of the Bogota Constitutional Court on the criminality of Colombian army officials in its consideration of the issue as to whether State agents actually collaborated as opposed to merely tolerating the mass atrocities in Mapiripan,[570] and the impact that such collaboration had on the identifying a link with members of the armed groups on the basis of control and to some extent dependence. What is crucial is not why the relationship was being examined, but how it was examined and whether that approach can be useful in considering the tests for attribution of conduct in the future jurisprudence of the ICJ.

In all three cases the approaches used were instrumental in identifying the link between the State and the members of the armed groups and this is useful to determine the extent to which the test of attribution of conduct as applied by the ICJ can reflect these nuanced considerations.

4.3.1 The *Paniagua Morales* case

The Commission of the IACtHR outlined the facts of this case. The Commission found that State agents had abducted, tortured and murdered several persons between 1987 and 1988.[571] The Court opined that in the circumstances of this case where it was plain that these atrocities were being committed by State

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[569] Jackson, *Complicity in International Law* (n 295) 191.
[570] The Court in *Mapiripan* considered the decision of 30 September 2003, issued by the Second Criminal Court of the Specialized Circuit of Bogotá referenced in the *Mapiripan Massacre* (n 97) fn. 122.
[571] *Paniagua Morales* (n 95) para 1.

agents attributing, or as the Court termed it "imputing," the acts of the State agents was not difficult.

However, in arriving at this Decision the Court found that

> [u]nlike domestic criminal law, it is not necessary to determine the perpetrators' culpability or intentionality in order to establish that the rights enshrined in the Convention have been violated, nor is it essential to identify individually the agents to whom the acts of violation are attributed. The sole requirement is to demonstrate that the State authorities supported or tolerated infringement of the rights recognized in the Convention. Moreover, the State's international responsibility is also at issue when it does not take the necessary steps under its domestic law to identify and, where appropriate, punish the authors of such violations…[572]

This approach towards determining the level of support needed to render conduct of members of armed groups set the precedent for other cases to follow and develop and the next two cases are examples of that.

4.3.2 The *Pueblo Massacre* case

The facts of this case concerned the extrajudicial killings of six peasants and the forced disappearance of thirty-seven more from the village of Pueblo Bello in Colombia sometime in January 1990.[573] This instilled a level of fear in the local community and this in turn strengthened the position of the paramilitary group in the area.[574] During the period of January 1988 and 1990, there were more than two hundred deaths related to paramilitary action.[575] Further evidence reported a history of intense collaboration between State agents and these groups for the purposes of provision of arms and intelligence.[576] The issue was whether the violations that resulted from these massacres and other acts could be attributed to Colombia.

The Commission found that the State played a large role in the creation of these groups in the 1970s and 1980s. However, in 1989, the previous protection from

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[572] Ibid para 91.
[573] *Pueblo Massacre* (n 96) para 2.
[574] Ibid.
[575] Ibid para 65(k).
[576] Ibid para 95(1)-95(3), 95(29).

the Supreme Court of Justice was removed and the State started to term these groups "criminal".[577] Aside from this, the Commission found that they did nothing further to dismantle these armed groups and to the contrary, promoted them and even requested them to commit crimes on the assurance that they would not be prosecuted subsequently.[578] On this basis, the Commission found that owing to the tolerance and support given to these groups, the acts of the military agents were attributable to the State.[579]

The State responded that the "objective international responsibility of the State cannot exist merely due to the fact that an illegal armed group flagrantly violated human rights."[580] According to the State,

> in order to attribute responsibility to the State for the facts committed, it is necessary to take into account the structures for attributing the fact to the State, which arise from the obligations embodied in the Convention. Only when it can be proved that the conduct of the illegal members of the armed group, is attributable by act or omission of the Colombian armed forces… may international responsibility be attributed to the State…[581]

They further argued that it would be unfair otherwise as

> [t]he structures for attributing responsibility to the State constitute *numerus clausus*, because they consist of a rigorous description of the events in which the violation of the treaty-based obligation is attributable to the State in question. This premise constitutes a guarantee of the principle of legal certainty.

On that basis the State attempted to deflect responsibility by arguing that the Colombian forces did not participate in these attacks and furthermore, the State (bearing in mind the financial constraints it was operating under) did all that was possible on the facts to avoid these violations by taking the necessary precautions.[582]

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[577] Ibid 96(a).
[578] Ibid.
[579] Ibid.
[580] Ibid 103(a).
[581] Ibid 103(c).
[582] Ibid 103(i).

The Court did not agree with the State's arguments. It opined that the existence of a rigorous structure for attribution was impossible and that attribution of conduct depended on the facts and circumstances of each case. According to the Court,

> the many different forms and characteristics that the facts may assume in situations that violate human rights makes it almost illusory to expect international law to define specifically – or rigorously or *numerus clausus* – all the hypotheses or situations – or structures – for attributing to the State each of the possible and eventual acts or omissions of State agents or individuals…

According to the Court, the international responsibility of a State arises when there is a violation of the *erga omnes* obligations to guarantee and render effective the protective norms under the Convention.[583] Consequently, the conduct of individuals can be attributed to the State where the State fails to uphold the *erga omnes* obligations that are reflected in the Convention, since the State is the guarantor.[584] That failure could sometimes result from particular relationships the State engages in with, for instance, collaboration with armed groups in a situation where these groups are clearly criminal in their objectives. Thus a stable "structure for attribution" is untenable and the better view would be to assess the nature of the collaboration and the effect that had on questions of State control over the groups committing mass atrocities. This focus on the effects of collaboration was also central to the Court in the *Mapiripan Massacre* case.

4.3.3 The *Mapiripan Massacre* case

The facts of this case, similar to the Pueblo Massacre, involved the massacre and torture of at least forty-nine civilians in the municipality of Mapiripan.[585] These atrocities were committed by members of the United Self-Defense Forces of

[583] Ibid para 111.
[584] Ibid para 113.
[585] *Mapiripan Massacre* (n 97) para 2.

Colombia ("USDFC") with the "collaboration and acquiescence of agents of the State."[586]

The State argued that the acts derived from "irregular actions of its agents and not from a policy of the State or its institutions."[587] While they accepted responsibility for this, they refused to accept responsibility on the basis that the acts of the armed group, the USDFC could not be attributed to them "as if they were agents." It argued that since the ACHR did not create a *lex specialis* towards the determination of the tests of attribution of conduct, the tests of attribution had to be drawn from general international law.[588] In this regard they argued that this conduct is not attributable to the State unless it falls under the principles reflected in Article 8, that the acts were done under the effective control of the State, or Article 9, that the acts were done in the absences of public authorities or Article 11, that the acts were adopted by the State.[589]

The State argued with respect to responsibility in the rules reflected under Article 8, that "there were no instructions or effective control by the State."[590] The State then went on to say that the acts were done by these armed groups which they referred to as criminal and some of the agents of the State, even if by omission.[591] They argued that those agents were punished harshly and thus in total, the acts of the individuals who participated in that massacre could not be attributed to the State.[592]

The Commission in response to this found that applying the *Paniagua Morales* principle earlier discussed, ie that acts of individuals who committed serious violations of human rights are to be attributed to the State in instances where the State tolerated or condoned these acts.[593] On this basis owing to the "degrees of

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[586] Ibid.
[587] Ibid para 97(a).
[588] Ibid para 97(c)(iv).
[589] Ibid para 97(d).
[590] Ibid para 97(e).
[591] Ibid.
[592] Ibid 97(f).
[593] *Paniagua Morales* (n 95).

participation and collaboration" between the armed group in question, responsibility was engaged under the Convention.[594]

The Court in determining a finding on the merits of the arguments found that the ACHR created a *lex specialis* in view of its special nature as a human rights treaty.[595] It opined that

> [t]he effect of these obligations of the State goes beyond the relationship between its agents and the persons under its jurisdiction, as it is also reflected in the positive obligation of the State to take such steps as may be necessary to ensure effective protection of human rights in relations amongst individuals. The State may be found responsible for acts by private individuals in cases in which, through actions or omissions by its agents when they are in the in the position of guarantors[and], the State does not fulfill these erga omnes obligations embodied in Articles 1(1) and 2 of the Convention…[596]

On that basis the Court found the acts of the USDFC attributable to the State.[597] Part of the ratio for this finding was that the Court found that the failure to perform the *erga omnes* obligations under the Convention arose out of the relationship between the State and the USDFC. The link between them resulted from

> a set of actions and omissions by State agents and private citizens, conducted in a coordinated, parallel or linked manner, with the aim of carrying out the massacre….[598]

In this regard, it might be useful to examine how the Court approached the issue of determining conduct that was coordinated, parallel or linked. This was accomplished by what they referred to as a rational appraisal "that did not close its eyes to the evidence."[599] Items that were considered relevant were the fact that the State allowed these groups landing rights without airport controls, logistical assistance to the scene of the massacre, movement through the training areas of the

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[594] Ibid 99(a).
[595] Ibid para 107.
[596] Ibid par 111.
[597] Ibid para 123.
[598] Ibid para 123.
[599] Ibid para 118 referencing the decision of the Colombian Constitutional Court in Judgment of 15 February 2005 issued by the Criminal Chamber of the High Court of the Court District of Bogotá

Army Mobile Brigade, lack of cooperation with authorities who tried to reach the scene and concealing evidence of the facts.[600] On this basis the Court found that there was true collaboration between the State and the armed group that went beyond mere omission.[601]

4.3.4 Suggestions from these case studies

In sum, therefore, these three case studies suggest that responsibility for the violations under the ACHR are not as a result of acts of non-State actors being attributed to the State, but because the responsibility for any violations under the ACHR was engaged on the basis that there was a failure to guard against them.[602]

However, this does not mean that it has no value to offer in suggesting better ways in which the question of attribution can be examined in cases coming before the ICJ. Some, as discussed in Chapter Two, have gone so far as to argue that State responsibility in these circumstances is not engaged on the basis of agency at all, but instead on complicity,[603] thereby treating the question of responsibility for State support of armed groups under the ACHR as a *lex specialis* regime of attribution,[604] through which States can be seen to be responsible for support of the armed groups. That, as discussed before,[605] is one way of addressing the lacunae in the positive law towards addressing State support of armed groups and the Court in *Mapiripan* have supported this.[606]

However, the issue that remains is whether the approaches used by the IACtHR to determine the attribution of conduct of individuals, can be of any assistance in suggesting improvements to the tests of attribution of conduct applied by the ICJ when they are both premised upon distinctive rationales and have different objectives. At first sight, the answer would be no. However, an examination

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[600] Ibid 116(a).
[601] Ibid 118.
[602] *Velasquez Rodriguez* (n 557) para 172.
[603] Jackson, *Complicity in International Law* (n 295) 190.
[604] Ibid.
[605] section 2.6.
[606] *Mapiripan Massacre* (n 97) para 107.

of the circumstances in which "support or tolerance"[607] of the armed group amount to direction or control by the State is important as the question of participation with the armed group in circumstances where there are obvious risks that mass atrocities can occur or have already occurred, and whether that level of collaboration with the group was sufficient to create a relationship that was one of dependence on the one side and control on the other.[608] In *Mapiripan*[609], the level of collaboration was sufficient to indicate a link. Thus in terms of incorporating approaches from other regimes in a parallel manner, this suggestion of approaching the link between States and armed groups on the basis of collaboration is significant.

4.4 Discussion

The suggestion that alternative standards for the tests of attribution for the purpose of State responsibility could be derived from the jurisprudence of human rights courts does not situate well with many commentators. Milanović, as discussed in Chapter Three, found that the rules of State responsibility should not be conflated with the rules concerning, determination of jurisdiction for the purpose of applicability of international human rights obligations.[610] As noted in that chapter, he found that State responsibility has a distinct purpose as "it arose from the muddied waters of diplomatic protection and treatment of aliens and should now try to resist being dragged back into the methodological mud made up of different substantive primary rules."[611] Implicit in his argument is the fear that that if a comparative approach were to be used, it would be dangerous as the Human Rights Courts approach the question of attribution in relation to existing primary obligations that exist either on an *erga omnes* or *erga omnes partes* basis. The ICJ has distinguished the questions of primary obligations from its secondary rules of which attribution is

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[607] Phrase used in *Mapiripan Massacre* (n 97) para 98: "the acts of private individuals involved in said acts can be attributed to the State and, therefore, entail its responsibility in accordance with international Law, for which it is sufficient to prove that there has been support or tolerance by the public authorities in the breach of the rights embodied in the Convention."
[608] *Nicaragua* (n 3) para 109.
[609] *Mapiripan Massacre* (n 97) paras 2, 96, 99, 118-121.
[610] Milanović, 'State Responsibility for Genocide' (n 17) 583.
[611] Ibid 585.

one. However, though the fear is understandable considering other approaches towards an assessment of facts in understanding links and the underlying nature or contexts of State relationships with armed groups is not dragging the questions of attribution back into a methodological mud.

The law is a tool for assessing and remedying the wrongs whether those wrongs are delictual, criminal or as with international law, neither of these. Method should support the fact finding process, so the consideration of different methods or approaches is not seeking to conflate primary with secondary rules. Instead it is seeking to determine whether the process of fact finding under the secondary rules can consider degrees of State assistance more inclusively and in so doing address the apparent disconnection between the State and the non-State armed group, in order to reveal that the influence being exercised over the group was controlling; and thus that it should be brought into the open, analysed and, indeed, judged.

The Decisions discussed in this chapter, both from the IACtHR and the ECtHR, operate on a more progressive basis in terms of how they are approaching the questions of attribution. Granted they are considering the questions of attribution in relation to determining jurisdiction, but this does not preclude the adoption of their more searching methods towards consideration of questions of relationships of control or dependence between the State and the armed group through which they assess the pragmatic results of State support and direction in all fields. The trend in the IACtHR towards addressing the relationship in nuanced way, distinguishing tolerance from collaboration or support, shows a more hands-on approach to the evidence. The trend in the ECtHR to evaluate in detail the questions surrounding dependence by analysing in painstaking detail the effect of funds transfer, debt forgiveness and provision of arms and equipment is not an approach to be ridiculed. Indeed, while the ICJ should, rightly, strive for consistency, its role is not only that

of stating and restating the law, but also to develop it to meet the requirements of a dynamic international society.[612]

This is being done by other international courts. For instance, while the ECtHR in the cases analysed above was looking at questions concerning the existence of "jurisdiction" within the meaning of Article 1 ECHR, the finding that such jurisdiction existed in those cases was only possible due the European Court giving full effect to the reality of the relationship between the TRNC and Turkey (in *Loizidou*) and between the MRT and Russia (in *Ilaşcu v Moldova*) in its assessment of the nexus between the Respondent State and the self-proclaimed government it supported. In a similar way, the ICJ should also factor in a full understanding of the nature and effect of the relationship between the State and the group, thus allowing a broader understanding of the role the State played in the operations of the groups it sponsored.

Despite contrary arguments, the test for attribution of conduct of indviduals to States is not settled. In his 2014 publication on State responsibility, Crawford did provide an unqualified statement that the test was settled. He noted that the Dissenting Opinion by Judge Al Khasawneh[613] objected to the test prescribed by the Majority.[614]

Thus notwithstanding arguments to the contrary at both the judicial and academic levels, there is a need to continue to critique and reconsider the test for attribution of conduct for individuals as this test is the fulcrum for addressing the current questions of responsibility for State support of armed groups and perhaps consideration and inclusion of approaches from other international courts and

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[612] *Competence of the General Assembly for the Admission of a State to the United Nations*: *Advisory Opinion* (n 46).
[613] See Crawford, *State Responsibility: The General Part* (n 98) 156.
[614] *Bosnian Genocide* case (n 3) (Dissenting) Separate Opinion of Vice President Al Khasawneh 241 para 39. Judge Al Khasawneh also suggested that the ILC itself has suggested more work be done on considering this vexed issue of attribution of conduct, as the ILC papers from the Fifty-sixth Session leaves further room for consideration of this lower standard for control as it left the question of control open. See ibid, citing Report of the International Law Commission on the Work of its Fiftieth Session, United Nations, Official Records of the General Assembly, Fifty-third Session, Supplement No. 10, UN doc. A/53/10 and Corr.1 para 395.

tribunals in the assessment of "control" will go a long way in addressing the current lacuna in law towards addressing State responsibility for support of armed groups who commit international crimes or later go on to commit international crime.

In the next chapter, this issue of interpretation of "control" is investigated by examining the tests from the international criminal law regime with a view to determining the extent to which these approaches towards the determination of control or dependence can be used to modify the ICJ approach towards attribution on the basis of direction and control.

Chapter Five: The Tests for Assigning Criminal Responsibility in the International Criminal Courts and Tribunals

5.1 Individual responsibility for participation in crimes of a collective nature

This chapter examines the different ways in which individuals are assigned responsibility in the international criminal law regime for participating collectively in international crimes. This is done with a view to assessing whether there are useful approaches from the international criminal courts towards suggesting appropriate modifications of the tests of attribution of conduct to States. The aim of this enquiry is to determine the extent to which implementation of similar approaches in dealing with individuals can be applied *mutatis mutandis* to States so as to more fully reflect the role of the State in the commission of international crimes perpetrated by non-State armed groups.

The international criminal law regime has, from its very inception, considered questions of allocation of criminal responsibility for participation in crimes of a "collective" nature in a sustained and detailed manner. Although this thesis accepts that the regime of State responsibility and the individual regime of responsibility are predicated on different rules and tests, there is a common link between them because they are both involved in the assigning of responsibility based on individual conduct. This chapter suggests that the approach of the international criminal courts towards the assigning of responsibility to individuals for participation in a common criminal plan could be applied to considerations of determination of State control over the acts of individuals in circumstances where these individuals commit international crimes. The regime of individual responsibility has considered these questions of individual participation not only in the context of collectively perpetrated crimes where the "collective" involves relationships between different branches of the State, but also relationships between State agents and members of paramilitary groups or other private entities and thus the aim of this chapter is to determine whether any of these approaches towards

assigning individual responsibility in these circumstances can usefully inform suggested modification of the tests of attribution of conduct of individuals to States.

As discussed in the next sections, the question of how to apportion responsibility for international crimes involving multiple participants has engaged the attention of the international criminal tribunals since the creation of the IMT, International Military Tribunal of the Far East ("IMTFE") and the Tribunals established under Control Council Law No. 10 at Nuremberg, persistently up to the creation of the modern tribunals and courts such as the ICTY, ICTR, different hybrid or "internationalised" tribunals and the ICC because of particular problematic aspects associated with the diversity and the scale of participation. As such, particular modes of participation through which responsibility could be assigned ("modes of responsibility") have been developed to address these problematic aspects. This chapter thus discusses the modes of responsibility that have been applied in the international criminal courts and tribunals to overcome these problematic aspects.

5.2 The challenges posed by the prosecution of international crimes

A first problematic aspect of the prosecution of international crimes derives from the fact that the crimes in question see the participation, at various levels and in different capacities, of multiple individuals. This requires international criminal tribunals to identify principles of attribution which can, as far as possible, distinguish "adequately between the various participants in mass atrocity and label their responsibility accurately."[615]

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[615] Jain, *Perpetrators and Accessories in International Criminal Law: Individual Modes of Responsibility for Collective Crimes* (n 1) 2. See also J Chalmers and F Leverick, 'Fair Labelling in Criminal Law' (2008) 71 *Modern Law Review* 217, 221. The term was initially introduced by A Ashworth in A Ashworth, 'The Elasticity of Mens Rea' in CFH Tapper (ed), *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (Butterworths 1981) 45, and at 53 Chalmers and Leverick note that the principle of fair labelling now appears in A Ashworth's *Principles of Criminal Law* as one of a number of normative principles governing the common criminal law.

The second problematic aspect concerns the "systemic nature" of international crimes, which are inherently different from their domestic counterparts. As discussed in Chapter Two, while domestic crimes carry with them societal reprehension of the anti-social individual, who is to be penalised for the harm he has inflicted on society,[616] those individuals who participate in international crimes are not seen as being "social deviants". Their commission of crimes is integrated into the fabric of society whereby these actions are instigated, motivated and condoned by the State.[617] As Neha Jain puts it, there is a "communal engagement with violence,"[618] or, as Vetlesen argues, an "internalisation of ideology,"[619] so that ultimately there is a system of criminality.[620] Thus international crimes, unlike their domestic counterparts, do not represent the actions of criminal individuals acting in isolation, but instead represent criminal individual actions that are contextualised within the wider system of State-condoned criminality. Therefore it was always necessary that devising appropriate approaches towards the determination of responsibility addressed individual responsibility in the context of collective criminality without veering into collective guilt.

There is a further, third problematic aspect which relates to this systemic dimension, which is that the scale of participation in international crimes is vast, thus linking the Accused to other participants is difficult. This is because the individual who completed the *actus reus* of the offence is often remotely connected to other participants, particularly high-level individuals who participated in the crime by either formulating the criminal policy, providing arms and equipment or simply being an impetus to the commission of international crimes even though they were outside of defined chains of command.

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[616] D Ormerod and K Laird, *Smith and Hogan Criminal Law* (12th edn, Oxford University Press 2008) 14-15; H Packer, *The Limits of Criminal Sanction* (Stanford University Press 1968) 262.
[617] D Goldhagen, *Hitler's Willing Executioners: Ordinary Germans and the Holocaust* (Abacus, 1997) 21-22; S Miligram, *Obedience to Authority* (Harper and Row 1974) 141.
[618] Jain, *Perpetrators and Accessories in International Criminal Law: Individual Modes of Responsibility for Collective Crimes* (n 1) 5.
[619] Vetlesen, *Evil and Human Agency: Understanding Collective Evildoing* (n 4) 32; Drumbl, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity' (n 4) 576-577.
[620] See discussion at section 2.4.1 on the systemic cause of international crimes.

The challenge thus facing prosecutors is the determination of appropriate modes, theories or approaches towards assigning responsibility on an individual basis where international crimes are collectively perpetrated with a tremendous number of participants who are often remotely connected to each other.

Consequently, this challenge was overcome by different courts and tribunals by identifying modes of responsibility that could, as far as possible, fairly label the responsibility of these individuals appropriately and consequently ensure that the punishment inflicted on them matched the severity or seriousness of the role they played in the wider system of criminality.

International criminal law, since its inception, has been influenced by domestic criminal law doctrines. While there is an increasing move towards a more comparative approach and the use and adaptation of domestic doctrines, as the introduction of German doctrines into the jurisprudence of the ICC shows, the IMT, IMTFE and the post-Second World War Tribunals set up under Control Council Law No. 10 relied heavily on Anglo-American criminal doctrines for assigning criminal responsibility based on complicity or accessory liability. Through accessory liability, individuals are labelled as perpetrators or accomplices/accessories to the crime (generally referred to as an "accomplice"). In addition to this, the law on complicity liability suggests that an accomplice can participate in an offence under one of two particular models of participation – either unitary or differentiated.[621]

Under the unitary approach, all those who contribute to the commission of a crime are treated equally for the purposes of criminal responsibility; in other words, under this approach, "[t]here are no accomplices; all are principals".[622] Under this model, there is no differentiation for the purposes of attribution among the participants to the collectively perpetrated crime as they are all treated as

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[621] Jackson, *Complicity in International Law* (n 295) 18; E van Sliedregt, 'The Curious Case of International Criminal Liability' (2012) 10 *Journal of International Criminal Justice* 1172, 1183.
[622] W Wilson, 'A Rational Scheme of Liability for Participating in a Crime' (2008) *Criminal Law Review* 3, 3.

confederates to the same criminal purpose on the basis that "there is little difference between the responsibility of the principal and accessory for the outcome".[623]

Criminal law, as some writers have posited, is premised on the notion that a crime is a moral wrong for which an individual is personally responsible for the fault or *culpa* he bears in causing harm to the public.[624] The unitary model of participation sees personal fault for infliction of harm as being spread through the cooperation of the participants, so that culpability could stretch to participants without whose skills, dynamism or influence the criminal activity could not have occurred, thereby meriting the unity of attribution.[625] The only scope for differential treatment among participants is in their punishment. According to David Ormerod and Karl Laird, "[t]he courts have generally seen their task as one of fitting the penalty to the particular degree of iniquity… of the offender."[626] Thus, differentiation among participants is left for the sentencing stage where the sentences upon the different participants are calibrated by application of judicial discretion.[627]

Under the differentiated approach, by contrast, there is a distinction both at the stage of attribution of responsibility, as well as in the punishment that is meted out to the different participants at the sentencing stage. This is accomplished by classifying individual roles for collectively participating in the commission of a crime into two broad categories: on the one hand, the principal (or principals) to the crime, and, on the other, accessories to the crime or accomplices.[628] The fault

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[623] Ibid 18

[624] See D Ormerod and K Laird, *Smith and Hogan Criminal Law* (13th edn, Oxford University Press 2011) 5, 8, 10-12.

[625] Wilson, 'A Rational Scheme of Liability for Participating in a Crime' (n 622) 3.

[626] Ormerod and Laird, *Smith and Hogan Criminal Law* (n 624) 40.

[627] Wilson, 'A Rational Scheme of Liability for Participating in a Crime' (n 622) 3.

[628] For example, in English Common Law where there is one crime but more than one person criminally liable the law divides them into principals and accessories. See JW Turner, *Russell on Crime* (11th edn, Steven and Sons 1958) approved in *Surujpaul v R* 42 Cr. App. R 266 at 269 (PC) as discussed in PJ Richardson, W Carter, J Christopher, Dame L Hobbs, B Emmerson QC, M Evans, D Friedman QC, Judge M Lucraft QC, A Shaw QC, S Shay and M Sikand, *Archbold Criminal Pleading Evidence and Practice* (Sweet and Maxwell 2015) para 18-1 and in German law there are two categories of accomplices or accessories: aiders and abettors. These appear at *Strafgesetzbuch* discussed in H Schumann, 'Criminal Law' in M Reimann and J Zekoll (eds), *An Introduction to German Law* (Kluwer International 2005) 386.

element under this model, unlike the unitary model is not distributed between the two categories of individuals: the principal is seen to bear the greater share because the accessory or accomplice is seen as merely having provided assistance to the crime instead of participating in it.

This model of participation is problematic when it comes to international crimes. Due to the unique nature of these crimes, it would not be fair that the person who would normally be considered to be the principal, ie the person closest to the physical commission (*actus reus*) of the offence,[629] should be so labelled and consequently punished more harshly when they are not the true engineers of, or motivators behind, the crime. Moreover, a differentiated approach of the type just described would not pay sufficient recognition to the systemic dimension to these crimes because it underplays the role of some participants, insofar as it relegates their position as mere accomplices when the commission of international crimes was driven by a cooperation of all participants. This is because it was only with this scale of cooperation that these international crimes could have had a concomitant effect on the scale of victims.

For these reasons, the drafters of the instruments establishing the various international criminal tribunals have generally looked towards adopting modes of responsibility that reflect a unitary approach. In this regard, there are five main modes of responsibility under a unitary model of participation that have been applied by international courts and tribunals, namely the IMT, IMTFE, tribunals set up under Control Council Law No. 10, the ICTY, ICTR and ICC and hybrid tribunals such as the SCSL who have patterned their Statutes after that of the ICTY. These modes are conspiracy, joint criminal enterprise, co-perpetration, indirect co-perpetration and superior responsibility. These Courts and Tribunals have in addition simultaneously applied "aiding and abetting," planning, instigation and ordering as differentiated models of participation.

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[629] Richardson et al, *Archbold International Criminal Courts and Practice, Procedure and Evidence* (n 628) para 10-63 and para 18-1.

Since this thesis seeks to suggest modifications to the test of attribution of conduct to States by suggesting some of the approaches towards the assigning of responsibility from international criminal law, it concentrates on modes of responsibility that fall under unitary models of participation as these unitary models factor in the effect of participation on the assigning of criminal responsibility to the participants. Where a State agent planned, instigated or ordered international crimes to be committed by armed groups, proof of direction and control over the individuals who committed those crimes is readily established. Thus these tests are not particularly helpful in identifying viable suggestions for a variation in the test of attribution of responsibility to States which reflects more nuanced forms of involvement. Additionally, since the mode of superior responsibility[630] addresses the assigning of responsibility, it (as the name suggests) is reliant on proof of a superior-subordinate relationship in order to trigger its application.[631] It is also of limited

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[630] Superior responsibility as a mode of liability originated in the early jurisprudence coming out of Nuremberg and Tokyo and refers to situations where superior is responsible for the crime of his subordinates. At these early trials it was discussed in four cases, *Yamashita (Re Yamashita)* United States Military Commission Manila and the Supreme Court of the United States (7 December 1945) Vol IV, Law Reports of Trials of War Criminals, selected and prepared by the United Nations War Crimes Commission, London, 1949 (His Majesty's Stationary Office 1948); *Toyoda (United States v Soemu Toyoda)*, Official Transcript of the Record of Trial 4998; *The Hostage Case (United States v Wilhelm List et al)* Judgment of 8 July 1947-19 February 1948, Vol. VIII, Law Reports of Trials of War Criminals selected and prepared by the United Nations War Crimes Commission, London, 1949 (His Majesty'sStationary Office 1949) 34-92; and the *The High Command Case (United States v Wilhelm von Leeb et al* Vol XII, Law Reports of the Trials of War Criminals selected and prepared by the United Nations War Crimes Commission, London 1949 (His Majesty's Stationary Office, 1949) 1-12. At the ICTY there is a substantial body of jurisprudence that have developed discussion on the application of the mode. In this regard for example, *Prosecutor v Zdravko Mucić aka "Pavo", Hazim Delic, Esad Landžo aka "Zenga", Zejnil Delalic* (the "*Čelebići*" case) (Trial Judgment) IT-96-21-T, ICTY, 16 November 1998; There has been considerable attention in the jurisprudence of the ICTY that has identified superior responsibility is a *sui generis* form of responsibility not a form of complicitious liability in that the superior is to be considered in his role as failing to discharge his duty with regard to the crimes committed. Instructive cases in this regard are *Prosecutor v Halilović* (Trial Judgment) IT-01-48-T, ICTY, 16 November 2005 para 54 finding that the commander does not share in the act also *Prosecutor v Naser Orić* (Trial Judgment) IT-03-68-T, ICTY, 30 June 2006 para 293. At the ICC the assigning of responsibility is addressed under Article 28 ICC Statute (n 60). However all the different approaches for assigning responsibility require some core elements, namely that there is "the existence of a superior – subordinate relationship, that the superior knew or had reason to know that the criminal act committed or about to be committed and finally that the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof." Although there has been two different standards of *mens rea* applied by the ICC and the ICTY/ICTR and jurisdictions that have patterned their international criminal law instruments on them they both share this common set of objective elements.

[631] *Čelebići* (n 630).

assistance in suggesting approaches towards questions of direction and control because they are also directly proven under this mode of responsibility and for the same reasons as planning, instigation or ordering, offers little assistance.

Additionally, since this thesis, as earlier discussed, is focussed on variations of the test of attribution outlined under Articles 4 and 8 ARSIWA, it does not seek to discuss the responsibility of States under Article 16 ARSIWA for the purposes of complicity as those tests consider complicity in the context of relationships between States only and this thesis is focussed on identifying State responsibility for support of a non-State actor – armed groups. Thus the discussion on aiding and abetting as a mode of responsibility is limited as those modes of responsibility will not be put forwards for the suggested variations to the tests of attribution. The modes of responsibility which look towards direct responsibility under a unitary model of participation, namely conspiracy, joint criminal enterprise, co-perpetration and indirect perpetration is more useful as it can relate to the objectives of this thesis to address State responsibility outside of the law on complicity. The tests used to determine liability under these selected modes of responsibility are now examined.

5.3 Conspiracy

The modes of liability that were pursued at the IMT, IMTFE and the tribunals established under Control Council Law No. 10 provided a foundation upon which the later international courts and tribunals elaborated upon to work out appropriate tests to identify and determine individual guilt in the context of collective criminality.[632] In the main, these early instruments and jurisprudence established that, notwithstanding the scale of participation and the apparent disconnect between the policy makers and high-level individuals who devised and supported these crimes and the lower-level individuals that committed the physical aspects of the crimes, they would all would be accountable on the basis of a shared plan. The introduction of this mode underscored an approach towards the assigning

[632] G Simpson, 'Men and Abstract Entities' in H van der Wilt and A Nollkaemper (eds), *System Criminality in International Law* (Cambridge University Press 2009) 92.

of criminal responsibility that obtains currency today. This mode introduced the notion that international crimes are collectively perpetrated and thus the collaboration among the different participants to effect a common plan is central to any question of determination of individual responsibility.

Under the Charter of the International Military Tribunal[633] there were no discrete modes of commission or participation identified. It loosely articulated "conspiracy or common plan" into the last sentence of Article 6 IMT Charter. The provision in question, which established three crimes under the jurisdiction of the Tribunal, namely crimes against the peace, war crimes, and crimes against humanity in Article 6(a), (b) and (c), respectively,[634] also provided that the IMT maintained jurisdiction to try persons as "individuals or as members of organisations".[635] Furthermore, according to the last sentence in the same place,

> [l]eaders, 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…

However, despite the fact that the last sentence of Article 6 stipulated that the leaders, instigators and accomplices were responsible for conspiracy to "commit any of the foregoing crimes" listed in the provision, the Tribunal found that conspiracy or common plan only applied to crimes against the peace,[636] thereby disregarding the attempt by the Prosecution in its initial Indictment to link the conspiracy to commit a crime against the peace to the commission of war crimes and crimes against humanity, because the commission of war crimes and crimes against humanity were "embraced or contemplated" in the "course of the common plan or conspiracy."[637]

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[633] London Agreement (n 76).
[634] Article 6(1) IMT Charter.
[635] Article 6(2) IMT Charter.
[636] Judgment of the Major War Criminals Before the International Military Tribunal (n 230).
[637] Indictment of the *International Military Tribunal of The United States of America, The French Republic, The United Kingdom of Great Britain and Northern Ireland and the Union of Soviet Socialist Republics v Herman Wilhelm Goering, Rudolf Hess, Joachim Von Ribbentrop et al,* Nuremberg Trial Proceedings Vol. 1. Indictment Trial of the Major War Criminals Before the

This conservative approach towards application of the conspiracy or common plan as a mode of responsibility was largely imitated by the IMTFE. The IMTFE also found that although the doctrine could only address crimes against the peace and saw no connection between crimes against the peace and the other two crimes under the Statute. It did, however, go further than the IMT because the Majority Judgment did not consider the time or decision of the action to invade territory relevant.[638] At the heart of these early attempts to deal with responsibility on the basis of common plan or conspiracy there was a judicial fear that, without an appropriate definition of scope of the plan, it would result in loose imputations of guilt. While vigorously defending conspiracy before the IMT, even Jackson later took issue with it in later US prosecutions that similarly utilised it as a mode of liability akin to accomplice liability,[639] referring to it as a sprawling and elastic doctrine.[640] Today, its reach is critiqued as it is seen as veering into guilt by association.[641] Due to this, its applications were, and still are limited to specific types of cases, such as racketeering and corruption where specific legislation allows its application.[642]

Similar issues were also raised in connection with the inclusion of the provision on liability based on "membership in criminal organisations". According to Bernays, who conceived of the mode, the conviction of an individual only

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International Military Tribunal available at <http://avalon.law.yale.edu/imt/count.asp> [accessed 8 August 2016].

[638] R Pritchard (ed), *The Tokyo Major War Crimes Trial* Vol.111 49762, 49763.

[639] *Krulewitch v United States*, 336 US 440, 445 (1949) (Concurring Opinion)

[640] Ibid para 449.

[641] Danner and Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law' (n 104) 116.

[642] D Browning Webb, 'Judicially Fusing the Pinkerton Doctrine to RICO Conspiracy Litigation (2008-2009) 97 *Kentucky Law Journal* 665; See SW Brenner, 'Civil Complicity: Using the Pinkerton Doctrine to Impose Vicarious Liability in Civil RICO Actions' (1993) 81 *Kentucky Law Journal* 369, 388; SW Brenner, 'Of Complicity and Enterprise Criminality: Applying Pinkerton Liability to RICO Actions' (1991) 56 *Mo. L. Rev.* 931, 1013. The Pinkerton doctrine is a unique feature of American law. It was developed in *Pinkerton v United States* 328 US 640, 651 (1946). The case involved ten substantive charges against two brothers related to sale and distribution of alcohol together with one charge of conspiracy. The doctrine was the result of Judge Douglas' direction to the jury that they could find both brothers guilty of the substantive offences if they were satisfied that the substantive offences were committed to advance a conspiracy between them. According to him, an individual is a member and offender unless 'he does some act to disavow or defeat its criminal purpose." Douglas found that, when individuals are partners in a crime, they are liable for each other's acts as long as those acts were undertaken to further the underlying purpose behind the conspiracy.

achieved its true moral significance, if the true nature of the instigation of the crime was addressed.[643] According to him, individuals functioned within a group and thus were motivated by the criminal intentions of the group.[644] The guilt of the individual thus had to be contextualised within the group, so that once an individual member of any group was tried, the IMT would be able to declare the organisation criminal[645] and where such a declaration was made, the IMT would have the "right to bring individuals to trial" as members.[646] There was therefore no attribution of responsibility to the group in the strict legal sense but a declaration of criminality against the group and attribution of individual responsibility as members of the criminal group.[647]

There was thus an incorporation of this concept into Articles 9,[648] 10[649] and 11[650] of the IMT Charter and subsequent to this there was an incorporation of laws

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[643] US Department of State, Memorandum of President Roosevelt from the Secretaries of State and War and the Attorney General, 22 January 1945, 4 <http://avalon.law.yale.edu/imt/jack01.asp> [accessed 6 August 2016].

[644] Ibid.

[645] Article 9(1) London Agreement (n 76): "At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization. Article 9(2) London Agreement: After the receipt of the Indictment the Tribunal shall give such notice as it thinks fit that the prosecution intends to ask the Tribunal to make such declaration and any member of the organization will be entitled to apply to the Tribunal for leave to be heard by the Tribunal upon the question of the criminal character of the organization. The Tribunal shall have power to allow or reject the application. If the application is allowed, the Tribunal may direct in what manner the applicants shall be represented and heard.

[646] Article 10 (n 76): "In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring an individual to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned."

[647] In the presentation of the case for the prosecution, Justice Jackson mentioned laws from several countries in which he posited there were pre-existing laws for collective criminality of groups. He cited examples such as the British India Act and US laws from the 1940s, which penalised membership in gangs. He also referred to French, Soviet and German Penal Codes which similarly addressed responsibility for membership in groups organised to perform banditry or crimes against the public peace.

[648] Article 9(1) London Agreement (n 76).

[649] Article 10 London Agreement (n 76).

[650] Article 11 London Agreement (n 76): Any person convicted by the Tribunal may be charged before a national, military or occupation court, referred to in Article 10 of this Charter, with a crime other than of membership in a criminal group or organization and such court may, after convicting him, impose upon him punishment independent of and additional to the punishment imposed by the Tribunal for participation in the criminal activities of such group or organization.

criminalising membership in organisations declared criminal in the Allied Nations and also in the occupied zones of Germany.[651] Under Control Council Law No. 10,

> a criminal organisation is analogous to a criminal conspiracy, in that the essence of both is cooperation for criminal purposes [however] that definition should exclude persons who had no knowledge of the criminal purposes or acts of the organisations and those who were drafted by the state for membership, unless they were personally implicated in the commission of acts declared criminal by Article 6. … Membership alone is not enough.[652]

Therefore an officer who took part in atrocities would thus only be responsible on the basis of individual participation. The declaration of criminality was not thus an attribution of responsibility to the group. Instead, there was a *declaration* of criminality and the *attribution* of responsibility to an individual would only occur if it was proven that he knew of the criminality of the organisation and was voluntarily participating in it. Furthermore, use of this method of declaration of criminality extended to administrative and judicial departments. For instance, in *Josef Alstötter et al* (the "*Justice*" case) the judicial system was described as being "perverted into a mechanism of the dictatorship" of the Third Reich.[653] In this case the judiciary was declared criminal and all of its membership held criminally responsible for crimes under the IMT Charter. The defendants were all judges and prosecutors as well as ministerial officers. The organisation was seen as a conspiracy and thus participation through membership rendered the members culpable.

However, though the mode was applied in the context of State organs, the same rationale was not applied in connection with non-State actors. Thus in the *IG Farben* case, the twenty-two defendants were all directors of a major German chemical company, who were charged with aggression, crimes against humanity and

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[651] The Trial of the Major War Criminals before the IMT (n 636) 171.
[652] Ibid 171, 256.
[653] *Josef Alstötter and others (the "Justice" case). The Justice Case (United States Military Court v Josef Alstötter et al*) Judgment of 3–4 December 1947, Vol. III, Trials of War Criminals before the Nurnberg Military Tribunals under Control Council Law No. 10 (United States Government Printing Office 1951) 1, 110.

war crimes due to the fact of having provided funding to the Nazi Party, and providing bomb-making materials.[654] The US military court found that the defendants were not as they "[w]ere neither high public officials in the civil government nor high military Officers. Their participation was that of followers not leaders. If we lower the standard of participation to include them, it is difficult to find a logical place to draw the line between the guilty and the innocent among the great mass of German people. It is of course unthinkable that the majority of Germans should be condemned as guilty of committing crimes against peace. This would amount to a determination of collective guilt…"[655]

As a functional tool for identifying individual responsibility in the context of collective criminality, therefore, the mode of conspiracy allowed the imputation of guilt based on voluntary and continued association with a criminal group. However, the IMT did not go so far as to allow this form of participation to implicate civilians in crimes against the peace.

Moreover, although principles of Nuremberg were endorsed by the UN General Assembly in 1950,[656] there was no inclusion of that early idea of organisations' responsibility. In the later trials that commenced in the 1990s before the specially created the ICTY and the ICTR ("*ad hoc*" tribunals) and the hybrid tribunals, such as the SCSL, or the ECC, there is no reliance on conspiracy or organisational responsibility in the instruments. However, the concepts seem to have filtered into the understanding of common purpose liability particularly in the creation of the three categories of JCE, which have been developed to reflect different nuances in the variety of ways individuals participated in wide reaching common criminal ventures. Despite the limitations of conspiracy as a mode of

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[654] *Carl Krauch and Others* ("*IG Farben*") Case Judgment of 4 November 1945-1 October 1946,Vol. IX Law Reports of Trials of War Criminals selected and prepared by the United Nations War Crimes Commission,London 1949 (His Majesty's Stationary Office 1948) 1-67.
[655] Ibid 39.
[656] General Assembly Resolution 177(II)(a) The International Law Commission were directed to formulate the Nuremberg principles. These principles were adopted by the International Law Commission in 1950.

responsibility, it informed the approach towards individual assignment of responsibility by focussing on an individual's involvement in a common plan.

5.4 Joint Criminal Enterprise

Joint Criminal Enterprise ("JCE") is a mode of responsibility which addresses individual responsibility in the context of collective participation in circumstances where crimes are pursued at the collective level."[657] JCE was seen to be capable to match "the complex relationships and deliberative structures"[658] involved in "[t]he use of the paramilitary group[s] by the higher-level group of political and military leaders."[659] In these circumstances the high-level remote military or political leader is directly responsible for the criminal acts of armed groups on the basis that he was involved in a common plan or purpose with them. JCE was a graft of Anglo-based domestic principles of common purpose liability[660] into international criminal law.[661] In its domestic form the mode evolved to deal with cases where it was unclear who was the aider or perpetrator.[662] The term "joint enterprise" was therefore used to describe these situations of collectively perpetrated crimes.[663] According to Smith, where there is a common purpose among participants, each Party is responsible for the acts of others carried out in pursuance of this agreement.[664] The doctrine however has many variations and, again according to Smith, if an individual goes outside the remit of the agreement, his co-adventurers are not responsible for his acts,[665] but the co-adventurers are responsible if that

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[657] J Ohlin, 'Three Conceptual Problems with the Doctrine of Joint Enterprise' (2007) 5 *Journal of International Criminal Justice* 69, 70.
[658] Ibid.69-70.
[659] K Gustafson, 'The Requirement for an Express Agreement for Joint Criminal Enterprise Liability: A Critique of Brdjanin' (2007) 5 *Journal of International Criminal Justice* 134, 149.
[660] KJM Smith, *A Modern Treatise on the Law of Complicity* (Clarendon Press 1991) 218.
[661] *Tadić* Appeal (n 78) paras 194, 220.
[662] Richardson et al, Archbold *International Criminal Courts and Practice, Procedure and Evidence* (n 628) para 18-1 referring to 1 Hale. 233, 615.
[663] Ibid referring to *R v Williams and Davis*, 95 Cr. App. R. 1 CA.
[664] Smith, *A Modern Treatise on the Law of Complicity* (n 660) 218.
[665] Ibid.

unplanned act, though unintended, was nevertheless reasonably foreseeable to the other co-adventurers.[666]

This mode of responsibility was articulated in the jurisprudence of the ICTY. Some commentators have identified the introduction of the doctrine of JCE as occurring with the Decision of the ICTY Trial Chamber against Anton Furundzija in 1998,[667] because it was the first conviction against an accused person made on the basis that he "participated in the purpose behind the offence."[668] Other commentators have cited the 1998 ICTY's Trial Chamber's Decision in the *Delalic* case[669] as an introduction of this mode instead, due to the fact that the conviction of the individuals of the Čelebići camp were on the basis that there was a shared common plan among them.[670] However, JCE formally entered into international criminal law jurisprudence in the 1999 Decision against Dusko Tadić by the Appeals Chamber of the ICTY, as this was the first Decision to identify and discuss JCE as a mode of responsibility in a rigorous manner. It was discussed in the determination of a cross-Appeal filed by the Prosecution following an initial acquittal.[671] On Appeal, Tadić was convicted for the killing of five men from Jaskici although he did not carry out the *actus reus* of the offence.[672] This case is discussed in further detail as the case introduced different categories of JCE and these are analysed later in the chapter. The attribution of responsibility to him was based on the application of the common purpose or joint criminal enterprise doctrine which was read implicitly into the provisions of Article 7 of the ICTY Statute.[673] This implicit reading was justified by

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[666] *R v Powell; R v English* [1999] 1 AC 1; *Chan Wing-Sui v R* [1985] AC 168.
[667] *Prosecutor v Anto Furundzija* (Trial Judgment) IT-95-17/1-T, ICTY, 10 December 1998 para 257.
[668] In this regard see the comments of G Boas, *International Criminal Law Practitioner Vol.1 – Forms of Responsibility in International Criminal Law* (Cambridge University Press 2013) 13.
[669] *Prosecutor v Zdravko Mucić et al* (Trial Judgment) (n 630) para 328.
[670] S Powles, 'Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity' (2004) 2 *Journal of International Criminal Justice* 606, 606.
[671] *Tadić* Appeal (n 78) para 173.
[672] Ibid para 172.
[673] *Tadić* Appeal (n 78)para 220; *Prosecutor v André Rwamakuba*, ICTR-98-44-AR72.4, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, 22 October 2004 (*Rwamakuba* Appeal Decision) para 9.

the Tribunal, on the basis that there was a foundation for the application of JCE on a customary basis.[674]

Due to the fact that this mode of responsibility responds to situations where there are multiple offenders, there are multiple legal tests for assigning responsibility. This can be seen to create a level of uncertainty to the law as there is no one legal test for assigning responsibility where a common criminal enterprise existed. Consequently, its grafting onto customary international law did not have a smooth path[675] and there was a need to delimit the parameters of its application very carefully. The end result is that JCE, as applied in the jurisprudence of the *ad hoc* courts, separated or categorised different factual scenarios in which the mode might be relevant and prescribed unique tests for each of these scenarios. Particularly, in the *ad hoc* jurisprudence there was consideration of the reach of the mode and some effort was made to establish limits and safeguards against imputation of guilt by association. In this way, it elaborated on the common law doctrine, but created more definition so as to label the responsibility of multiple participants in an international crime as fairly and clearly as possible.

This was accomplished by the creation of three separate categories of JCE as modes of responsibility. The Appeals Chamber defined both physical and mental elements for the proof of JCE.[676] There are three physical elements: plurality of persons, the existence of a common plan or purpose, and the participation of the Accused in the common plan or purpose.

To elaborate on the physical elements, it would have to be established that there was a plurality of persons and this plurality did not necessarily have to be

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[674] *Tadić* Appeal (n 78) para 220. These views were not repeated in full by Judge Cassese in the later *Prosecutor v Ayyash et al*. (STL-11-01) para 248-249. Here Judge Cassese no longer felt that JCE 3 could not apply to crimes of special intent. However his comments at paras 210-211 suggest that JCE as a mode of responsibility is customary but if it conflicts with Lebanese law, the interpretation most favourable to the accused will be used. See in this regard also M Milanović, 'Special Tribunal for Lebanon Delivers Interlocutory Decision on Applicable Law' (16 February 2011) *EJIL: Talk!* <www.ejiltalk.org/special-tribunal-for-lebanon-delivers-interlocutory-decision-on-applicable-law/>.
[675] A Cassese, L Baig, M Fan, P Gaeta and A Whiting, *Cassese's International Law* (Oxford University Press 2008) 18.
[676] *Tadić* Appeal (n 78) para 194.

organised into any specific political or administrative structure.[677] Secondly, there would have to be in existence a common plan that did not have to be previously arranged or formulated, but which could have materialised extemporaneously.[678] This test was based on the very inclusive interpretation of "common plan" in the *Tadić Appeals* Decision that allowed for the consideration of all plans, including those formed in a spontaneous manner.[679] The third element, as outlined by the Appeals Chamber was that there must have been participation in the common design

> involving the perpetration of one of the crimes provided for in the Statute. This participation need not involve the 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.[680]

These apply to all three forms of JCE. The mental elements, however, are different under the separate categories of JCE.[681]

According to the ICTY Appeals Chamber, the first category JCE or "JCE 1,"[682] applied to "cases of co-perpetration, where all individuals voluntarily participated in the common design and shared the same criminal intent to commit a crime and one or more of them actually perpetrated the crime with intent."[683] The second category or "JCE 2" applied to cases where "the offences charged were alleged to have been committed by members of military or administrative units, such as those running concentration camps."[684] This was referred to in later cases as the "concentration camp cases JCE" or "systemic JCE."[685] This applied to cases where officials of concentration camps had personal knowledge of international crimes

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[677] Ibid para 227.
[678] Ibid.
[679] Ibid.
[680] Ibid.
[681] Boas, *International Criminal Law Practitioner Vol.1 – Forms of Responsibility in International Criminal Law* (n 668) 34-51.
[682] *Tadić* Appeal (n 78) para 196.
[683] Ibid para 220. See also Boas, *International Criminal Law Practitioner Vol.1 – Forms of Responsibility in International Criminal Law* (n 668) 51-52.
[684] Ibid para 202.
[685] In the *Prosecutor v Haradinaj et al* (Trial Judgment) IT-04-84-T, 03 April 2008 it was referred to as concentration camp cases and in *Kvočka et al* (Appeal Judgment) (n 80) para 82, it was referred to as "systemic JCE".

being committed in the camp and were found to have had an ntent to further the criminal purpse by sharing in the common intention to commit these crimes.[686] The third category JCE or "JCE 3" applied to cases involving "a common design to pursue one course of conduct where one of the perpetrators commits an act, which while outside the common design, was nevertheless a natural and foreseeable consequence of effecting that common purpose."[687] These are discussed in more detail in the following sub-sections.

5.4.1 JCE 1 – The "shared intention"

Individuals would be responsible under the JCE 1 if they "voluntarily participated in one aspect of the common design, even if they did not personally effect the physical act."[688] The key element was the sharing of an intention of the criminal result. Two cases are discussed in the following sub-sections to illustrate the approach used by the Appeals Chamber in assigning responsibility under this mode.

5.4.1.1 The Tadić Appeal

This sharing of intention was evidenced in *Tadić*[689], and in some other cases involving small-scale criminal enterprises by a division of roles or some other significant act of causation.[690] This provided a moral justification to treat the Accused as direct co-perpetrators with parity of culpability, since to hold only one

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[686] Boas, *International Criminal Law Practitioner Vol.1 – Forms of Responsibility in International Criminal Law* (n 668) 57, 59, 67.
[687] *Tadić* Appeal (n 78) para 204.
[688] Ibid para 196; the use of the doctrine was supported by reference to the *Georg Otto Sandrock* case (*Almelo Trial*). In this case a British Court found that three Germans were guilty of murdering a British prisoner of war under the doctrine of common enterprise because they all has the intention of killing him even though they each played a different role. The same ratio was applied in *Hoelzer et al*, a Canadian case on similar facts as well in regard to the murder of a Canadian prisoner of war by three Germans.
[689] *Tadić* Appeal (n 78).
[690] This view finds support in the analysis proposed by Smith, *A Modern Treatise on the Law of Complicity* (n 660) 19: "Settling responsibility for offences which incorporate a harm element in the form of a specified result or consequence necessarily draws on notions of causal attribution. If the alleged principal cannot be said to have 'caused' the result he would at least be free from responsibility. In criminal law when determining principal liability both factual and legal cause must be established. To be a factual cause, the conduce must be a sine qua non. To be legally imputable such a factual cause must be reasonably 'proximate'.".

person liable as perpetrator would disregard the role of all the others who had "in some way made it possible for the perpetrator to carry out the physical act."[691]

This emphasis on a significant act of causation to evidence a shared intention in a common criminal purpose is not new. It seemed to have had some early precedent at the Nuremberg trials and this was relied on as evidence of the customary root of this doctrine by the Appeals Chamber.[692] Five cases that were tried under Control Council Law No. 10 were examined in the *Tadić* Appeals Chamber Decision – the *George Otto Sandrock* case (the "*Almelo Trial*"),[693] *Hoelzer et al*,[694] *Jespen and others*,[695] S*chonfeld*[696] and the *Ponzano* case.[697] All five cases dealt with such significant acts that were either a direct role in a common criminal plan to kill prisoners of war or an indirect form of assistance that helped bring about the offence.

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[691] *Tadić* Appeal (n 78)para 192.
[692] Ibid para 220. Criticisms that the application was not customary have been made. See, for instance, Ohlin, 'Three Conceptual Problems with the Doctrine of Joint Enterprise' (n 657) 76; *Prosecutor v Milan Martić* (Appeal Judgment) (Separate Opinion of Judge Schomburg) IT-95-11-A, ICTY, 8 October 2008 para 4.
[693] *The 'Almelo Trial' (British Military Court v Otto Sandrock et al)* Judgment of 24-26 November 1945, Vol. 1, Law Reports of Trials of War Criminals selected and prepared by the United Nations War Crimes Commission, London, 1949 (His Majesty's Stationary Office 1947) 35.
[694] *Trial of Hoelzer et al. (Canadian Military Court v Hoelzer et al)* Judgment of 25 March – 6 April 1946, Vol. I, Law Reports of the United Nations War Crimes Commission selected and prepared by the United Nations War Crimes Commission, London, 1949 (His Majesty's Stationary Office 1947) 341, 347, 349.
[695] *Trial of Gustav Alfred Jepsen et al* (*British Military Court v Alfred Jepsen et al*) Judgment of 13–23 August 1946, Vol. I, Law Reports of the United Nations War Crimes Commission selected and prepared by the United Nations War Crimes Commission, London, 1949 (His Majesty's Stationary Office 1947) 35
[696] *Trial of Franz Schonfeld et al (British Military Court v Franz Schonfeld et al*) Judgment of 11–26 June 1946, Vol XI, Law Reports of the United Nations War Crimes Commission selected and prepared by the United Nations War Crimes Commission, London, 1949 (His Majesty's Stationary Office 1949) 68.
[697] *Trial of Feurstein and others* ("The Ponzano Case") Hamburg, Germany (4–24 August 1948) Law Reports of the United Nations War Crimes Commission vol 1-3. The Prosecutor had stated the following:
"It is an opening principle of English law, and indeed of all law, that a man is responsible for his acts and is taken to intend the natural and normal consequences of his acts and if these men […] set the machinery in motion by which the four men were shot, then they are guilty of the crime of killing these men. It does not— it never has been essential for any one of these men to have taken those soldiers out themselves and to have personally executed them or personally dispatched them. That is not at all necessary; all that is necessary to make them responsible is that they set the machinery in motion which ended in the volleys that killed the four men we are concerned with" quoted at *Tadić* Appeal (n 78).

For instance, in the *Almelo* case,[698] one man fired the fatal bullet at the Dutch prisoner of war while another stood as look out; or in *Ponzano*[699] orders were given for execution without clear proof that the execution was the Decision of a lawfully constituted Court.

In all the judgments there was a reference to liability that could perhaps be best summed up in the dictum given by the Judge Advocate in the *Ponzano* case, which concerned the killing of three British officers in the vicinity of Ponzano di Miagra. Here, the Judge Advocate found that an Accused did not have to inflict the fatal injury. It was sufficient that he was merely a "cog in the wheel of events leading up to the result."[700]

The mode of responsibility could thus be proven where there was evidence of division of roles to the common plan. Further, each of the roles should have demonstrated a link in the chain of causation leading up to the offence. These roles should also have been with the knowledge that the criminal plan was being effected, so that while the participation did not have to be the *sine qua non*, it should nevertheless form a link in the chain of causation.[701]

This analysis of knowledge of the common plan with a heavy focus on the distribution of roles was evident in the later jurisprudence coming out of the ICTY and also in the ICTR. However, later cases suggested the inclusion of further tests so as to limit a "generally expansive" use of this category,[702] with some inquiry being

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[698] The *Almelo* case (n 693) 38 noting the dictum of the Judge Advocate: "There is no dispute, as I understand it, that all three [Germans] knew what they were doing and had gone there for the very purpose of having this officer killed; and, as you know, if people are all present together at the same time taking part in a common enterprise which is unlawful, each one in their (sic) own way assisting the common purpose of all, they are all equally guilty in point of law".
[699] *The Trial of Feurstein* ("The Ponzano Case") British Military Court sitting Hamburg Germany, Judgment of 24 August 1948. (2007) 5(1) *Journal of International Criminal Justice* 1.
[700] The summing up of the Judge Advocate in *The Trial of Feurstein ("The Ponzano Case")* (n 699) 2. This point is noted against the dictum of the Appeals Chamber that the cases tried after the Second World War focus on a loose notion of being "concerned" in the crimes charged. This is noted in section 5.4.2 fn 578.
[701] *Tadić* Appeal (n 78) para 199.
[702] Boas, *International Criminal Law Practitioner Vol.1 – Forms of Responsibility in International Criminal Law* (n 668) 84.

made as to whether JCE with its focus on the division of roles in a common plan could be pleaded in relation to large-scale plans, that encompassed relationships between leaders and various paramilitary groups and regular forces, or whether that could be criticised as an overreaching of this mode of responsibility.[703] To this end, there was further enquiry as to the scope of assignment of individual responsibility for criminal participation under this category of JCE in the Trial Chamber's Decision in the *Brdjanin* case.[704]

5.4.1.2 The Brdjanin Decisions

In this case, the Prosecution had pleaded on the Indictment that Brjdjanin, together with other high-level individuals from the Serbian Democratic Party and the leadership of the Serbian Republic of Bosnia–Herzegovina, together with the army of the Republika Srspska and Bosnian-Serb paramilitaries, participated in a joint enterprise for genocide, crimes against humanity, grave breaches to the Geneva Conventions and Violations to the Laws and customs of war. The common plan under consideration was the "Strategic Plan" among the Bosnian-Serb leadership and the Bosnian-Serb representatives of the armed forces to link areas that were mainly

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[703] *Brdjanin* (Appeal Judgment) (n 79) para 426; see also discussion on this in W Schabas, Y McDermott and N Hayes (eds), *The Ashgate International Criminal Law Companion Critical Perspective* (Routledge 2016) 135-136; W Jordash and P Van, 'Failure to Carry the Burden of Proof – How Joint Criminal Enterprise Lost its way at the SCSL' (2010) 8 *Journal of International Criminal Justice* 519, 593.

[704] *Brdjanin* (Trial Judgment) (n 79) paras 1-4 noting that Radoslav Brdjanin was charged with twelve counts together with Molimir Talic and "others" with the substantive offences of genocide and complicity in genocide, persecution and exterminations as a crime against humanity, torture and grave breaches to the Geneva Conventions, through acts such as deportation and wanton destruction of villages in the area designated as the Autonomous Region of Krajina. This region included the municipalities of Prijedor, Kotor Varos, Sanski Most, Kjluc and Banja Luka, which had been critical population areas for Bosnian Muslim and Bosnian Croats. The emergence of the Autonomous Region of Krajina, as based on the Prosecution's case, was a reaction to the imminent declaration that Bosnia–Herzegovina would declare its independence from the SFRY. Subsequently, the Serbian Democratic Party ("SDS") carved out a separate entity within Bosnia–Herzegovina and named it the Autonomous Region of Krajina. It included about fifteen municipalities and this became part of the proclaimed Serbian Republic of Bosnia–Herzegovina. Brdjanin was the "First Vice President of the Association of the Bosanska Krajina Municipalities, President of the Autonomous Region of Krajina crisis staff and a permanent member of the SDS." Part of the policy of the SDS was to rid the area of Bosnian Muslims and Croats so as to advance the Serbian character of this newly proclaimed state. Subsequently, from around early 1991, the leadership which included Brdjanin, started to put out propaganda that presented Bosnian Muslims and Croats as "fanatics intending to commit genocide on the Serbian People of the BiH [Bosnia–Herzegovina]."

populated by persons of Serb descent and to eventually gain control of these areas and forcibly and permanently remove all persons of non-Serb descent.[705] This plan could only have been implemented through instilling fear and by force against non-Serbs.[706]

The Trial Chamber, here, in discussing the tests used to determine proof of *mens rea* under JCE 1, suggested that there must be proof that there "was a common plan between the member of the JCE physically committing the material crime charged and the person held responsible under the JCE for that crime."[707] As a result, the count failed in relation to the JCE, because, according to the Trial Chamber,

> [t]he Accused can only be held criminally responsible under the mode of liability of JCE if the Prosecution establishes beyond reasonable doubt that he had an understanding or entered into an agreement with the Relevant Physical Perpetrators to commit the particular crime eventually perpetrated or if the crime perpetrated by the Relevant Physical Perpetrators is a natural and foreseeable consequence of the crime agreed upon by the Accused and the Relevant Physical Perpetrators…[708]

It further found that there was no agreement among the physical perpetrators and the Accused and indeed, any of the high-level authors who formulated this Strategic Plan. These high-level authors remained "structurally remote" from the physical perpetrators.[709] They postulated that although there was a common plan, ie the Strategic plan, all participants driven by the same motive to implement the plan could have done so without agreement with each other. Alternatively the relevant physical perpetrators could have committed those crimes as a result of orders from their paramilitary superiors. That meant the individuals committing the crimes were never involved in the common plan between their paramilitary superiors and the Accused.[710] Thus, in the absence of an agreement between the relevant physical perpetrators and the high-level Accused, in these large-scale crimes, there is room to

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[705] Ibid para 65.
[706] Ibid para 66 fn 124 and fn 125.
[707] Ibid para 264.
[708] Ibid para 347.
[709] Ibid para 354.
[710] Ibid.

reasonably infer that the relevant physical perpetrators were committing international crimes independently of the Accused.[711] This finding was also based on the Trial Chamber's drawing of a distinction between an "espousal" of a plan as opposed to an actual agreement among participants.[712] The Trial Chamber suggested that where there is a vast scale of participation, JCE 1 may not be appropriate as a mode of responsibility, as the *Tadić* Appeals Chamber Decision focussed on a far smaller scale of enterprise.[713] This reasoning was rejected on Appeal.[714]

The *Brdjanin* Appeal addressed a core set of cases from the *ad hoc* jurisprudence to determine whether proof of participation in a common plan required proof of agreement among all participants.

As that as the cases tried after the Second World War focussed on a loose notion of being "concerned," they could not neatly fit into the categories of JCE discussed by the ICTY.[715] Acknowledging this, the *Brdjanin* Appeals Chamber Decision nevertheless found that there were two significant cases that addressed large-scale enterprises in which the accused persons were remotely connected to the physical perpetrators. The cases in question were *United States v Greifelt and others* (the so-called *RuSha* case)[716] and the *Justice* case,[717] both tried under Control Council Law No. 10.

The Appeals Chamber noted that in the *Justice* case, both the physical perpetrator and a person connected with plans or enterprises involving the commission of a crime were considered to have "committed" the crime.[718] There was a perversion of the German Justice system whereby petty infractions of the law

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[711] Ibid para 351.
[712] Ibid.
[713] Ibid para 355.
[714] *Brdjanin* (Appeal Judgment) (n 79) paras 391-492.
[715] Ibid fn 841.
[716] *The RuSHa Case (United States Military Tribunal v Greifelt and others)* Judgment of 10 March 1948, Vol V, Trials of War Criminals before the Nurnberg Military Tribunals under Control Council Law No. 10, Vols. 4-5 (United States Government Printing Office 1951)

[717] *The Justice Case (United States Military Court v Josef Alstötter et al)* (Judgment) (n 653).
[718] *Brdjanin* (Appeal Judgment) (n 79) para 395.

resulted in serious charges being levied against Jews so that the Justice system resulted in the torture and ill treatment of thousands during detention and after sentence.[719] This was sufficient to inculpate the Chief Justice, Chief Prosecutor and other officials from the Justice system who conformed to the criminal policies of the Nazi State.[720]

The same reasoning was also applied in *United States v Greifelt and others*. Here the Military Tribunal opined that while an Accused may not have physically carried out an evacuation of populations, if there are orders signed by him, he can be inculpated and in fact "his participation by instigating the action is more pronounced than that of those who actually performed the deed…"[721]

In both cases, the question of participation in a common criminal plan did not require proof of agreement between the physical perpetrators and the high-level Accused who were responsible for ideologically driven policy. The Appeals Chamber also looked at more contemporary authorities and noted that two key cases from the ICTY also addressed this question of whether agreement among participants was required as proof of intention to participate in a common plan and the applicability of JCE in large-scale criminal enterprises: *Krstić*[722] and *Stakić*.[723]

In *Krstić*, the Trials Chamber did not require the physical perpetrators to have been members of the JCE.[724] Krstić was a general of the Drina Corps in the Republika Srpska army. *Krstić* and the political and military leadership of the VRS formulated a plan to permanently remove the Bosnian Muslims from Srebenica and take over the enclave.[725] According to the Trials Chamber, where the crimes that were committed

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[719] Ibid para 398.
[720] Ibid.
[721] Ibid.
[722] *Krstić* (Trial Judgment) (n 5).
[723] *Prosecutor v Milomir Stakić* (Appeal Judgment) IT-97-24-A, ICTY, 22 March 2006.
[724] *Krstić* (Trial Judgment) (n 5).paras 601, 612-613; and see also *Brdjanin* (Appeal Judgment) (n 79) para 408.
[725] Ibid para 612.

> fell *within* the object of the joint criminal enterprise, the prosecution must establish that the accused shared with the person who personally perpetrated the crime the state of mind required for that crime…[726]

Here, the Trial Chamber focussed on the sharing of the common intention and did not evidence that from proof of agreement between the different participants. According to the Trials Chamber, Krstić's intention was clearly proven in this category of JCE on the basis of his "extensive participation" in the criminal enterprise.[727] The Trial Chamber found that the humanitarian crisis that prevailed during the forced evacuation was evident and that it was so instrumental to the forced evacuation that "it cannot but have also fallen within the object of the criminal enterprise."[728] Thus regardless of proof of an agreement between the Accused and the relevant physical perpetrators, the Trial Chamber found that there was an intention to share in a common criminal enterprise. This finding was not overturned on Appeal.[729]

Similarly in *Stakić*, the common enterprise was among high-level political leaders, the police and military, but the physical crimes were committed by other individuals including members from paramilitary groups.[730] There was no separate requirement that there be an agreement between those committing the *actus reus* of the crimes and those who designed it. What was imperative was that there be some sharing of the intent for the common plan and that the use of the mode of responsibility, in some way reflected "the responsibility of those who made it possible for the perpetrators to carry out the criminal acts."[731] As to the issue of whether this mode of responsibility can be used to address large-scale commission of crimes or systemic crimes in that it involves a substantial degree of State machinery, the Appeals Chamber found the mode to be applicable.

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[726] Ibid para 615.
[727] Ibid.
[728] Ibid.
[729] *Brdjanin* (Appeal Judgment) (n 79) para 408.
[730] *Stakić* (Appeal Judgment) (n 723) paras 68, 70.
[731] *Brdjanin* (Appeal Judgment) (n 79) para 406.

The *Brdjanin* Appeals Chamber fortified itself on this position by applying the *Rwamakuba* Decision before the ICTR.[732] In the *Rwamakuba* case, the Defence also argued that JCE was inappropriate to address responsibility for genocide because there was no customary rule to suggest that the mode could be extended to genocide.[733] They also argued that the mode was "confined to crimes with greater specificity in relation to the identity and relationship as between the co-perpetrators and victims to the extent they dealt with specific incidents and situations."[734] The Appeals Chamber rejected this again relying on the *Justice* case.[735] The Appeals Chamber opined that the *Justice* case "shows that liability for participation in a criminal plan is as wide as the plan itself, even if the plan amounts to a "nation-wide government-organized system of cruelty and injustice."[736] Accordingly, in *Rwamakuba,* the liability for the genocide could be similarly based as detailed in the *travaux préparatoires* to the Genocide Convention whereby the overall objective of the Convention was to suppress and punish this crime at all stages, including all the successive stages to the perpetration including incitement, preparation and attempt.[737]

The outcome of the *Brdjanin* Appeal was that he was convicted on the basis of JCE 1 because he participated in a common plan with the relevant physical perpetrators. There was no need to prove that he entered into a specific agreement with each armed group or military formation, what was sufficient was that each of

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[732] *Brdjanin* (Appeal Judgment) (n 79) paras 423, 482.
[733] *Prosecutor v Rwamakuba* (n 673) paras 6-7.
[734] Ibid para 25.
[735] *Justice* (n 717).
[736] *Prosecutor v Rwamakuba* (n 673) para 25.
[737] Ibid para 27: "Although the doctrine of common purpose was not mentioned by name, the *travaux préparatoires* make clear that the Contracting Parties sought to ensure that all persons involved in a campaign to commit genocide, at whatever stage, were subject to criminal responsibility. In discussing the provision outlawing complicity, the representative of Luxembourg drew a distinction between a person who, on the one hand, rendered "accessory or secondary aid, or simply… facilities, to the perpetrator of an offence," who was called an "accomplice" and was punished "only if the crime were actually committed," and a person who, on the other hand, "rendered essential, principal, or indispensable aid," and was therefore "termed a co-perpetrator and was placed on the same footing, in regard to punishment, as the perpetrator."

them were participating in some aspect of the common plan with a view to effect a forced evacuation at all costs.

That being so, there was strong precedent to apply the JCE in circumstances whereby there is no agreement among the physical perpetrators such as paramilitaries or lower-level soldiers and the high-level planners, once it was clear the physical perpetrators committed the crimes in response to the plans for the crimes that were made by high-level planners whose objectives these physical perpetrators executed.

5.4.1.3 Discussion

The cases discussed above were crucial in introducing an analysis of the effect of participation in the assigning of responsibility to an Accused. The mode dissolved the distinction between the perpetrator and the so-called accessory and instead introduced a mode of responsibility that held the individual far removed from the physical perpetration of the act equally responsible as the physical perpetrator because he shared the same intention as that individual. The cases showed that this sharing of an intention focussed on a common plan that could either have been express or implied. In each instance, it was not necessary that the accused person be shown to have had express agreement with the physical perpetrator but that this agreement with the physical perpetrator could be inferred. The cases showed the ratio of the Tribunal in arriving at these conclusions. Both cases have been of general application in the jurisprudence of the Tribunal. The cases are significant because they show that the accused persons were responsible because the shared intention was sufficient to create a link between the participants, each of whom had different roles. The issue here is whether this approach towards assessment of the link between the high-level State agent and an apparently random armed group member can usefully applied to the tests of attribution of conduct to individuals in the State responsibility regime.

Katrina Gustafson, in defence of JCE 1, critiqued the attempt to limit the ambit of the operation of the doctrine by reference to an agreement between physical perpetrators and the often high-level Accused charged. According to her, this

requirement goes against the very rationale underpinning this mode of responsibility which is that

> in a context of system criminality, the leaders of criminal activity are often removed from the physical commission of crimes, while at the same time are thought to bear at least the same, if not greater, responsibility for these crimes as compared to the principal perpetrators…[738]

Thus, an attempt to impose this almost artificial limitation was based on a flawed understanding of the rationale and requirements of this mode of responsibility. Thus quite distinct from the crime is the consideration of the impact of the initial plan on others who for one reason or the other shared in that intention and a consideration of how that plan was effected. It perhaps would not be best to see some as "members" or "non-members" of the plan but instead to see the different participants as operating in one overall enterprise through different concurrent acts created by a diversity of roles, or as the Italian doctrine posits, there is a concurrence of interdependent causes, "*causa causae est causa causati*".[739]

The overall enterprise could be broken up into workable components through which plans, as a matter of practicality, can be effected. This is referred to by Elies van Sliedregt as the concept of delinking.[740] What van Sliedregt sees is that instead of using the prosecution strategy to charge one large-scale joint enterprise, liability could instead be engaged for those who participate in separate but linked JCEs, which run in tandem with each other.[741] According to her,

> [w]hile the Appeals Chamber accepts that JCE liability may attach to those participating in large scale criminal enterprises, the 'interlinked JCE' seems to be the preferred theory in cases such as *Brdjanin*, with policy makers on one hand and executors or foot soldiers on the other hand.[742]

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[738] Gustafson, 'The Requirement for an Express Agreement for Joint Criminal Enterprise Liability: A Critique of Brdjanin' (n 659) 145.
[739] *Tadić* Appeal (n 78) para 215 referring to D' Ottavio Court of Cassation 12 March 1947.
[740] E van Sliedregt, 'System Criminality at the ICTY' in H van der Wilt and A Nollkaemper (eds), *System Criminality in International Law* (Cambridge University Press 2009) 195.
[741] Ibid 197.
[742] Ibid 195.

Thus, if knowledge can be imputed to at least one member in each enterprise, then there is a link in the overall chain of causation. So emerging from this are separate JCEs in which there are different members. The non-members of one are linked to the other through a common denominator, which is the overall policy approach by the State that supports the commission of the crimes.

If this idea of separate but linked JCEs is taken to its logical conclusion, it is a viable tool to address system-wide criminal enterprises which incorporate a variety of actors and thus usefully suggest an approach through which the conduct of all individuals engaging in the crime could be seen as being attributable to the State because the paramilitary groups are in reality acting on behalf of the State by giving effect to its policies or plans. This creates control over the operations in which the crimes occur because the crimes of apparently disconnected groups in apparently separate JCEs are really all committed in obedience to the State, as they effect the underlying criminal policy or plan. The jurisprudence of the ICC has not utilised this mode of responsibility and instead have applied the doctrine of co-perpetration. The use of co-perpetration was discussed by Judge Schomburg in *Stakić*[743] and *Gacumbitsi.*[744] It never took root in the *ad hoc* jurisprudence but has been identified as a mode of liability in several indictments from the ICC. These two Decisions and their relevance to these stated conclusions are discussed in section 5.5.

5.4.2 JCE 2 – Inference of intention from knowledge of the common plan

The second category of JCE (JCE 2) builds on the elements of JCE 1, so that in addition to requiring proof of a shared intent for the crime, there must be further evidence that the Accused had personal knowledge of the "system of ill treatment"[745] as well as an intention to further a criminal purpose.[746] In the next sections the approach used by the Appeals Chamber in assigning responsibility under this mode

[743] *Stakić* (Trial Judgment) (n 83) paras 438-441.
[744] *Sylvestre Gacumbitsi v The Prosecutor* (Appeal Judgment) (n 87) paras 17, 21 and 46.
[745] *Tadić* Appeal (n 78) para 228.
[746] *Krnojelac* (Appeal Judgment) (n 81) paras 89, 94, 96.

is discussed by revisiting the *Tadić* Appeal Decision and two further cases that applied the mode.

5.4.2.1 The Tadić Appeal

According to the *Tadić* Appeals Chamber, in order to prove the subjective elements of this mode, firstly, the Accused must have personal knowledge of the nature of the system and secondly, the Accused must be shown to intend to further the common concerted design for ill treatment.[747] Both requirements could be inferred automatically based on the rank or official position of the Accused and this would show the "common design and the intent to participate therein."[748] The identification of these principles were based on two selected cases decided by the Nuremberg Tribunals established under Control Council Law No. 10.[749] The reference to the term 'system' by the ICTY[750] was not in relation to large-scale systems of actors, but more to the fact that there was a defined system for the perpetration of crimes. The Tribunal referred to the *Dachau Concentration Camp* case[751] and *Belsen*,[752] both of which dealt with trials of German authorities for offences committed in concentration camps. In both these cases, the accused men were found guilty for specific instances of ill treatment of the detainees as well as killing in the concentration camps. Under this head, participation and intent to participate in the criminal acts were automatically inferred based on the rank and position of the accused men within the camps. The Appeals Tribunal did not expand further as to the application of this approach. There are limited examples of the application of JCE 2, but two of these are discussed below.

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[747] *Tadić* Appeal (n 78) para 203.
[748] Ibid.
[749] Ibid para 202.
[750] Ibid.
[751] *The Dachau Case* (*United States Military Court v Gottfried Weiss et al*) Judgment of 15 November - 13 December 1945, Vol. XI, Law Reports of the United Nations War Crimes Commission selected and prepared by the United Nations War Crimes Commission, London, 1949 (His Majesty's Stationary Office 1949).
[752] *The Belsen Trial* (*British Military Court v Josef Kramer et al*) Judgment of 17 September – 17 November, 1945, Vol. II, Law Reports of the United Nations War Crimes Commission selected and prepared by the United Nations War Crimes Commission, London, 1949 (His Majesty's Stationary Office 1947).

5.4.2.2 The Kvočka Appeal

The *Kvočka*[753] and *Kronjelac*[754] Appeal Chambers' Decisions provide further interpretation of how these two elements are to be interpreted and applied.[755]

Kvočka was charged together with several other guards from the Omarska camp. These camps were established after the Serbian takeover of Prijedor in 1992 to detain individuals in opposition to the takeover.[756] He was described by the Appeal Chamber as the functional equivalent of the Deputy Commander and had some degree of authority over the guards at the Omarska camp.[757] He made limited attempts to prevent crime or alleviate suffering of the detainees at the hands of service guards at the camp.[758] Furthermore, he played a crucial role in "maintaining the functioning of the camp" despite his obvious awareness that the camp was a "criminal endeavour."[759]

Despite Kvočka's claims that he was not aware of the criminal activities at the camp, the Appeals Chamber found differently. To the Chamber, the conditions at the camp, including the widespread ill treatment and harsh detention conditions, would have been obvious to anyone working at the camp, even for a few hours.[760] This was even more so in the case of Kvočka who was in a position of authority at the camp.[761] The Appeals Chamber found that the requirement that the accused person be aware of the criminal objectives of the system was met.[762]

In discussing the ratio for finding Kvočka responsible at the Omarska camp, the Trial Chamber found that Kvočka opted to work at the camps and was in a position of authority over other guards committing acts of abuse against the

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[753] *Kvočka et al* (Appeal Judgment) (n 80).
[754] *Krnojelac* (Appeal Judgment) (n 81).
[755] Boas, *International Criminal Law Practitioner Vol.1 – Forms of Responsibility in International Criminal Law* (n 668) 57.
[756] *Kvočka et al* (Appeal Judgment) (n 80) para 2.
[757] Ibid para 3.
[758] Ibid.
[759] Ibid para 3.
[760] Ibid para 203.
[761] Ibid.
[762] Ibid.

detainees[763] and would regularly have received information regarding this abuse.[764] Moreover, he had the power to prevent the crimes and did so only on a few occasions, and to the contrary maintained functioning of the system.[765] Thus not only was there knowledge of the criminal system but an active participation in fulfilling it.[766] The Appeals Chamber upheld these finding and endorsed proof of these two factors that were relied on by the Trials Chamber in determining this mode of responsibility.[767] There was further elaboration of these tests in the later *Kronjelac* Appeals Chamber Decision.

5.4.2.3 Kronjelac Appeal

Kronjelac was a commander at the KP Dom concentration camp. He was alleged to have participated in a common criminal purpose for the persecution and ill treatment of Muslim and non-Serb detainees at the camp.[768] This case further discussed the extent to which an accused person under this mode can be held responsible on the basis of inference of a shared intent with members of the system, where those other members went on to commit crimes of specific intent.

According to the Trial Chamber, Kronjelac could not be found liable under this mode because there was no evidence that he entered into an agreement with other members of the camp[769]to abuse the detainees and thus lacked the intent to commit the particular crime charged.[770] Further, since it could not be proven that he shared an intention with these other employees to further the criminal purpose because he did not enter into an agreement with them,[771] he could not be found

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[763] *Prosecutor v Miroslav Kvočka et al* (Trial Judgment) IT-98-30/1-T, ICTY, 2 November 2001 paras 356, 399-400.
[764] Ibid.
[765] Ibid para 414.
[766] Ibid.
[767] *Kvočka et al* (Appeal Judgment) (n 80) para 243.
[768] *Krnojelac* (Appeal Judgment) (n 81) para 1.
[769] *Prosecutor v Milorad Krnojelac* (Trial Judgment) IT-97-25-T, ICTY, 15 March 2002 paras 170, 487.
[770] Ibid.
[771].Ibid.

responsible under JCE 2 and instead was convicted under the lower mode of aiding and abetting.[772]

The Appeals Chamber overturned this and reinstated convictions for JCE,[773] finding that his knowledge of the system in place was sufficient to infer his intention to participate in the crimes committed as part of that system.[774] On the question of whether the second element was proved, the Appeals Chamber found that there was no express requirement to prove that Kronjelac had entered into any agreement with his subordinates. According to the Appeals Chamber,

> the intent of the participants other than the principal offenders presupposes personal knowledge of the system of ill-treatment (whether proven by express testimony or a matter of reasonable inference from the accused's position of authority) and the intent to further the concerted system of ill-treatment. Using these criteria, it is less important to prove that there was a more or less formal agreement between all the participants than to prove their involvement in the system…[775]

According to the Appeals Chamber, what was important was that the Accused simply intended to further this system of ill treatment and this could be established by the inference of intent from the facts, namely "Kronjelac's duties, his knowledge of the system in place, the crimes committed as part of that system and their discriminatory nature…"[776]

Unlike JCE 1 with a requirement to prove a shared intention, in this system- or group-based category where there was an organised structure within the group, all that was relevant was that within that group the Accused demonstrated the will to further the common approach towards ill treatment.

Similar to Kvočka therefore, the assigning of criminal responsibility was upheld simply on the basis of an inference of intention to participate in the crimes of other camp employees, simply by virtue of a high position in a defined system that

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[772] Ibid.
[773] *Krnojelac* (Appeal Judgment) (n 81) para 112-113.
[774] Ibid 111.
[775] Ibid para 94.
[776] Ibid para 111.

was routinely effecting international crimes. This shared intention however was not based on an act of control by the State agent in the system but his acquiescence.

5.4.2.4 Discussion

Of all the categories of JCE applied by the *ad hoc* tribunals, JCE 2 has been applied most limitedly. As a mode of responsibility it draws most heavily on the Nuremberg ideas of imputations of intent resulting from association in an organisation. While the mode did not resort to the assigning of responsibility on the basis of responsibility as member, the manner in which the tests for intention have been applied, by referring heavily on presumptions of knowledge and consequent inferences of intent, make the mode less suited for the proposed modifications to tests of attribution of conduct by the ICJ.

While it may be possible to assign responsibility in this automatic manner in a confined system as a concentration camp, it will be overreaching to suggest its usefulness to large-scale enterprises. The mode has been applied only with reference to these concentration camp type situations.

Of the three strains, the way in which JCE 2 inferred intention, on the basis of acquiescence or failure to prevent crimes of subordinates, is not immediately useful, in suggesting a parallel approach towards the determination of direction or control. This is because the State responsibility regime views duties to prevent or punish under primary obligations. Thus to suggest an approach that merges the two might conflate the distinction between primary and secondary rules. Where it can have potential to suggest meaningful approaches is to the extent that one State agent was aware of the system of criminality that was either ongoing in another State which he was supporting or in armed groups under his patronage or that of the State he was supporting.

According to the test clarified in *Kvočka,* personal knowledge of the system of ill treatment inculpates an Accused, so that even if at the outset, the criminal

activities within the system are not proven, once there is an awareness later on that is sufficient to consider intention.[777] For reasons discussed above, this approach might not be immediately useful as with this mode there were defined power structures and lines of command thereby assisting with questions of complicity through omission. With the questions of direction and control in the context of the regime of State responsibility under consideration in this thesis, there are not these defined lines of command so the inference of knowledge in a structured systemic environment might be an overreaching of the suggestions for subtle variations to the current tests of attribution.

An interesting possible application of JCE 2 outside of the concentration camp situation was in one of the Decisions, *Prosecutor v Jose Cardoso Ferreira*,[778] coming out of East Timor's Special Panels for Serious Crimes.[779] Section 14.3(a) of this instrument mirrors Article 25 of the Rome Statute. The Panel applied JCE under this mode of liability, reading it as the "mode of participation envisaged in section 14(a)."[780] The Accused was a member of the Kaer Mutin Meran Putih militia and, though not a commander, he participated in several acts of ill treatment on the basis of political affiliations and consequently, was charged with several counts of crimes against humanity.[781] The case thus suggests that the concept also works within non-State structures.

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[777] Ibid.
[778] *Prosecutor v Jose Cardoso Ferreira* Case No. 4/2001, Judgment, 5 April 2013.
[779] The East Timor's Special Panels for Serious Crimes was created pursuant the United Nations Transitional Administration in East Timor. The Tribunal was "established The Special Panel was established within the Dili District Court, pursuant to Section 10 of UNTAET Regulation no. 2000/11 as amended by 2001/25, in order to exercise jurisdiction with respect to the following serious criminal offences: genocide, war crimes, crimes against humanity, murder, sexual offences and torture, as specified in Sections 4 to 9 of 2000/15." It was created to try atrocities committed pursuant to the scale of violence and commission of international crimes that ensued after a UN referendum saw a vote for Timorese independence. The pro-Indonesian militias sympathetic to the Indonesian occupation since 1975 killed over 2,000 Timorese supporters and caused over half a million to flee their homes. For more on this see 'Ad-Hoc Court for East Timor' (Global Policy Forum) <www.globalpolicy.org/international-justice/international-criminal-tribunals-and-special-courts/adhoc-court-for-east-timor.html> [accessed 15 July 2016].
[780] *Jose Cardoso Ferreira* (n 778) para 367.
[781] Ibid para 4.

Admittedly, Boas has noted that nowhere in the Decision is distinction among the different forms of participation made. Nevertheless, in its findings, the Panel treated the Kaer Mutin Meran Putih as a discrete organisation in which the Accused was a member and one of the bases of the conviction was that the Accused shared in the common intention to arrest and detain victims.[782] Although the arrests and detentions were random and not (as with the ICTY cases) in a concentration camp, there was still an organised approach towards them. The detainees were either taken to Koramil,[783]the sub-district territorial defence command, kept in their own homes[784] or taken to fields or forests[785] and detained and ill treated there. This may have influenced the Court's broad reasoning. This suggests that JCE 2 could be applicable in these circumstances as well since a paramilitary operation, could be likened to a systemic operation.

However, even here there is a formal line of command in place through which the inferences can be made and the crimes may occur in obedience to the organisation as opposed to the wider State policies and thus it may be that a modification in the approach towards how control can be assessed will need to look beyond this category.

5.4.3 JCE 3 – Inference of intention where crimes are foreseeable

Under JCE 3 an Accused is responsible on the basis that he participated in a common design to pursue one course of conduct where one of the perpetrators commits an act, which while outside the common design, was nevertheless a natural and foreseeable consequence of effecting that common purpose."[786] This has been seen as an extended form of JCE that considers an individual equally responsible for crimes considered in excess of collateral to the initially planned.[787] Once again the category was identified in the *Tadić* Appeal Decision and thereafter consistently

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[782] Ibid para 374.
[783] Ibid paras 55, 59.
[784] Ibid para 56.
[785] Ibid para 57.
[786] *Tadić* Appeal (n 78) para 204.
[787] *R v Powell*; *R v English* (n 666).

applied in the jurisprudence of both *ad hoc* tribunals. Tadić is once more revisited along with two selected cases that address how the test of reasonable foreseeability can be applied. In this regard, although there is a considerable number of cases that have applied this mode across the two *ad hoc* and internationalised tribunals, there are few Decisions that have considered the question of how reasonable foreseeability is to be assessed and thus those Decisions have been selected for particular examination in the next sections.

5.4.3.1 The Tadić Appeal

The Appeals Chamber in *Tadić* found that criminal responsibility "may be imputed to all participants within the common enterprise where the [crime] was both a predictable consequence of the execution of the common design and the Accused was either reckless or indifferent to that risk."[788] In justifying the customary nature of this mode, the *Tadić* Appeals Chamber relied on the *Essen Lynching* case[789] that was heard in a British military court and the *Kurt Goebell (Borkum Island)* case[790] which was heard before a US military court. Both cases involved the killing of prisoners under military guard by mobs as they were marched in the street. In finding that the escorts and the charged civilians were criminally responsible for the deaths, the Court in both of those instances found these men guilty of murder because they "were all concerned with the killing".[791] Marching prisoners of war through the streets and not intervening to prevent attacks connected these guards to the crime as they became concerned in the killing. Moreover, marching them in the streets was an unlawful act, from which this consequence of the mob attacks was obvious.

In considering the applicability of these early cases, the *Tadić* Appeals Chamber found of the Accused that "not all of them intended to kill but all intended to participate in the unlawful ill treatment of the prisoners of war."[792] Thus on that

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[788] *Tadić* Appeal (n 78) para 204.
[789] Ibid para 207.
[790] Ibid para 210.
[791] Ibid para 209.
[792] Ibid.

basis it was reasonable hold them "morally and criminally responsible for the deaths,"[793] although they did not complete the *actus reus* of the offence.

The Tribunal further applied an objective assessment of the tests of foreseeability. In examining early jurisprudence coming out of Nuremberg, the Chamber noted that in *D'Ottavio et al*[794] the Court of Cassation held that on similar facts relating to death resulting from the action of a group member not specifically contemplated between the members, that they were all responsible. The Appeals Chamber in *Tadić* building on this, opined that

> for there to be a relationship of material causality between the crime, willed by one of the participants and the different crimes committed by another, it is necessary that the latter crime should constitute the logical and predictable development of the former.[795]

In other words, it was virtually certain to have occurred based on the whole of the evidence against the Accused as objectively assessed.[796] To elaborate, in assessing the extent to which this extended version of JCE can be applied, it must be virtually certain that the criminal outcome was predictable.[797]

However, the test also incorporated a subjective element. Inherent in the participation in an act that will logically and predictably terminate in another crime is risk taking. The concurrent application of both objective and subjective standards when approaching the issue of risk sharing became an issue in the later jurisprudence. *Tadić* and the later cases suggest that the foreseeability requirement

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[793] Ibid.
[794] Ibid para 212.
[795] Ibid para 218.
[796] This reasoning appears in UK Common Law. The principle was discussed in UK law *R v Woolin* [1999] AC 2, under this principle the *mens rea* for murder is made out if an accused embarks on a course of action that will be virtually certain lead to death or serious bodily harm and that the defendant appreciated that consequence, thereby fulfilling the *mens rea* for murder. It has suggested that "extended" forms JCE assess the predictability of a circumstance on the basis that the ensuing crimes were virtually certain.
[797] *Prosecutor v Ruto et al* (Decision on the Confirmation of Charges) (n 89).
Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-01/11-373 paras 335-36; *Prosecutor v Bemba* (Pre-Trial Chamber II) (n 433) paras 360-369.

should be interpreted simultaneously, both objectively and subjectively. According to Boas, *Tadić* suggested both types of foreseeability.[798] He noted that

> [t]aking paragraphs 220 and 228 together, *Tadić* would appear to put forward three additional elements that must be established in order to attribute third category JCE liability on the accused (1) it was foreseeable that a crime other than the one agreed on in the common plan (the deviatory crime) might be perpetrated by one or more of the JCE participants; (2) the accused and everyone else in the group must have been able to predict the deviatory crime would 'most likely' be perpetrated by one or more of the JCE participants; and (3) the accused nevertheless willingly took the risk and participated in the JCE…[799]

Boas further found that the first and second element maintained both the objective and subjective foreseeability tests.[800] The Accused and the rest of his group must have been able to predict the crime and the crime should also have been something a reasonable person in the position of the Accused could have foreseen as well.[801] This apparent requirement that the deviated or collateral crime must have been both objectively and subjectively foreseeable was also applied in *Brdjanin* Trial Judgment[802], the *Vasiljević* Appeals Judgment[803] and the *Krstić* Trial Judgment.[804] Boas notes that the formulation including both objective and subjective assessments of the foreseeability of the crime was confirmed in *Vasiljević*[805] and thereafter that the Vasiljević formulation repeated into several cases across both *ad hoc* tribunals[806] and the hybrid or internationalised tribunals, such as the ECC and SCSL.[807] The

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[798] Boas, *International Criminal Law Practitioner Vol.1 – Forms of Responsibility in International Criminal Law* (n 668) 73.
[799] Ibid 72.
[800] Ibid.
[801] Ibid.
[802] *Prosecutor v Radoslav Brdjanin* (Trial Judgment) IT-99-36-T, ICTY, 1 September 2004.
[803] *Prosecutor v Mitar Vasiljević* (Appeal Judgment) IT-98-32-A, ICTY, 25 February 2004.
[804] *Krstić* (Trial Chamber) (n 5) para 613.
[805] *Prosecutor v Mitar Vasiljević* (Trial Judgment) IT-98-32-T, ICTY, 29 November 2002 para 63.
[806] *Vasiljević* (Appeal Judgment) (n 803); *The Prosecutor v Elizaphan and Gérard Ntakirutimana* (Appeal Judgment) ICTR-96-10-A & ICTR-96-17-A, 13 December 2004; *Prosecutor v Slobodan Milošević* (Indictment) IT-02-54-T, ICTY 22 November 2002.
[807] *Prosecutor v Charles Ghankay Taylor*, SCSL-03-1-T, SCSL, 18 May 2012; *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao (the RUF accused)* (Appeal Judgment) SCSL-04-15-A, SCSL, 26 October 2009. In each of these cases the accused were charged under JCE 1 and JCE 3 under the Statute of the SCSL. These judgments were not used as separate case studies as the

formulation was that the crime was a natural and foreseeable consequence of the execution of that enterprise and that the Accused was aware of that consequence but nevertheless participated in the enterprise.[808] In the later *Krstić* Decision there was an even further consideration of the degree of risk that was considered to be sufficient to inculpate accused persons.

5.4.3.2 The Krstić Appeal Decision

Krstić was the Chief of Staff and later the Commander of the Bosnian-Serb Army.[809] He was Commander during the Srebrenica massacre and was alleged to have committed genocide, crimes against humanity and violations to the humanitarian law.[810] Although JCE was not specifically pleaded on the Indictment, the Trial Chamber found that there was sufficient notice of it as the Prosecution had alleged he acted in concert with others.[811] He was found responsible on the basis that those acts were foreseeable from his involvement in the plans to separate enclaves in Srebrenica,[812] despite his defence that as a career officer he was duly cautious and ensured observance that the Geneva Conventions humanitarian protections were in place.[813] He was nevertheless found to have been responsible on the basis of JCE 3 because the crimes with which he was charged were a natural and foreseeable consequence. This conviction was upheld on Appeal. The Appeals Chamber found that in cases where it must be determined whether an Accused is to be responsible for acts that are a natural and foreseeable consequence, there is no need to show that he "was aware that those other acts would have occurred."[814] All that was necessary was that it be shown that when the Accused participated in the enterprise, it was probable that the collateral crimes would result.[815] This formulation that relied on

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findings largely repeat the decisions of the ICTY. See Boas, *International Criminal Law Practitioner Vol.1 – Forms of Responsibility in International Criminal Law* (n 668) 131-132 who confirms this.
[808] *Vasiljević* (Trial Judgment) (n 805) para 73.
[809] *Krstić* (Trial Chamber) (n 5) para 3.
[810] Ibid.
[811] Ibid para 602.
[812] Ibid para 302.
[813] Ibid.
[814] Ibid para 150.
[815] *Krstić* (Appeal) (n 82) para 150.

probability of occurrence was also applied in the *Vasiljević* Trial Chamber Decision[816] and has been consistently applied in the range of jurisprudence applied at the *ad hoc* tribunals and the internationalised tribunals who have charged on the basis of this extended version of JCE 3.[817]

On this basis therefore, if there was an agreed forcible transfer as, for instance, in *Krstić,* and this resulted in murders, beatings and abuses at the detention area, these were "the foreseeable consequences of the ethnic cleansing campaign."[818] Additionally, if there was a plan for forcible transfers and this later resulted in acts of genocide being committed, then that would as well mean that the accused person would be criminally responsible for the acts of genocide as well under this mode of responsibility.

This has been questioned in the later cases with some finding that reliance on this mode led to a "dilution of the genocidal intent in the *ad hoc* Tribunals' jurisprudence."[819] In the *Stakić* Trial Chamber Decision,[820] this was further discussed.

5.4.3.3 The Stakić Trial Chamber

The case concerned charges of crimes ranging from genocide to extermination and to destruction of places of worship against Dr. Molimir Stakić.[821] Stakić had been elected to the Prijedor Municipal Assembly and eventually

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[816] *Vasiljević* (Trial Judgment) (n 805) para 63.
[817] *Vasiljević* (Appeal Judgment) (n 803); *The Prosecutor v Elizaphan and Gérard Ntakirutimana* (Appeal Judgment) ICTR-96-10-A & ICTR-96-17-A, 13 December 2004; *The Prosecutor v Elizaphan and Gérard Ntakirutimana* (Appeal Judgment) ICTR-96-10-A & ICTR-96-17-A (n 806); *Milošević* (Indictment) (n 806). *Prosecutor v Charles Ghankay Taylor* (n 807); *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao (the RUF accused)* (Appeal Judgment) (n 807). In each of these cases the accused were charged under JCE 1 and JCE 3 under the Statute of the SCSL. The judgments do not add to the discussion as the findings largely repeat the decisions of the ICTY. See Boas, *International Criminal Law Practitioner Vol.1 – Forms of Responsibility in International Criminal Law* (n 668) 131-132 who confirms this. *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao (the RUF accused)* (Trial Judgment) SCSL-04-15-T, SCSL, 2 March 2009.
[818] *Krstić* (Trial Chamber) (n 5) para 616.
[819] R Henham and P Behrens (eds), *The Criminal Law of Genocide – International, Comparative and Contextual Aspects* (Ashgate 2007) 104.
[820] *Stakić* (Trial Judgment) (n 83).
[821] Ibid para 5.

nominated as the Vice President of the Serbian Democratic Party ("SDS").[822] In that capacity, it was alleged that he had planned, together with Karadžić and other members of the Bosnian-Serb leadership, for the forcible removal of non-Serbian individuals from certain defined areas. The relevant acts in question had been materially committed by members of various Bosnian-Serb paramilitary groups.

Stakić was acquitted of genocide.[823] The *Stakić* Tribunal Chamber opined that "according to the applicable law for genocide, the concept of genocide as a natural and foreseeable consequence, does not suffice."[824]

In its Decision at the Trial, the Chamber could not reconcile the *dolus specialis* required to prove genocide with this mode of liability. It was not convinced that it could convict an Accused for a crime requiring this special intent, on the basis that the Accused could foresee or logically predict as a consequence to the plan for creating a unified Serbian State through destruction of particular groups.[825] Moreover, it found that the intention to displace a group is not the same as the intention to destroy it.[826] Thus, according to the Trial Chamber, while the killing that resulted from the broader framework of activities from the SDS and the Autonomous Region of Krajina concerning the separation of States, there was insufficient evidence of his personal intention to destroy the Muslim group.[827]

The *Stakić* Appeals Chamber applied the earlier precedent and confirmed that in the *Brjdanin* Decision on Interlocutory Appeal, the Appeals Chamber confirmed that once an Accused entered into a joint criminal enterprise with an awareness that additional crimes would occur, that was sufficient.[828] Additionally, bearing in mind that the mode of responsibility is to be proven separately to the offence, the consideration of intent while considering the mode is unnecessary.

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[822] *Stakić* (Trial Judgment) (n 83).
[823] Ibid para 561.
[824] Ibid para 558.
[825] Ibid para 547.
[826] Ibid para 554.
[827] Ibid.
[828] *Brdjanin* (Decision on Interlocutory Appeal) (n 79) para 5.

The issue that arises then is to what extent this category of JCE can usefully provide suggested proposals that can be applied to modifications to the current tests of attribution of conduct of individuals to States and overall what suggestions arise from this mode of responsibility in its entirety?

5.4.3.3 Discussion

There are three main concerns that are relevant in answering this question of applications from JCE to the tests of attribution: firstly, the extent to which application of both objective and subjective tests and their relationship to the assigning of responsibility on assessments of risk create uncertainty in the law, secondly whether it is indefensible to suggest borrowing approaches towards assigning of responsibility from a mode of responsibility that imputes criminal intention to all accused persons even where they have been charged with crimes of special intent and lastly, whether this category is too unwieldy to offer any meaningful suggestions to an already settled test in international law, which for all its limitations is stable in law.

Firstly, in this mode intention was not predicated on pre-meditation but was based on recklessness; either the Accused foresaw the risk and continued with his action or he was indifferent to it. In both cases the assigning of responsibility under this category was based on an appreciation of risk.[829]The formulation of this category and this "risk" assessment dimension was not new, but had some precedent in international criminal law from the early jurisprudence coming out of the Nuremberg Tribunals, where the early Decisions set out a pair of requirements. They were "a criminal intention to participate in a common design and the foreseeability that criminal acts other than those envisaged in the common criminal design are likely to be committed by other participants in the common design."[830]

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[829] M Summers, 'The Problem of Risk in International Law' (2014) 13(4) *Washington University Global Studies Law Review* 667, 681-682.
[830] *Tadić* Appeal (n 78) para 206.

There is the fear that deciding cases on the basis of risk assessment is dangerous because it has the potential to introduce confusion into legal approaches. This is so particularly when assessments start to evaluate esoteric points such as probabilities and possibilities as these cases have done. However, despite the reasonableness of these fears, there are safeguards that prevent perverse interpretations. These have been usefully identified by the different Chambers in the cases selected for discussion and have been implemented across the corpus of cases that have applied this category. One safeguard is that there is a double barrelled approach towards assessment of whether participation in the plan would logically and predictably terminate in further crimes being committed. In devising both objective and subjective assessments of the question of foreseeability, the risk is evaluated within clear guidelines that consider both the information that was available to the Accused at the time he decided to participate in the initial plan and also the information that would have put a reasonable and objective individual on notice that a collateral crime could occur. There is an even further safeguard as the question of logical foreseeability has to be virtually certain and there must be no competing inferences.[831] This being so the question of foreseeability was not one of chance but of a considered assessment of the situation.

If this assessment is applied in the situations where State agents embark on relationships with armed groups and supply their needs from the point of view of military, administrative and weapons supply, the question to be asked on a case-by-case basis is whether on that initial agreement it was foreseeable that the armed groups operating in the social or military context as they were would go further to commit international crimes. The further issue from this is whether the provision of aid in particular circumstances where there is every likelihood that an armed group will commit offences is sufficient to imply that there was a relationship of control

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[831] *R v Woolin* (n 796); as applied in the international criminal jurisprudence Pre-Trial Chamber II, *Prosecutor v Ruto et al* Decision on the Confirmation of Charges.
Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-01/11-373 paras 335-36; *Prosecutor v Bemba* (Pre-Trial Chamber II) (n 433) paras 360-369.

between the armed group and the State because the State was the entity controlling the armed group's ability to complete the crime.

Inherent in the notion of control is the concept of direction and there are circumstances where provision of support in different fields suggests that the armed group is being directed in terms of implicit directions being offered to them to complete their conquest. In cases where the State maintained relationships with groups in volatile situations, it can be evidenced that the State is in control as in continuing to support that group, it exercised effective control over any operation in which international crimes occurred because the international crimes were logically predictable. The State through its agents controlled the execution of the crimes by the members of the armed groups by giving them the means and the impetus to complete the physical aspects of the crime. The decisions of the armed groups were steered by the supporting State. It therefore follows that there is effective control in these circumstances and it is reasonable to attribute the conduct of individuals to the State in these circumstances.

Secondly, the modes of responsibility are always separately proved from the substantive crime. According to van Sliedregt, JCE 3 is a form of derivative liability and as such it is "no different to any other form of criminal participation" and thus it does not require full proof of the crime.[832] According to her, to suggest that charging JCE 3 has the effect of watering down the *dolus specialis* for genocide is unmerited.[833] Her view is supported in the jurisprudence as in the *Brdjanin* Appeal judgment, Justice Shahabudeen noted that

> [t]he third category of Tadić does not, because it cannot, vary the elements of the crime; it is not directed to the elements of the crime; it leaves them untouched. The requirement that the accused be shown to have possessed a specific intent to commit genocide is an element of that crime. The result is

[832] E van Sliedregt, 'JCE as a Pathway for Convicting for Genocide' (2007) 5(1) *Journal of International Criminal Justice* 184, 203.
[833] Ibid.

> that that specific intent always has to be shown; if it is not shown, the case has to be dismissed…[834]

Thus there is no reason to dismiss the approaches for determining responsibility because of the nature of particular crimes. The assigning of responsibility is a distinct process. Since this is so, an examination of the suggested improvements to the current tests of control are thus not out of place as the focus is on method of assessment.

Thirdly, this category has been criticised for being unwieldy and over-expansive,[835] but this betrays a level of unwarranted panic. It is important to note that the methodology towards the assigning of the responsibility is well structured so that it is clear how the connection of the Accused to the crime was made and whether the proof of the objective and subjective elements were clear. This would prevent fears by some writers that the mode is being manipulated to fit to the facts instead of being a "pure product of the law."[836] It has been criticised on the basis that the principle has no customary base, that it violates the *nullem crimen* principles, and most States now approach similar issues on the basis of co-perpetration.[837] While co-perpetration is a valid tool for assessing and assigning responsibility, it does not mean that this approach is as flawed as some have made it out to be. At the end of the day what is critical is that the mode of responsibility is clearly and logically applied.

According to Cassese, much of the fear about the doctrine has never materialised and in addition, as the doctrine it served a valuable policy purpose.[838] According to him, the concept is crucial in international criminal law, even more

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[834] *Brdjanin* (Decision on Interlocutory Appeal) (n 79) Dissenting Opinion of Judge Shahabuddeen paras 4-5.
[835] ME Badar, 'Just Convict Everyone – From Tadić to Stakić and Back Again' (2006) 6 *International Criminal Law Review* 293, 302.
[836] M Karnavas, 'Is Emerging Jurisprudence on Complicity in Genocide before the International *ad hoc* Tribunals a Moving Target in Conflict with the Principle of Legality?' in R Henham and P Behrens (eds), *The Criminal Law of Genocide – International, Comparative and Contextual Aspects* (Ashgate 2007) 110.
[837] The Extraordinary Chamber Cambodia Case 002 Defence Submission in Intervention or Amicus Curiae Brief on JCE III Applicability Case no.002/19-09-2007-ECCC/SC.
[838] A Cassese, 'The Proper Limits of Individual Responsibility under the Doctrine of JCE' (2007) 5(1) *Journal of International Criminal Justice* 109, 133.

than in its domestic ancestors because international crimes are "perpetrated by groups of individuals, military details, paramilitary units or government officials acting in unison or in pursuance of a policy."[839] If the debates over structural remoteness have been conceded and it is accepted that participatory responsibility of this nature depends not on the connection to the individual, but to the crime, then fears of overreaching are misplaced as a careful approach to working out the means by which the Accused was connected to the crime is at the end of the day what is important.

The van Sliedregt model of looking at the different JCEs committed by paramilitary groups, and government officials and determining the ways in which they interact provides a way forwards.[840] This will no doubt be an invaluable tool in working out the modalities of commission when examining responsibility for mass atrocities. In addition to this are the modes of responsibility based on perpetration, which expressly view the participation in a common plan as "functional domination."[841]

5.5 Perpetration

Perpetration as a mode of responsibility entered into international criminal jurisprudence with the Decision from the Trial Chamber at the ICTY in the case against Molomir Stakić.[842] The case to some has been described as being innovative, as it marks a turning point in the Trial Chambers' search to look for new sources of law outside those explored by the ICTY.[843] Although its application was later rejected on Appeal at the ICTY[844], this mode of participation has overtaken JCE in the jurisprudence of the ICC as the cases that have come out of that Court have relied

[839] Ibid 110.
[840] van Sliedregt, 'JCE as a Pathway for Convicting for Genocide' (n 832).
[841] Further discussed in section 5.5.1.
[842] *Stakić* (Trial Judgment) (n 83) paras 438-441.
[843] J Ohlin, 'The Co-perpetrator Model of Joint Enterprise' (2008) Cornell University Faculty Publications paper 775 <http://scholarship.law.cornell.edu/facpub/775> 739.
[844] *Prosecutor v Milomir Stakić* (Appeal Judgment) IT-97-24-A, ICTY, 22 March 2006 paras 59-62.

substantially on this mode of participation to assign criminal responsibility as opposed to JCE.[845]

Perpetration in the form that it is being applied at the ICC is based on the application of German law identified in section 25 of the German Criminal Code, the *Strafgesetzbuch*.[846] Article 25 states that

> (1) Any person who commits the offence himself or through another shall be liable as a principal.
>
> (2) If more than one person commit the offence jointly, each shall be liable as a principal (joint principals).[847]

Article 25 itself is the product of the 1975 reformulation by the *Bundesgerichtschof* of the law that was based on Roxin's 1965 theory of perpetratorship.[848] It identifies three forms of perpetration: direct, co-perpetration and indirect perpetration.[849] Article 25(3)(a) ICC Statute has incorporated all of the provisions of Article 25 of the *Strafgesetzbuch*,[850] and as Judge Van den Wyngaert noted the jurisprudence of the ICC has further introduced a combined version "indirect co-perpetration." Consequently both the jurisprudence coming out of the ICC as well as academic commentary describing the methods of assigning criminal responsibility under this

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[845] This has been identified in the commentary T Weigend, 'Intent, Mistake of Law and Co-perpetration in the Lubanga Decision on Confirmation of Charges' (2008) 6(3) *J Int Crim Justice* 471; T Liflander, 'The Lubanga Judgement at the ICC: More Than Just the First Step?' (2012) 1(1) *Cambridge Journal of International and Comparative Law* 191; A Eser, 'Individual Criminal Responsibility' in A Cassese, P Gaeta, and JRWD Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*. Vol. 1. (Oxford University Press 2002).

[846] There have been criticisms of this grafting of domestic law onto the modes of responsibility identified at Article 25 ICC Statute (n 60). In the main are the Dissenting Opinion of Judge Fulford in *Prosecutor v Lubanga et al* (n 86) and the Concurring Opinion of Judge Van Den Wyangaert in *Prosecutor v Chui* (n 88).

[847] Section 25 The German Criminal Code, the *Strafgesetzbuch* available online at <https://www.gesetze-im-internet.de/englisch_stgb/> English translation authorised by the Federal Ministry of Justice.

[848] G Wehrle and T Weigend, 'Claus Roxin on Crimes as Part of Organised Power Structures' (2011) 9 *Journal of International Criminal Justice* 191, 193.

[849] N Jain, 'The Control Theory of Perpetration in International Criminal Law' (2011-2012) 12 *Chicago Journal of International Law* 159, 166.

[850] Article 25(3)(a) ICC Statute (n 60) provides that:
In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible.

mode draws heavily on German case law. Since discussion in the *Stakić* Trial Chamber Decision[851] focussed on the "control over the crime" theory that was "systematized through the scholarship of Claus Roxin,"[852] and since the scholarship was instrumental in the formulation of the current German law, Roxin's imprimatur has impacted on the formulation of different legal tests with which to label the responsibility for participation in international crimes by those high-level actors that have been indicted. Co-perpetration and indirect perpetration are distinct and they have been separately applied by the Office of the Prosecution at the ICC in their charging appropriate modes of liability on the indictments. However, sometimes there has been an undifferentiated treatment between the two strains or categories of perpetration in the jurisprudence. Additionally, beyond the ICC, these doctrines have also been applied in domestic German law, and as well some authors have noted their application in Spain and Latin America where international crimes are being prosecuted domestically.[853] These applications are discussed in the next sections.

5.5.1 Co-perpetration

Co-perpetration has been succinctly defined as "the joint commission of a criminal act through a knowing and willing working together of the individual participants."[854] According to Jain, it has two requirements. Firstly, there is an objective requirement that there must have been the execution of a criminal act collectively and secondly, there is the subjective element that there must have been a common plan.[855] As functional domination, it presupposes the existence of a common plan to which all participants agree.[856] However, this imports a reckless standard to assessing whether the accused person was aware that there was a

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[851] *Stakić* (Trial Judgment) (n 83) paras 438-441.
[852] Jain, 'The Control Theory of Perpetration in International Criminal Law' (n 849) 165.
[853] F Munoz-Conde, 'The Application of the Notion of Indirect Perpetration through Organized Structures of Power in Latin America and Spain' (2011) 9(1) *Journal of International Criminal Justice* 113.
[854] Jain, 'The Control Theory of Perpetration in International Criminal Law' (n 849) 167.
[855] Ibid.
[856] Ibid 171.

"substantial likelihood that crimes would result from cooperation" over the common acts.[857]

The first requirement for the collective execution of the criminal act occurs where each perpetrator has a "functional act domination, of each co-perpetrator which arises from the principle of division of labour and functional role allocation."[858] Secondly, due to this allocation of roles, the criminal act can only be achieved if each role is performed, so that within each role while there is a autonomy or as the German case law terms it "act-domination,"[859] the failure by one co-perpetrator results in the failure of the entire criminal plan,[860] and thus it can be said, that the heart of this mode of participation is that each co-perpetrator "simultaneously controls the total act."[861]

In this way it bears similarity to JCE 1 which was classed as a form of co-perpetration and which also was based on an allocation of roles to achieve a desired common purpose.[862] The formulation of the mode is not without its challenges as there have been arguments by German scholars as to whether an individual who assists at the preparatory stage is actually a co-perpetrator or, on a differentiated theory, should be labelled as something less, ie an accessory.[863] There is a division in the interpretation. There is authority that suggests that even the smallest contribution at the preparation stage is enough to render that contributor a co-perpetrator if it is carried out with the appropriate will.[864] According to the dictum coming out of those

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[857] Ibid 179.
[858] Ibid.
[859] Ibid fn 17 and 32 noting the comments of Ulrich Sieber and Marc Engelhart, General Legal Principles of International Criminal Law on the Criminal Liability of Leaders of Criminal Groups and Networks, Max Planck Institute for Foreign and International Criminal Law 16 (Unpublished Report, 2009) (German) ("MPICC Report"). English abstract of the study available at <www.mpicc.de/en/forschung/forschungsarbeit/strafrecht/participation.html> [accessed 18 July 2016].
[860] Ibid.
[861] Ibid.
[862] See discussion at section 5.4.1.
[863] M Bohlander, *Principles of German Criminal Law* (Hart 2009) 161-162.
[864] Jain, 'The Control Theory of Perpetration in International Criminal Law' (n 849) 167.

courts, simply convincing one person to stab another, was a sufficient level of contribution to render the whole group as co-perpetrators.[865]

Against this, there are also some views whereby, preparatory acts such as a gang leader who suggests a crime but leaves the modalities of commission up to the autonomous choices of the rest of the gang, it may not be enough, but that is question that is decided on assessment of the facts.[866] Michael Bohlander considers that in examining these questions, the challenging issues are resolved on a case-by-case basis on careful examination of the facts.[867] According to him, even though a consideration of the will of the Accused is a subjective matter, it can be objectively assessed by inferring criminal intention from the whole of the facts under analysis.[868] In this way, the question of whether a collective of individuals are co-perpetrators and thus equally liable on the basis of division of roles is a question of fact more than a question of law, as the critical issue is to consider the full significance of the roles in allowing the execution of the final criminal act.

Proof of the second requirement, ie that there was a common plan is also proven by a subjective test. Similar to the common law requirement discussed earlier in the context of JCE, here too, in order to prove this mode of responsibility there must be a common plan. Drawing on the details from the General Legal Principles of International Criminal Law on the Criminal Liability of Leaders of Criminal Groups and Network ("MPICC") report[869], Jain noted that although there must be mutual consent for the "joint realization of the act,"[870] this could be demonstrated at either the beginning or at the time of the act. Moreover, there was no requirement that it had to be "jointly developed," or explicit as such consent could be implied.[871] So too, each of the participants do not need to know each other, it will suffice that they each

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[865] *The Cat King Case* BGHSt 28, 346, 35, 347 in M Bohlander, *Principles of German Criminal Law* 163.
[866] Ibid.
[867] Bohlander, *Principles of German Criminal Law* (n 863) 161-162.
[868] Ibid 163.
[869] MPICC Report (n 859).
[870] Jain, 'The Control Theory of Perpetration in International Criminal Law' (n 849) 170.
[871] Ibid based on MPICC Report (n 859) 31.

focussed on their own roles, but are aware that each other participant is similarly working towards the realisation of the crime.

Unlike Anglo-American law, there is no responsibility for crimes that have been committed in excess or collaterally to the common plan.[872] However, while Anglo-American law perceives criminal acts that occurred during the execution of another crime as an excess, German law does not. Instead, it finds that

> each perpetrator may be given some leeway to act as the situation demands as long as this helps accomplish the common goal. Therefore, deviations from the common plan that are within the range of the relevant acts with which one must normally reckon do not count as an excess…[873]

On that basis therefore, responsibility could be assigned. However, what is required is that this deviation was foreseeable as

> [a] deviation from the original plan during the joint executing action can also be introduced into the agreement by a mutual understanding, which again negates excess.[874]

Seeing as mutual understanding can be inferred and also does not have to be jointly developed, the scope of this mode of participation is particularly suited to situations in which there is collaboration, either express or implied between State agents and paramilitaries or armed groups. Although it is directed at collective criminality as JCE is, the methodology here imputes dominion over the act or control over the act far more easily.

5.5.1.1 The Stakić Trial Decision

The jurisprudence of the *ad hoc* tribunals, starting with the Decision of the ICTY Trial Chamber in the *Stakić* case, is illustrative of the way in which the doctrine of co-perpetration developed and has been applied.

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[872] See discussion on the principle applied in *R v Jogee*; *R v Ruddock* [2016] UKSC 8 replacing the principle in *Chan Wing-Sui v R* (n 666).
[873] MPICC Report (n 859) 32.
[874] Jain, 'The Control Theory of Perpetration in International Criminal Law' (n 849) 170.

In determining whether Stakić was guilty of the crimes charged, the Trial Chamber departed from ICTY precedent and applied co-perpetration as a mode of responsibility.

In this case, Stakić was alleged to have taken a critical role in the takeover of power in the Prijedor area.[875] The crimes with which he was charged occurred in this political context.[876] His role in the crimes charged came to prominence shortly after the proclamation of the Autonomous Region of Krajina in response to the declaration of independence of Bosnia–Herzegovina.[877] He was installed in a key position in the municipality as president of the Crisis Staff that was established straight after the proclamation.[878] His role as a co-perpetrator started to emerge after this assumption of power as he started to liaise with other State agents on particular plans to remove non-Serbs from the area between Semberija and Krajina, as the goal was to create access corridors for Serbs.[879] This was to be accomplished according to the Strategic Plan in which Radovan Karadžić outlined six strategic goals. The Prosecution's military expert Ewan Brown concluded that this could be seen as the "political direction given by the Bosnian Serb leadership regarding the creation of the Bosnian State."[880] At the heart of these goals was the "separation from the other two national communities – separation of states."[881]

Stakić was key in disseminating propaganda via the media and proved to be instrumental in effecting separatist sentiments.[882] There were later attacks on several areas in this Prijedor region[883], establishment of detention centres[884], in which there

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[875] *Stakić* (Trial Judgment) (n 83) para 5.
[876] Ibid para 41, in which the Tribunal noted that "Given the significance of … the political context in which the crimes charged in this Indictment were committed, The Trial Chamber will recall them in some detail."
[877] Bosnia–Herzegovina proclaimed its independence on 3 March 1992. This was recognised by the European Community as a sovereign nation on 6 March 1992 and United States on 7 April 1992. See *Stakić* (Trial Judgment) (n 83) para 40.
[878] Ibid para 64, also paras 88-89 noting that the assemblies were converted to Crisis Staffs.
[879] Ibid para 42.
[880] Ibid para 43.
[881] Ibid para 42, this separation was further evidence in the plan to create a Serbian corridor between Semberija and Krajina.
[882] *Stakić* (Trial Judgment) (n 83) paras 129-158.
[883] Ibid.

were killings[885], interrogations[886], acts of sexual abuse in the camps,[887] destruction of cultural, residential and commercial properties[888] and forcible transfers of non-Serb individuals out of the area.[889] These acts were committed by the Serbian authorities in conjunction with paramilitary groups.[890] According to the Trial Chamber, "[t]here is ample additional evidence to suggest that the Serb authorities organised and were responsible for escorting convoys out of Serb-controlled territory."[891]

As a high-ranking official of the SDS and as president of the Crisis Staff, Stakić was part of the plans for forcible removal of individuals in these targeted areas and the escalation of events whereby Serbian agents were disarming paramilitaries or working in conjunction with Bosnian-Serb entities could only have been done in conjunction with the Bosnian-Serb authorities, thereby evidencing a mutual consent. This in turn led to the other consideration, namely where, aside from the plan, was there functional control over the act? This could only be determined with reference to the plan and the role of the individual in relation to it.

At Trial, the Prosecution pleaded all three categories of JCE. In regards to the third category, the Defence argued that the Prosecution must prove that the Accused had a "share in the intent of the crime committed by the extended joint criminal enterprise" and where the prosecutions relies on inference to prove *mens rea* it must be the "only inference available on the evidence".[892] This, as was seen in *Brdjanin*, could have led to a fracturing of the evidence as in that case, the Court found that there were competing inferences that mitigated against the finding that the crimes

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[884] Ibid paras 159–200.
[885] Ibid paras 201-255 with a list of approximately 75 individuals killed.
[886] Ibid para 228.
[887] Ibid para 314.
[888] Ibid para 276.
[889] Ibid paras 298-299.
[890] Ibid para 313.
[891] Ibid.
[892] Ibid para 430.

committed in excess of the plan.[893] However, with co-perpetration these issues simply would not have arisen.

In dealing with these submissions, the Trial Chamber applied the doctrine in accordance with Roxin's[894] theory completely, thereby establishing that Stakić by virtue of a common plan, ie the formulated Strategic Plan, exercised dominion over the criminal acts perpetrated by the different paramilitaries based on a combination of factors.

To the Trial Chamber, the notion of co-perpetration through joint control "is closer to what most legal systems understand as committing and avoids the misleading impression that a new crime not foreseen in the Statute of this Tribunal has been introduced through the backdoor."[895] The Trial Chamber defined co-perpetration as "an agreement or silent consent to reach a common goal by coordinated co-operation and joint control over the criminal conduct."[896] In this way, it was not so much that the crimes committed were reasonably foreseeable on the implementation of the separatist plans, but additionally that it ascribed responsibility to different actors for a shared control they demonstrated over the act. The Trial Chamber repeatedly in its judgment referred to this sharing of control over the crimes committed, describing the role of the Accused as being "based on [a] mutual exchange of information,"[897] his "interdependency between the Crisis Staff and the army and police"[898] and the commission of international crimes being the product of "synchronised activities".[899] Moreover, the general lawlessness which also prevailed in Prijedor, allowed for implementation of the objectives of the Strategic Plans.[900] Though there was one wide separatist plan, it was fulfilled through the skill and dynamism of different groups and sectors operating concurrently with each other, so

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[893] See Discussion at section 5.4.
[894] C Roxin, *Täterschaft und Tatherrschaft* (de Gruyter Recht 2006) 298-300.
[895] *Stakić* (Trial Judgment) (n 83) para 441.
[896] Ibid para 440.
[897] Ibid para 489.
[898] Ibid para 484.
[899] Ibid para 487.
[900] Ibid para 491.

that they all maintained joint control over the acts committed through the dissemination of varied roles. There was, as it were, a joint realisation of criminal goals, such goals being the logical consequence of embarking on a policy of forced removal and separatism at all costs.

The idea of co-perpetration itself, as applied by the Trial Chamber, relied on the work of German scholar Roxin.[901] According to Roxin, there was a shared control over the criminal act. The co-perpetrators could only realise the plan if they act together.[902] Conversely, the failure of one Party to act can frustrate the whole joint plan.[903] The *mens rea* of the offence under this doctrine is the awareness of the substantial likelihood that punishable conduct would occur as a consequence of coordinated cooperation based on the same degree of control over the execution of common acts.[904] Mohammed Badar, writing on the issue of *mens rea* here, notes that

> [i]n addition to the *mens rea* required for the specific crime charged, this mode of liability (co-perpetratorship) requires proof of (i) mutual awareness of substantial likelihood that crimes would occur; and (ii) the defendant's awareness of the importance of *his own role*...[905]

This was the critical test. According to the Trial Chamber, this was evident to the facts of the present case. The Trial Chamber was convinced that

> Dr Stakić knew that his role and authority as the leading politician in Prijedor was essential for the accomplishment of the common goal. He was aware that he could frustrate the objective of achieving a Serbian municipality by using his powers to hold to account those responsible for crimes, by protecting or assisting non Serbs or by stepping down from his superior position...[906]

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[901] Ibid para 440 identifying the work of Roxin, *Täterschaft und Tatherrschaft* (n 894) 298-300.
[902] G Wehrle and B Burghardt, 'Claus Roxin as Part of Organised Power Structures' (2011) 9 *Journal of International Criminal Justice* 191.
[903] *Stakić* (Trial Judgment) (n 83) para 440 referring to Roxin, *Täterschaft und Tatherrschaft* (n 894) 298-300.
[904] Richardson et al, Archbold *International Criminal Courts and Practice, Procedure and Evidence* (n 628) para 10-63.
[905] ME Badar, *The Concept of Mens Rea in International Law: The Case for a Unified Approach* (Hart 2013) 363.
[906] *Stakić* (Trial Judgment) (n 83) para 498.

The doctrine thus, in focussing on the acts and intention of his role in the plan as opposed to other collateral acts and antecedents, allowed for the attribution of responsibility without need to show a connection between the Accused and the direct perpetrator. It also allowed for the attribution of responsibility where power chains and lines of communication were broken, so that evidential requirements would be easier to meet.

Therefore, on this particular point, the *Stakić* Trial Chamber applied a combination of two forms of commission, namely co-perpetration and indirect co-perpetration (to which the tribunal refers using the German notion of *mittelbare Täterschaft* ("perpetrator behind the direct perpetrator").[907] This approach drew to a close several of the doctrinal queries on the reach of the law to embrace participants who are far removed from the physical perpetrators. With coordinated cooperation the scope for connecting the various groups that perpetrate commission of international crimes on a vast scale is enhanced.

However, as noted earlier, this application was overturned by the Appeals Chamber acting *ex proprio motu*. In rejecting the Trial Chamber's approach, the Chamber opined that the introduction of new modes would cause confusion in the jurisprudence.[908]

The Appeals Chamber further found that the Trial Chamber erred in conducting this analysis and stated that co-perpetratorship as defined and applied by the Trial Chamber does not have support in customary international law or in the "settled jurisprudence of the Tribunal."[909]

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[907] Ibid para 439.
[908] JCE was applied in the following: *Stakić* (Trial Judgment) (n 83) para 59; see JCE confirmed in *Prosecutor v Multinović et al* (Decision on Ojdanić Motion Challenging Jurisdiction: Indirect Co-Perpetration) IT-05-87-PT, ICTY, 22 March 2006 para 40; *Prosecutor v Čermak and Markač* (Decision on Prosecution's Consolidated Motion to Amend the Indictment and Joinder) IT-03-73-T, ICTY July 14 2006 para 26; *Prosecutor v Jadranko Prlić, Milivoj Petković et al* (Decision on Petković's Appeal on Jurisdiction) IT-04-74-AR72.3, ICTY, 23 April 2008 para 21, *Prosecutor v Rwamakuba* (Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide) (n 673).
[909] *Stakić* (Appeal Judgment) (n 723) paras 62-63.

This exclusion did not obstruct the application of this mode in later cases at the ICC, where it seems to be preferred over JCE.

5.5.1.2 The Lubanga Trial Chamber Decision

The jurisprudence of the ICC so far has interpreted Article 25 as including the two categories of perpetration – co-perpetration and indirect perpetration and there has been a suggestion for a combined approach by Judge Van den Wyngaert "indirect co-perpetration."[910] This implicit reading of these modes of liability into Article 25 has met with some criticism. At the forefront of these criticisms are no less than two current Judges, Judge Adrian Fulford and Judge Christine van den Wyngaert, whose Dissents are later examined in this section. Co-perpetration and indirect perpetration have been applied in separate cases, and the approaches towards determination of responsibility under these modes are examined. So far, there has not been a completely separate treatment of each doctrine as the jurists have treated with them at times in an undifferentiated manner. In the next sections some of the approaches used by the ICC and the criticisms of these approaches in determining proof of these modes are examined. The discussion leads in with the *Lubanga* Decisions,[911] which was the first conviction and application of co-perpetration.

The facts surrounding this Decision centre on a very complex conflict. There was an ongoing power struggle in the Ituri region, a north-eastern province of the DRC that borders Uganda.[912] In the factual matrix accepted by the Trial Chamber of the ICC, there was a noted deep ethnic divide between the Hema and the Lendu groups.[913] From about 1999 to 2003, the Trial Chamber accepted that there was an escalation of this ongoing power struggle in the Ituri region following the assassination of Laurent Kabila in 1997.[914]

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[910] In *Lubanga et al* (n 86) and the Concurring Opinion of Judge Van Den Wyangaert in *Prosecutor v Chui* (n 88) paras 58-59.
[911] *Lubanga et al* (n 85); *Lubanga et al* (n 86).
[912] *Lubanga et al* (n 86) para 67.
[913] Ibid.
[914] Ibid para 71.

Thomas Lubanga entered the fray around September 2000. He was a founding member of the Union of Congolese Patriots and that year, there was a military overthrow of the military wing to the Uganda-supported rebel group the RCD-Movement for Liberation (one of the groups the Rally for Congolese Democracy fractured into). The eventual result was that by January 2002 Lubanga had assumed the position of Minister of Defence of this group.[915] Later that year peace talks were held at Sun City and an agreement was reached by the head of the RCD-Movement for Liberation to increase efforts as Hema–Lendu integration. Lubanga disagreeing with the result of these talks, abandoned the group and reformed a new militia, the Force patriotique pour le liberation du Congo ("FPLC"), that continued to further the cause for separatism in favour of the Hema.[916]

As a war lord, he was involved in several internal conflicts to advance these economic and political ends and was involved in copious acts in breach of international law. Of these, he was alleged to have been involved in the conscription and enlisting of children under the age of 15 and it is these acts which later grounded the charge against him at the ICC.[917] These children, though recruited from the Congolese province in Bunia, were for the most part trained in Uganda and the arms supply emanated from there as well. He was thus able to perpetrate these crimes with funding and support from another State and in this way, it could be seen that the definition of the common plan was widened to include this transnational element.

He was charged with being responsible as a co-perpetrator for enlisting and conscripting children under the age of 15 into the FPLC and using them to actively participate in hostilities within the meaning of Article 8(2)(b)(xxvi) and Article 8(2)(e)(vii) of the ICC Statute. These charges were confirmed by the Trial Chamber

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[915] Ibid para 82.
[916] Ibid paras 86-88; on the Hema allegiance, see 'Who's who in Ituri - militia organisations, leaders' (IRIN 20 April 2005) <www.irinnews.org/report/53981/drc-who-s-who-in-ituri-militia-organisations-leaders.l> [accessed 15 September 2013].
[917] *Lubanga et al* (Decision Concerning Trial Chamber I) (n 86) para 9.

on 29 January 2007.[918] He was convicted by the ICC on the 14 March 2012 and this was confirmed on Appeal on the 1 December 2014.

According to the Pre-Trial Chamber, Lubanga's contributions showed that there was evidence of control over the crime, even if that control emanated from a remote location.[919] The determination as to whether the particular contribution of the Accused resulted in liability as a co-perpetrator was then further considered to be based on an analysis of the common plan by assessing carefully the role that was assigned to, or was assumed by the co-perpetrator, according to the division of tasks.[920] The Pre-Trial Chamber found that co-perpetration as a mode of liability was established on the control over the crime theory and they placed much reliance on the scholarship of Roxin.[921] This analysis of the common plan was viewed by the Pre-Trial Chamber as having to be proved by both objective and subjective elements; that is, the facts of the case demonstrated control and that the Accused was aware of its criminality.[922]

The Trial Chamber elaborated on the issue of proof of the objective elements decided that the plan must include "an element of criminality".[923] Proof of this element was held to be sufficient if the under-mentioned areas were accomplished:

> (i) that the co-perpetrators have agreed: (a) to start the implementation of the common plan to achieve a noncriminal goal, and (b) to only commit the crime if certain conditions are met; or
>
> (ii) that the co-perpetrators (a) are aware of the risk that implementing the common plan (which is specifically directed at the achievement of a non-criminal goal) will result in the commission of the crime, and (b) accept such outcome...[924]

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[918] Ibid para 1.
[919] *Lubanga et al* (Decision on the Confirmation of the Charges) (n 85) paras 330-331.
[920] *Lubanga et al* (Trial Chamber I Judgment) (n 85) para 1000.
[921] Ibid (Dissenting Opinion of Judge Fulford) at para 10.
[922] Ibid (Pre-Trial Chamber) para 331.
[923] *Lubanga et al* (Trial Chamber Decision) (n 86) para 982.
[924] Ibid.

The Majority found that both limbs were satisfied. Thus once more, it was not an excess or collateral act, but was considered to be part of the crime that was initially planned.

Proving control was thus made easier. There was an implicit awareness of this by the Pre-Trial Chamber who stated that the Accused would not have to prove the "should have known" standard of control to this crime, and that a "mutual understanding among the co-perpetrators would be sufficient to realise the common plan's objectives."[925] This was later endorsed by the Trial Chamber when they later found that Lubanga was guilty of the crime of child conscription as a direct co-perpetrator. According to the Trial Chamber, the first port of call was to establish the objective elements of the crime. The objective elements were to be established by the common plan or agreement, the essential contribution of the Accused to this plan and proof of his knowledge or intent as described under Article 30 that his contribution meant to bring about the objective elements of the substantive crime, that is, the *dolus directus*.[926]

In describing the elements, it was to be established that "there were at least two individuals involved in the commission of the crime" and this plan need not have been explicit for the "conduct of each co-perpetrator to be connected."[927] This essentially is a restatement of the requirement for a plurality of persons and proof of an agreement whether it be tacit or express identified in first category JCE under *Tadić* and that was referred to as co-perpetration in any event.

On the second requirement that there be an essential contribution, the Trial Chamber required that in relation to the exercise of the role and functions assigned to him, the contribution must be essential.[928] As to the mental element, it would be

[925] Ibid para 929.
[926] Ibid para 1109.
[927] Ibid para 988.
[928] Ibid para 1000.

proven once the Accused showed "an awareness that a consequence will occur in the ordinary course of events".[929]

In this vein, there was definition as to how the Accused could contribute to the overall enterprise and the level of knowledge required of him to prove he was aware of the criminal consequences of the act. This would put to rest some of the doctrinal fears as to imputation and inference of intent in an unrestrained manner. In utilising a formulation for contribution the Trial Chamber opined that

> [t]hose who commit a crime jointly include... those who assist in formulating the relevant strategy or plan, become involved in directing or controlling other participants or determine the roles of those involved in the offence. This conclusion makes it unnecessary for the prosecution to establish a direct or physical link between the accused's contribution and the commission of the crimes...[930]

In formulating the level of knowledge required the Trial Chamber opined that at the time the plan was agreed, the participants must have been aware of a reasonable risk that an adverse outcome "will occur in the ordinary course of events. A low risk will not be sufficient.[931] This would involve consideration of the "concepts of possibility and probability."[932]

The value to this approach is that it expressly establishes criminal liability for recklessly participating in a common plan that inherently carried the risk that, in the ordinary course of events related to that plan, a crime would result. This recklessness addresses the role of the high-level perpetrators very effectively especially when they retain that transnational support. Such an individual would not be able to hide behind diffused power chains and plead that his contribution was not related to theirs or that their activities were remote from him, because was reckless as to its

[929] Ibid 1012.
[930] Ibid para 1004.
[931] Ibid para 1012.
[932] Ibid.

consequences.[933] It would furthermore prevent each co-perpetrator from pleading disconnection to the *actus reus* of the offence, where identifiable essential contributions to the *actus reus* of the offence was not possible, since each reckless participant could be implicated with guilt.

Rebel groups such as the one Lubanga headed often start off their mission with a non-criminal plan: usually to establish military control of an area. Other groups would be operating with relative autonomy from each other, in some instances dealing with the securing of recruits and arming them. Although there would be a common plan among all of the group to achieve particular ends, no proof would be required that they were each integrated initially to a common criminal purpose. If there was a risk, for example, that such recruitment might involve the use of children and this was never the goal, but still a viable risk in light of the conscripting methods used by the group, then they should have foreseen that risk and accepted it. It is the same rationale used in Anglo-American law regarding criminal recklessness, but the utility here is not so much the rationale, but the ease with which it is amenable to be identified and applied.[934]

Proving the doctrine through proof of these component parts offers more facility for the Defence to state his role and participation to a defined degree, thereby preventing allegations of collective guilt. This is a live issue and it has been used before in trials dealing with decentralised power chains.

For instance, Pinochet in defending himself against attribution of responsibility as a commander, in regard to giving orders to the Chief of Staff to the Secret Police had this to say:

> there are many things I ordered him to do, but which things? I had to exercise power, but I could never say I was running the DINA [Dirección de Inteligencia Nacional, The National Intelligence Directorate]. [They] were

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[933] See, for example in the UK system, *R v G* [2003] UKHL 50 – here an accused is only reckless if on the circumstances known to him it was unreasonable to take the risk. The international criminal law standards are similar.
[934] *R v Adomako* [1994] 3 WLR 288.

> under orders, under the supervision of all the junta... And I would like you to understand the following. The Chief of the Army always asks 'What are you going to do?' The question of 'How', how am I going to do it? Is a question for the Chief of Intelligence rather than the Chief of the Army...[935]

Such a defence would not work under a case charging the mode of liability as co-perpetration as the tests take note of the relationship between the different sections, focussing on the level of autonomy of each group over the crimes, not the relationship among the participants in determining if there was shared control. This mode of responsibility broadens the scope of accountability among all participants, in particular the remote and high-level actors who are connected to, and in fact exert control, over the criminal activities of the other participants. This mode of responsibility therefore, suggests a useful approach towards assessing the extent to which a State exerted control over the criminal activities of groups with which they initially associated, under apparently non-criminal plans, on the basis that the crimes they subsequently committed was both foreseeable and under their control.

5.5.1.3 Dissenting Views at the ICC on co-perpetration

In his Dissenting Opinion in the Trial Chamber Decision in *Lubanga*[936] Judge Fulford took issue with the application of Roxin's "control over the crime" theory into the law of the ICC.[937] He went further to suggested that the ICC Statute was sufficiently clear on its text as to what method or approach could be used to assign criminal responsibility to individuals for participation in international crimes.[938] His suggested approach was for an assessment that concentrated on the treaty text.[939] According to him, the doctrine as promulgated through the work of Roxin was focussed on domestic doctrine. He found that there was a direct transposition of the domestic concepts into the international context and this he described as

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[935] K Ambos, 'Command Responsibility and *Organisationsherrschaft*' in H van der Wilt and A Nollkaemper (eds), *System Criminality in International Law* (Cambridge University Press 2009) 145.
[936] *Prosecutor v Thomas Lubanga Dyilo* Case No. ICC-01/04-01/06 (Decision Concerning Trial Chamber I Judgment of 14 March 2012) (Separate Opinion of Judge Adrian Fulford).
[937] Ibid paras 8, 10.
[938] Ibid para 7.
[939] Ibid para 13.

dangerous.[940] According to him, this was regardless of whether the ICC and domestic doctrines mirror each other.[941] Moreover, he found that the words of the Statute were plain enough and established the equality of culpability for co-perpetrators, even those who were absent from the scene. The resort to the doctrine thus was unnecessary.[942]

Judge Fulford thus laid out a check list based on the text of the ICC Statute which included the requirement of coordination of a plan either express or implied, direct or indirect contributions, intent to engage in the conduct and has an awareness that the consequences will happen in the ordinary course of things.[943]

Judge Fulford was not alone in these views. Judge Van den Wyngaert in the Trial Chamber Decision *Prosecutor v Chui*[944] also took issue with the grafting of domestic legal concepts and was very critical of Roxin's theories being transposed into the method used by the Court to assign criminal responsibility.[945]

The thrust of her critique was with the application of an objective test to determine whether the accused person was connected to the common plan. She took issue with Roxin's plan on the basis that it emphasized connection to the plan as opposed to the crime.[946] She further critiqued that this connection was to be assessed on an objective standard for two reasons. Firstly, in creating an objective standard, it would mean that instead of relying on Article 30 ICC Statute to determine questions of criminal intent, it relies on the rules attributing intent on the basis of recklessness.[947] She noted that while the Trial Chamber II in *Lubanga* did not equate

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[940] Ibid para 10.
[941] Ibid para 6
[942] Ibid para 12.
[943] Ibid para 16.
[944] *The Prosecutor v Mathieu Ngudjolo Chui* (n 88).
[945] Ibid (Concurring Opinion of Judge Christine Van den Wyngaert) paras 5-6.
[946] Ibid para 31.
[947] Ibid para 36. Judge Van den Wyngaert expressed further views that this mode violates the principles of personal responsibility and this view has also been supported by A Gil, 'Mens Rea in Co-perpetration and Indirect Perpetration according to Article 30 of the Rome Statute – Arguments against punishments for excesses committed by the Agent or Co-perpetrator' (2014) 14(1) *International Criminal Law Review* 82, who analyses in this study why the principle violates the personal responsibility for one's own acts. That discussion is outside the remit of this thesis.

recklessness with the *dolus eventualis*, they were nevertheless prepared to inculpate an Accused on the basis of recklessness and there was an inherent danger to assigning responsibility on this basis.[948]

She agreed with Judge Fulford in his Dissent in *Lubanga* insofar as that reliance on risk is "unhelpful and confusing" and is nothing more than the "*dolus eventualis* being dressed up as a *dolus directus* in the second degree".[949] To her, there was nothing on the ICC Statute to allow this, and like Fulford, she advocated an approach that focussed more on the connection to the crime as opposed to potential dangers from engaging in particular plans. According to her, had that been the object of the Statute, conspiracy as a mode of responsibility would have been included.[950]

She further took issue with the requirement for an "essential contribution" finding that this allowed unnecessary speculation and that for clarity the contribution must not be essential but direct.[951] Realising the effects of her opinion on the questions of impunity as a result of these suggestions for modifications in the approach towards assigning responsibility, she suggested that there is no hierarchy to the modes of responsibility identified at Article 25. Thus accused persons could be convicted as accessories. She drew the example of *Prosecutor v Charles Taylor*[952], whereby JCE was not proved but aiding and abetting was, and he was sentenced to a fifty-year term.[953]

Her Decision did not factor in the complex nature of international crimes, whereby the heavy-handed arm of the State may institute a policy of forced displacement or separation of communities and work in conjunction with different groups. By addressing shared control in these circumstances, there is an obvious

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[948] Ibid paras 36-37.
[949] Ibid para 38.
[950] Ibid para 15.
[951] Ibid para 48.
[952] *Prosecutor v Charles Taylor v Charles Ghankay Taylor* (n 807).
[953] *Prosecutor v Mathieu Ngudjolo Chui* (Trial Chamber II) (Concurring Opinion of Judge Christine Van den Wyngaert) (n 88) paras 5-6.
[953] Ibid para 26.

control over the crime, made even more forceful with the clear risk that such emotive plans that draw on instinctive fears as to racial, religious, or political protection can escalate into something far worse. Thus there may be practical benefits to allowing reckless culpability.

At the end of the day however, whatever the views on the doctrine for the purposes of this thesis, both the Majority Opinion and the Dissenting Views and Concurring Opinion further add to a growing repository of approaches towards understanding these questions of State responsibility for international crimes. It is not a choice of one or the other, as the checklist proposed by Judge Fulford suggests a cadre of tests that can work to assess these vexed questions of individual participation in complex, organised, large-scale crimes, as does Judge Van den Wyngaert's suggestions. Taken as a whole, co-perpetration has much to offer for the proposals outlined at the start of this thesis.

In sum, this approach by the ICC also effectively put to rest the long-standing arguments raised in the jurisprudence that sought to prove the culpability in an agreement by connection of participants to the physical perpetrator through a shared approach to responsibility. This mode embraces diverse and remote participants who operate from different locations and are screened by diffused power chains. Further, even though the test can embrace a large number of participants does not mean that there are broad imputations of guilt that could compromise fair trials. Inherent in the doctrine are sufficient safeguards as it will come down to an evaluation of the evidence. The scope of justice was never to provide a shield of impunity by devising obscure tests that did not situate in the social context in which it operates. The safeguard is that a test is simply a test; there must be evidence to support it and if that evidence is lacking then quite rightly the Accused will be discharged.

Further modes of perpetration and their application in the jurisprudence are examined in the next section.

5.5.2 Indirect Perpetration

This mode of responsibility assigns criminal responsibility where a person perpetrates or commits a crime *through* another.[954] Commentators have identified that the "through" signifies a relationship between the "Hintermann" (the indirect perpetrator) and the "Frontmann" (the direct perpetrator) whereby the Hintermann controls the Frontmann, in as much as he uses or manipulates him as a human tool or instrument.[955] There are two further categories here. In one category, the Frontmann has a deficit; most often he is seen to lack the requisite intention for the offence. This is exploited by the Hintermann.[956] However, he is not to be likened to the "innocent agent" that appears in Anglo-American systems. Whereas under the doctrine of innocent agency, there is an exculpation of guilt based on the fact that the Accused was not in a position to know or do better (either he was not of capacity or suffering from a defect of the mind), here the principle operates differently.[957] The Frontmann is still regarded as having control over the act, but this is overtaken by a domination over his will.[958] Thus, although he is a guilty agent, he is but a mere tool in the hands of the Hintermann. Cryer criticises the exculpation of a guilty agent noting that to see a guilty agent "as a mere tool" is to "fail to respect the importance of her voluntary and intentional act."[959] Nevertheless, the mode allows for the assigning of criminal responsibility to the Hintermann on the basis that he maintained control over the act of the Frontmann. The areas in which this control is established is where there is a utilisation of a mistake on the part of the Frontmann or on the basis of the Hintermann's superior knowledge.

In the second category, the Accused maintains hegemony through control over an organisational apparatus, or *Organisationsherrschaft*.[960] According to Jain, there are three elements that exist through this mode – "power," ie there are

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[954] Jain, 'The Control Theory of Perpetration in International Criminal Law' (n 849) 171.
[955] Ibid.
[956] Ibid.
[957] Ibid.
[958] Ibid.
[959] R Cryer, 'General Principles of Liability in International Criminal Law' in D McGoldrick, P Rowe and E Donnelly (eds), *The Permanent International Court Legal Policy and Issues* (Hart 2004) 243.
[960] Jain, 'The Control Theory of Perpetration in International Criminal Law' (n 849) 171.

established hierarchical structures, "fungibility," ie those directly committing the act can be exchanged and "detachedness," ie the organisation must operate outside the law.[961]

Due to these tests, the mode of responsibility is seen to be accurate. To some, the introduction of this mode of responsibility is not simply a regurgitation of *Dogmatik* into international law,[962] as it has an intrinsic value. Thomas Weigend, for instance, finds that this mode has managed to solve some of the problems associated with the assigning of criminal responsibility for international crimes in an effective manner.[963] So too, Gehrard Werle sees it as being directly amenable to international crimes because the doctrine

> tries to provide a solution to a problem that has been discussed since the very beginning of international criminal law, that being: how to ascribe criminal responsibility to political and military leaders who, without ever laying a hand on a single victim themselves, plan and set into motion the large-scale and systematic commission of international crimes…[964]

This had led Werle to ask whether this mode of responsibility is "the perfect fit for international prosecution of armchair killers",[965] as it puts to rest the search for identifying appropriate modes of responsibility in the commission of international crimes. He has gone even further to argue that this mode though new to international criminal law is well known in domestic legal systems[966] and this is evidenced in part by the fact that it has been the basis of several indictments coming out of the ICC and also in Latin America and Spain.[967] Some of these Decisions are examined here

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[961] Ibid 174.
[962] The *Dogmatik* is a series of rules and tests that provide coherence and structure to the German Code of Criminal Law. It is explained in G Fletcher, 'New Court, Old Dogmatik' (2011) 9(1) *Journal of International Criminal Justice* 179, 180-185; J Ohlin, 'Co-perpetration – German dogmatik or German invasion' Cornell Legal Studies Research Paper No 14-07, 7 November 2013.
[963] T Weigend, 'Problems of Attribution in Criminal Law' (2014) 12(2) *Journal of International Criminal Justice* 253, 253-254.
[964] G Wehrle, 'Indirect Perpetration – A Perfect Fit for Prosecution of Armchair Killers' (2011) 9(1) *Journal of International Criminal Justice* 85, 87.
[965] Ibid 85.
[966] Ibid 87.
[967] Munoz-Conde, 'The Application of the Notion of Indirect Perpetration through Organized Structures of Power in Latin America and Spain' (n 853) 113.

to assess the different aspects of the test to determine their viability in being used to redesign the method of attribution of conduct to States. Within the international courts and tribunals, the doctrine was introduced into the jurisprudence again through the *Stakić* Trial Chamber Decision (albeit as a passing reference) and in the later Separate Opinion appended by Judge Schomburg in the *Gacumbitsi* case before the Appeals Chamber.[968] It has been one of the modes through which several persons have been charged at the ICC. Although the so-called "Ocampo six," eg President Kenyatta, Francis Muthuara, William Ruto, Henry Kogsey, Joshua Sang and Mohammed Hussain Ali[969], had their charges withdrawn owing to insufficiency of evidence, their charges were initially confirmed. All three were charged with international crimes alleged to have been committed through this mode. Additionally, prior to this Katanga and Chui[970] were charged pursuant to this mode as well. Katanga was convicted on the lesser mode as an accessory, but Chui was acquitted. The tests applied are now examined further in the subsequent sections.

5.5.2.1 The Gacumbitsi Appeal

While the Trial Chamber in *Stakić* viewed joint criminal enterprise as only one form of interpretation of perpetration, it focussed its consideration on co-perpetration leaving indirect perpetration as another option that it simply referred to in a footnote.[971] When the Prosecution attempted to argue its applicability in *Milutinovic*[972] at the Trial Chamber subsequent to this, it was rejected outright on the basis that it had no customary status in international law.[973]

It was only later at the ICTR in the Appeal Decision against Sylvestre Gacumbitsi that express mention of the doctrine was made and attention paid to the role of the mode in addressing collective crimes, in a Separate Opinion appended by Judge Schomburg. Gacumbitisi was charged for committing genocide, on the basis

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[968] *Sylvestre Gacumbitsi v The Prosecutor* (Appeal Judgment) (n 87).
[969] In this regard, see (n 89) *Prosecutor v Muthuara, Kenyatta and Ali* and *Prosecutor v Ruto, Kogsey and Sang*.
[970] *Prosecutor v Mathieu Ngudjolo Chui* (n 88).
[971] *Stakić* (Trial Judgment) (n 83) para 439 fn 942.
[972] *Prosecutor v Milutinovic et al.* (Trial Chamber Judgment) IT-05-87-T, ICTY, 26 February 2009.
[973] Ibid paras 40-42.

that he participated in the genocide at the Rusomo commune by inciting individuals to separate themselves from their Tutsi neighbours and kill them. He further supplied machetes. He often was accompanied on his mission with Interahamwe milita and supervised some of the killings.[974]

Judge Schomburg's grievance with the Majority Decision was as to its method of determining responsibility. He argued that, if the Majority found as they did, that Gacumbitsi had a major role in the genocidal campaign, it should have convicted the Accused of genocide regardless of whether he had killed anyone or supervised any killings,[975] the reason being that he exercised control over the other genocidaires. Thus, although Gacumbitsi was convicted of genocide because he was found to have actually supervised a massacre,[976] that was a *de minimis* point in light of his overall role in the genocidal campaign. According to Judge Schomburg,

> [m]odern criminal law has come to apply the notion of indirect perpetration even where the direct and physical perpetrator is criminally responsible ("perpetrator behind the perpetrator"). This is especially relevant if crimes are committed through an organised structure of power in which the direct and physical perpetrator is nothing but a cog in the wheel that can be replaced immediately. Since the identity of the direct and physical perpetrator is irrelevant, the control and, consequently, the main responsibility for the crimes committed shifts to the persons occupying a leading position in such an organised structure of power. These persons must therefore be regarded as perpetrators irrespective of whether the direct and physical perpetrators are criminally responsible themselves or (under exceptional circumstances) not...[977]

In this regard he posits that the doctrine overcomes the hurdles connected to the structural remoteness between the Accused and the physical perpetrators. Moreover, as he frames it, it allows for the high-level actor to be dealt with in the trial system more severely than the lower-level "cogs" and prevents the difficulties associated with proof of *mens rea* under JCE 3.

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[974] *Prosecutor v Sylvestre Gacumbitsi* (Trial Judgment) ICTR-2001-64-T, ICTR, 17 June 2004 paras 35-36.
[975] *Sylvestre Gacumbitsi v The Prosecutor* (Appeal Judgment) (n 87) (per Schomburg Separate Opinion) para 21.
[976] Ibid paras 60-61.
[977] *Stakić* (Trial Judgment) (n 83) (Separate Opinion) para 20.

According to Judge Schomburg, although there are distinctions, "co-perpetratorship and indirect perpetratorship differ slightly from joint criminal enterprise with respect to the key element of attribution."[978] It seems under this doctrine either responsibility is attributed for sharing causative roles or for controlling the acts of others. He suggested that the two approaches, though they overlap, should still be harmonised so that it would assist in defining "sharper contours" by "combining objective and subjective components in an adequate way" which will in turn facilitate the imputing of criminal responsibility on Accused persons in situations where the physical crime was committed by a non-member of the criminal enterprise.

According to Judge Schomburg, with genocide it will be irrelevant whether the Appellant killed somebody by his or her own hand, because

> it would overlook that the persons most responsible for the killing of at least 800,000 Tutsis in Rwanda in 1994 were those who acted behind the scenes, who organized and planned this genocide, and who instructed, ordered and instigated others to carry it out. They committed genocide on an unimaginable scale.[979]

The doctrine of indirect perpetration allows for these "behind the scenes" actors to be addressed without the complexities of assessment of *mens rea* requirements.

This form of liability was not novel. According to Judge Schomburg, it was used to prosecute the Argentinian Junta for crimes committed under Pinochet, and has proven to be especially effective with organised crime and State-induced criminality.[980] Citing the cases brought against the Junta and the German cases

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[978] Ibid para 22.
[979] *Sylvestre Gacumbitsi v The Prosecutor* (Appeal Judgment) (n 87) para 9.
[980] See Argentinean National Appeals Court, *Judgement on Human Rights Violations by Former Military Leaders* of 9 December 1985. For a report and translation of the crucial parts of the judgment, see *Judgement on Human Rights Violations by Former Military Leaders* of 9 December 1985 (1987) 26 *ILM* 317. The Argentinean National Appeals Court found the notion of indirect perpetratorship to be included in Art. 514 of the Argentinean Code of Military Justice and in Art. 45 of the Argentinean Penal Code. The Argentinean Supreme Court upheld this judgment on 30 December 1988.

involving crimes by East German border guards, there was specific attention to the details of control.[981] For instance, in the *Politburo ca*se the German Courts opined that in certain circumstances, it is the "man behind the scenes" who has the most significant contribution especially if the takes advantage of the the direct perpetrator's willingness to bring about the *actus reus* of the crimes.[982]

He further supported his case by noting that the provisions of the then imminent Article 25 of the ICC Statute provided straight away for this mode of liability.[983]

While the opinion confirmed the entry of the mode into international criminal jurisprudence, it did not go further to discuss how the mode could be applied, ie what tests could be used, in what stages. According to Jain, although the judgment outlines the physical elements the judgment was not so clear on what states of mind were relevant,[984] and moreover, the way the mode was presented was unclear as it conflated the two modes and they are separate forms of perpetration.[985]

The exact contours of this mode and the more nuanced approaches towards application of the tests to establish with it are seen in the ICC jurisprudence and also in the approach by the Latin American Courts.

5.5.2.2 Katanga and Chui; Kenyatta and others

The doctrine entered into the jurisprudence with the Pre-Trial confirmation Decision on the charges in Katanga and Chui. The facts arose out of the Hema–Lendu conflict addressed earlier in the *Lubanga* case. Katanga was the leader of the Patriotic Resistance Front, a combatant group, and Chui was a colonel in the Congolese army.[986] Chui was later acquitted at the Trial Chamber, on the basis that the method outlined by the Pre-Trial Chamber for assigning responsibility according

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[981] *Politburo* BGHSt 40, 218–240, 236.
[982] Ibid.
[983] Article 25 ICC Statute (n 60).
[984] Jain, 'The Control Theory of Perpetration in International Criminal Law' (n 849) 181.
[985] Ibid.
[986] *Prosecutor v Germain Katanga and Mathieu Ngudololi Chui* (Decision of the Pre-Trial Chamber Decision on Confirmation of Charges) (n 88) paras 7, 10.

to this mode and the reasons for this mode being used to address situations of collective criminality was discussed.

According to the Pre-Trial Chamber, where two or more persons jointly commit an international crime, the case could be assessed either through, in their terms, "indirect co-perpetration" or through mutual attribution of the crimes to different accused persons.[987] Reflecting a nuanced approach towards the question of assigning of responsibility, the Pre-Trial Chamber implicitly read perpetration through an organisation or *Organisationscherrschaft*, into the provisions of Article 25(3)(a) provided in the ICC Statute.[988]

The approach of the Court here was to firstly identify the "perpetrator's control over the organisation."[989] This could be inferred or directly adduced from evidence of control over an organised apparatus of power. According to the Trial Chamber, the higher up the individual was in the hierarchy and the more detached the mastermind was from the physical perpetrator, the greater his blameworthiness would be.[990]

The Pre-Trial Chamber went further to discuss what would constitute an organised apparatus of power. Firstly, there would have to be some sort of hierarchical relations between a superior and subordinates, but more than that, there would have to be sufficient subordinates so that they can be easily replaced.[991] It further noted that for the position of the superior that there was "recognised leadership," ie that orders will be carried out by subordinates.[992] Further, the means of control could be demonstrated by the capacity to hire, train, impose discipline, and provide resources to these subordinates.[993]

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[987] Ibid para 494.
[988] Ibid para 495.
[989] Ibid.
[990] Ibid para 503 referring to the dictum in *The Attorney General v Eichmann*, Case 40/61 ILR para 197.
[991] Ibid para 512.
[992] Ibid para 513.
[993] Ibid para 514.

Critically the Pre-Trial Chamber noted that "the leader" would use his control over the apparatus to execute crimes, which means that the leader, as the perpetrator behind the perpetrator, mobilises his authority and power within the organisation to secure compliance with his orders. According to the Court, "[c]ompliance must include the commission of any of the crimes under the jurisdiction of this Court."[994]

On this basis therefore, unlike the more familiar notions of superior responsibility, the Pre-Trial Chamber in their application of the doctrine equated the term superior with leader. The ability of the leader to control derived from the sheer mass of subordinates willing to do his will. His ability to control also did not simply arise from a position of command, but instead from a wide range of indicators such as the ability to fund, arm, hire and train.[995] The Pre-Trial Chamber thus applied the mode in a sustained way fully cognisant of the modern-day face of warfare, suggesting the mode to be applicable in a wide range of control situations.

The most recent cases involving charging of this mode occurred with the six cases brought against President Kenyatta, Francis Muthuara, William Ruto, Henry Kogsey, Joshua Sang and Mohammed Hussain Ali. All of the cases against these individuals perished – charges against Ali, Kogsey and Muthuara were never confirmed; cases against Ruto and Sang perished due to lack of evidence; the Prosecution had to withdraw the charges against Kenyatta owing to an insufficiency of evidence, with allegations being made in the media that witnesses were bribed or intimidated;[996] Chief Prosecutor Bensouda confirmed this.[997] The failure of these cases was not an indictment against the mode of responsibility but on an insufficiency of evidence.

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[994] Ibid.
[995] Ibid para 513.
[996] 'ICC drops Uhuru Kenyatta charges for Kenya ethnic violence' (BBC 5 December 2014) <www.bbc.co.uk/news/world-africa-30347019> [accessed 19 July 2016].
[997] M Pflanz, 'Witnesses pull out of Uhuru Kenyatta ICC case' (The Telegraph 18 July 2013) <www.telegraph.co.uk/news/worldnews/africaandindianocean/kenya/10188737/Witnesses-pull-out-of-Uhuru-Kenyatta-ICC-case.html> [accessed 7 August 2016].

However, despite this conclusion, the Pre-Trial Chamber Decisions regarding criminal responsibility of individuals who perpetrate international crimes through another, ie through the existence of an *Organisationscherrschaft* are useful. The finding in this case was instructive as it suggests another pathway for assigning responsibility in situations where a State official or agent satisfies the test of actual control over the paramilitary organisation, whose members are committing international crimes because there is a hierarchical organisation between them.

According to the Pre-Trial Chamber, Francis Muthuara and President Kenyatta were responsible for the international crimes perpetrated in the wake of the post-2007 election violence on the proof of key elements, the existence of a plan,[998] the making of essential contributions to the plan[999] and the use of hierarchical structures outside the State, whose members were changeable.[1000] They were charged with several counts of crimes against humanity under Section 7 ICC Statute.[1001] They Court identified them as being "indirect co- perpetrators."[1002] However, an analysis of how the Court approached the assigning of responsibility was similar to methods described for the *Organisationscherrschaft*.

On the objective tests, there was proof of a common criminal plan between the Mungiki and the Accused. This common criminal plan did not have to be explicitly proven, but could have been inferred from the acts of the co-perpetrators. This was demonstrated by:

> (i) the contacts between Mr. Muthaura, Mr. Kenyatta and Maina Njenga through their respective intermediaries for the purposes of securing the services of the Mungiki for the PNU [Party of National Unity] Coalition; (ii) the agreement reached between Mr. Muthaura, Mr. Kenyatta and Maina Njenga to the effect that Mungiki members would be used for the attack in Nakuru and Naivasha; (iii) the order given by Mr. Muthaura and Mr. Kenyatta to Mungiki leaders to commit the crimes in Nakuru and Naivasha;

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[998] *Prosecution v Kenyatta* (n 89) para 399.
[999] Ibid paras 401, 404.
[1000] Ibid para 407.
[1001] Ibid para 27.
[1002] Article 7 ICC Statute (n 60).

> and (iv) the activities performed by Mr. Muthaura and Mr. Kenyatta at the execution stage of the plan to commit such crimes…[1003]

The Pre-Trial Chamber then determined the extent to which there was an essential contribution to this plan. According to the Chamber, "the essential contribution may consist of activating the mechanisms which lead to the automatic compliance with their orders and thus the commission of crimes."[1004] Critically the Chamber noted that this "essential contribution does not require that the essential character of the task be linked to its performance at the execution stage."[1005] Thus provision of weapons and coordinating activities can be considered essential contributions.[1006]

On these facts there was evidence at the Pre-Trial Stage that President Kenyatta placed Mungiki members under the control of the local politicians, contributed funds for the group and established links through intermediaries to with the Mugiki for the purpose of effecting international crimes.[1007] Further based on evidence of meetings with Mayen Jenga, the top leader of the Mungiki, they found there was the existence of such agreement.[1008] As such, they found that there was a plan and that Kenyatta relied on the pre-existing organisational structures in the Mungiki to effect the crimes as well as the mechanisms within the group to ensure that the crimes would be carried out.[1009] There was a fungible quality to the members of the Mungiki as in the situation where they were mobilised before entering Navaisha; it did not frustrate the common purpose, because the members were easily replaced.[1010]

[1003] *Kenyatta* Pre-Trial (n 89) para 400.
[1004] Ibid para 402.
[1005] Ibid.
[1006] Ibid, applying *Katanga* (n 88) para 526.
[1007] Ibid para 406.
[1008] Ibid para 306.
[1009] Ibid para 408.
[1010] Ibid.

To the Court this underlay the rationale of the mode of indirect perpetration.[1011] During the course of its discussion, the Court also formulated the last objective requirement which was that the organisation used maintained a hierarchical structure and that compliance with orders was automatic.[1012] These elements were inferred from the facts on the basis that

> the direct perpetrators were entirely replaceable and, as such, that the commission of the crimes was not dependent upon their will but was secured by the utilization of a pre-existing hierarchical and organized structure by Mr. Muthaura and Mr. Kenyatta. This is in line with the underlying rationale of the model of indirect co-perpetration, according to which the suspect must have "control over the crime committed", in the sense that he controls or masterminds its commission because he decides whether and how the offence will be committed by direct perpetrators who are merely anonymous and interchangeable figures.[1013]

In approaching this, the Chamber noted that when the group approached Navaisha, several of its members left, however they were replaced, thereby putting into question the assertion by the Accused that they could not control such an amorphous group.[1014] The Chamber then outlined the subjective elements of the crime namely that there was a mutual awareness among the group that they were implementing the plan and that they were aware of the factual circumstances that allowed for a joint control over the crime.[1015] In order to prove this, a former member of the Mungiki testified.[1016] Thus without an internal member of such groups, proof is difficult.

The Chamber offered a nuanced approach towards determining the mental intent to participate. In assessing intent under this mode, the Chamber suggested two gradations of *the dolus directus*: firstly, the Accused had a *dolus directus*, ie the express will to cause the consequences of the plan; secondly, the *dolus directus* in the second degree, ie that the consequences were predictable in the ordinary course

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[1011] Ibid para 410.
[1012] Ibid para 407.
[1013] Ibid para 409.
[1014] Ibid.
[1015] Ibid para 410.
[1016] Ibid paras 301, 328, 343.

of things. Notably, the Court did not speak about a *dolus eventualis*, ie the reasonable prediction that the consequences could occur.[1017]

This is far as the mode has developed so far. It has been criticised on the basis that it has the effect of watering down the requirement of personal responsibility.[1018] By following this method, Judge Van den Wyngaert fears that the model "dehumanizes the relationship between the indirect perpetrator and the physical perpetrator."[1019] Yet, is this an error? Being part of an apparatus that is geared towards effecting either directly or as a consequence is already dehumanizing. At the root of Judge Van den Wyngaert's fears is that there is a reluctance to approach the question of assigning responsibility on a unitary basis.[1020]

By way of compensation, she states that the sentencing aspects could reflect the gravity of the offence. Although her critique is relevant to assessing the method of determining responsibility by advocating strict reliance on the treaty text, it turns a blind eye to the integration of Roxin's work into the *Strafgesetzbuch* and that effect on the interpretation of the Statute which is designed along similar lines. The original notions derived from Roxin's work are about this collective approach towards criminality where crimes are collectively perpetrated. In these situations, maintaining the distinction is unnecessary.

Judge Van den Wyngaert's approach has been imitated in some domestic trials implementing international criminal law. Munoz-Conde in discussing the trials noted the Buenos Aires Court found that upon the Junta seizing power in 1976, there were separate military zones created in which commanders operated autonomously. The Court found that their role in crimes were limited in comparison to the role

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[1017] Ibid para 411.
[1018] Arendt, *Eichmann in Jerusalem* (n 4).
[1019] *Prosecutor v Mathieu Ngudjolo Chui* (Trial Chamber II) Concurring Opinion of Judge Christine Van den Wyngaert) (n 88) para 53.
[1020] Ibid para 22.

played by the individuals who controlled the system and subordinates were easily replaceable.[1021]

As a result of this, several Junta leaders were convicted. Their convictions as indirect perpetrators were later overturned and they were instead convicted as necessary contributors, on the basis that they planned, organised and instigated the group.[1022] This did not affect the sentencing, but it indicated a reluctance by this Court to hold an individual directly responsible when this level of control was evident. What these discussions show is that the detailing and approaching of the different relationships between individual agents are complex and require a unique method towards assigning responsibility. This method draws on three key approaches, a holistic review of power apparatus, the connection between power structures of the State and armed groups, and a realistic assessment of the consequences of a plan.

5.6 Discussion

Co-perpetration, indirect perpetration and JCE provide useful approaches that can be implemented in a proposed variation of the tests of attribution of conduct of individuals. Co-perpetration, and the first two categories of JCE are particularly useful in that the question of assigning responsibility is approached by analysing the extent to which an Accused controlled the crime through a combination of objective and subjective elements,[1023] as "there must be both the appropriate factual circumstances for exercising control over the crime, and an awareness of such circumstances."[1024] The tests used for indirect perpetration and JCE 3 goes even further. Both elaborate an awareness that in circumstances where it likely or predictable that international crimes will occur, criminal intention can be inferred as in the application of JCE 3. Also, deviations from the common plan that are within

[1021] Munoz-Conde, 'The Application of the Notion of Indirect Perpetration through Organized Structures of Power in Latin America and Spain' (n 853) 117.
[1022] Ibid 118.
[1023] S Manacorda and C Meloni, 'Indirect Perpetration v Joint Criminal Enterprise' (2011) 9(1) *Journal of International Criminal Justice* 159, 169.
[1024] Ibid.

the range of the relevant acts with which one must normally reckon do not count as incidental crime. The scope of control is broader and this prevents the use of "fungible intermediaries"[1025] to effect what can only be seen as something that will in the normal course of objective reasoning be seen as a necessary part of the criminal plan embarked on.

While this may be perceived as a strength, there are some who find that the more objective approach towards the question of responsibility understates the importance of the mental states of an Accused in determining questions of culpability.[1026] Some commentators also take issue with the conflated way in which the ICC has applied the domestic principles on perpetration treating them synonymously.[1027] Yet to some "[t]he question is whether such doctrinal overreach is a natural outgrowth of the judicial application of the doctrine of indirect co-perpetration or whether it is implicit in the doctrine itself."[1028] The application of the modes by the international criminal courts examines the relationship between State agents and paramilitary groups, and thus grafting these approaches into an assessment of the critical aspects of the tests of attribution of conduct to individuals may be useful.

The modes of responsibility all form part of the quest to find the test to more robustly deal with the criminal implications that arise from these relationships, as State agents use non-State actors including armed groups to carry out their objectives that can only end in the commission of an international crime. Taken in combination, the different categories of perpetration of modes of responsibility and their tests for the assigning of criminal responsibility, provide a set of tools that further examines the nature of the relationship between State agents and armed groups, and particularly with the issue of control in a very nuanced manner. These modes pierce the veil of impunity by looking more qualitatively at any initial plan formulated

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[1025] Jain, *Perpetrators and Accessories in International Criminal Law: Individual Modes of Responsibility for Collective Crimes* (n 1) 5.
[1026] J Ohlin, 'Joint Intentions to Commit International Crimes' (2011) 11 *Chi J Intl L* 693, 742.
[1027] *Chui* (n 1019) (Concurring Opinion Judge Van den Wyngaert) para 62.
[1028] J Ohlin, 'Assessing the Control Theory' (2013) 26 *Leiden Journal of International Law* 725, 737.

between State agents and members of armed groups and then relate the subsequent execution of that plan to the commission of international crimes, because the crimes were committed in the context of that plan. Moreover, under a unitary approach there was shared control or functional domination over each stage of the commission. It thus suggests that a State can direct an operation in which international crimes occur by participating in a dangerous plan in which international crimes will predictably occur. This approach towards understanding control might provide a means to better address State responsibility for support armed groups who commit international crimes.

Chapter Six: The Case for Variation of the Tests of Attribution of Criminal Conduct to States

6.1 The responsibility arising out of support armed groups in the commission of International crimes during conflict

This thesis has identified that responsibility of armed groups for the commission of international crimes during armed conflict is addressed under positive international law on two bases. Firstly, individual members of armed groups can be prosecuted and therefore are personally responsible for the commission of international crimes. Secondly, States are responsible where the acts of these individuals can be attributed to it under the customary rules reflected in Articles 4 and 8 ARSIWA, as interpreted in the case law of the ICJ in three main cases: the *Nicaragua* case, *Armed Activities Congo* case and the *Bosnian Genocide* case. Since the ICJ declined to discuss questions relating to attribution in the *Croatian Genocide* case, it does not assist in the discussion of attribution in any meaningful way; thus those three cases represent the defined ICJ position as to the circumstances in which the conduct of individuals from armed groups can be attributed to a State.

As discussed in this thesis, the commission of international crimes by members of armed groups does not occur in a vacuum but more often than not there is a heavy element of State involvement. The regime of individual criminal responsibility has approached this question of State involvement by developing and applying innovations to domestic doctrines of liability based on participation in a crime. Thus, there have been a range of prosecutions in which the State element in the commission of international crimes has been recognised. These prosecutions against State agents were premised on the basis of a shared criminal intention with the members of armed groups.[1029] Charges have been brought against State agents and members of armed groups under participatory modes of responsibility, such as joint criminal enterprise as in *Tadić* and *Brdjanin*. More recently, cases coming out

[1029] *Tadić* Appeal (n 78) para 220 and also *Bosnian Genocide* (Dissenting Separate Opinion of Vice President Al Khasawneh) (n 3).

of the ICC have introduced new modes of assigning responsibility to individual members of armed groups, based on innovations to the German doctrines of perpetration, such as co-perpetration as was demonstrated in the case of Lubanga[1030] and also indirect perpetration as in the cases brought against the Kenya leadership in the wake of the 2007 post-election violence.[1031] These modes of responsibility in the individual regime of criminal responsibility thus could address both the responsibility of the State agent and the members of the armed group on the basis that they were acting in pursuit of a shared criminal goal.

This approach of "shared responsibility" is not maintained when it comes to consideration of the responsibility of States for the participation in international crimes. As discussed in Chapter Three, State responsibility for the support of armed groups who commit international crimes are limited to the circumstances in which conduct of these individuals could be attributed to the State on the basis that the State either directed or controlled the operation in which the international crimes were perpetrated or the armed groups were completely dependent on the State for its existence.[1032] Anything short of this would be insufficient. Further, whereas international criminal law recognises degrees of complicity so that in some circumstances, as with the models of joint criminal enterprise and perpetration, the supporter or the encourager of the international crime is considered to be there equally responsible as the direct perpetrator,[1033] as opposed to circumstances where they are merely seen as assisting the principal as an aider or abettor. There is no such gradation in the law of State responsibility.

Two further points must be made in regard to this. Firstly, under the law of State responsibility, only State-to-State actors are seen as being enjoined in a complicit relationship; the rules reflected under Article 16 simply do not take notice

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[1030] *Lubanga et al* (Trial Chamber I Judgment) (n 85) and (Decision on the Confirmation of the Charges) (n 86).
[1031] *Kenyatta et al* (n 89).
[1032] See discussion at section 3.3.1 discussing the tests of attribution defined in *Nicaragua* (n 3).
[1033] See discussion at section 6.6.1.

of State-to-non-State relationships.[1034] Additionally, under the rules of attribution of conduct, the critical tests of "direction," "control and "complete dependence" are interpreted literally. This is because the rules of attribution in the law of State responsibility originated in a unique context with a specific and formal approach that distinguished a State's primary obligations from the rules of attribution.[1035] Consequently, the assessment of the tests are not based on inference of intentions in a manner parallel to that which obtains in the individual criminal law regime.

6.2 The rationale behind the law for the current approach towards attribution under the law of State responsibility

The current approaches towards attribution of conduct of individuals to States reflect the codification efforts of the International Law Commission to separate the "primary rules of substantive international law from the secondary rules of [S]tate responsibility [with]…the focus on the latter."[1036] There is a fear among some commentators, that adoption of new methodologies might risk creation of confusion of an area that was hard to settle into a reasonably clear framework by conflating the distinction between questions of obligation and secondary questions relating to determination of attribution of conduct of individuals. Thus the emphasis on maintaining the current methodology towards the rules of attribution stem from the fear that the rules have a distinct method and purpose that

> rose from the muddied waters of diplomatic protection and treatment of aliens, and should now try to resist being dragged back into the methodological mud made up of different substantive primary rules.[1037]

The issue thus is whether this fear is well founded and whether this asserted rationale for leaving the current tests of attribution as it stands, is with merit.

[1034] Wilson, 'A Rational Scheme of Liability for Participating in a Crime' (n 622) and section 5.4 generally.
[1035] Miller 'Revisiting Extra Territorial Jurisdictional Justification for Extra Territorial Jurisdiction Under the European Convention' (n 514) 1225. The phrase functional over formal, is borrowed from her, notwithstanding she was using to speak about the development of the law in relation to extra territorial jurisdiction under the ECHR.
[1036] Milanović, 'State Responsibility for Genocide' (n 17) 559.
[1037] Ibid 587.

The development of the law in the prescription of the legal tests for attribution of conduct of private citizens to the State has been part of a slow evolution.[1038] The law on State responsibility evolved from a core set of primary obligations to keep citizens of other States safe on its territory. Where mobs, insurgents or the like injured foreign nationals, it was seen to be a violation of these obligations that arose in the field of diplomatic protection.[1039] This was distinct from the secondary rules that developed in relation to the law on attribution and thus, even if there was a breach of the obligations to keep citizens safe, this did not affect the questions relating to the attribution of conduct of individuals to States.

In the aftermath of the First World War, there was a crystallisation of this norm which created an overriding duty on States to protect individuals on their territory.[1040] Even though a State was responsible for the actions of mobs or insurgents, the acts of these private groups were not attributed to States per se, but the State was responsible because it failed in its obligation to protect the foreign nationals.[1041] This is distinguishable from the rules concerning the attribution of conduct of organs to the State.[1042] This is why Milanović has been so strong in his mandate that there should be a resistance to the variations to current tests of attribution of conduct,[1043] as there is this fear that variations to the tests of control will obscure this distinction.

A response to his fears calls for an elaboration on his understanding of the underpinning reasoning for the law on the current rules of attribution. As has been discussed so far, on that separate set of rules, the attribution of conduct of individuals to States could only occur where the State had the capacity to control the individual.

[1038] Note discussion at section 3.1.1.
[1039] See discussion at section 3.1.
[1040] Borchard, *The Diplomatic Protection of Citizens Abroad: or the Law of International Claims* (n 335) 217.
[1041] See discussion at section 3.1.1.
[1042] 'Responsibility of States for Damage Done in Their Territories' (n 341).
[1043] Milanović, 'State Responsibility for Genocide' (n 17) 587.

A State as an abstract can only express itself through its organs.[1044] Thus, a State imbues an individual with the authority to act on its behalf and so the acts of that individual become the acts of the State itself.[1045] The rules as to how this could be done were classed as secondary rules under the ARSIWA and this instrument clarified and delimited the scope of operation of tests for attribution of conduct, with some provisions notably Articles 4 and 8 being referred to in the jurisprudence of the ICJ as being reflective of custom.[1046]

Article 4 codifies the basic principle that the conduct of "any State organ shall be considered an act of that State under international law".[1047] It specifies that an organ is any person or entity that has that status under internal law whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organisation of the State and whatever its character as an organ of the central government or of a territorial unit of the State.[1048] This is in keeping with the underlying principle that a State is indivisible.[1049] The ICJ has held that acts of persons or entities who do not have formal status as organs, can only be attributed to the State for the purposes of international responsibility, "provided that in fact the persons, groups or entities act in 'complete dependence' on the State."[1050] This complete dependence renders the groups *de facto* State organs.[1051]

So too, under Article 8, the conduct of a person or group shall be considered an act of State under international law, if the person or group of persons are in fact acting under the instructions of, or under the "direction or control" of that State in carrying out the conduct.[1052] According to the ICJ, this would require proof that the

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[1044] League of Nations, *Committee of Experts for the Progressive Codification of International Law, Questionnaire No. 4, "Responsibility of States for Damages Done in their territories to the Persons or Property of Foreigners"*, referenced in Eagleton, *Responsibility of States in International Law* (n 345) 44 fn 1.
[1045] Ibid 4.
[1046] *Bosnian Genocide* (n 3) paras 305, 407.
[1047] Article 4(1) ARSIWA (n 10).
[1048] Ibid.
[1049] Crawford, *The International Law Commission's Articles on State Responsibility* (n 24) 95 para 5.
[1050] *Nicaragua* (n 3) para 392.
[1051] Ibid para 390.
[1052] Article 8 ARSIWA (n 10).

State had "effective control over the military operations in the course of which the violations were committed;"[1053] that is they controlled the operations in which violations, or to state it more generally, mass atrocities occurred.

Therefore, Milanović's argument suggests that these rules can be classed as *sui generis* and this prevents modifications due to the risk of conflation of primary rules and secondary rules. If this argument is to be pushed to its limit, the suggestion that it leaves is that methodological modifications or modifications to the test of attribution in general might be too great a risk in confusing the law in an area of law that fought long and hard to achieve the clarity it now has.

This thesis takes issue with this, and has argued that modifications would not automatically result in a conflation of primary and secondary rules. While the test for control must remain as that of "effective" control, a more functional and purposive understanding of the core components to proof of "effective"can be modified so that a different approach is adopted towards examination of issues of "direction," "control" and "complete dependence." This approach could derive from the regime of individual responsibility as there seems to be a common rationale underpinning both individual regimes of responsibility. As was discussed in this thesis, both the regimes of individual criminal responsibility and State responsibility were part of a communitarian response by States to address the complex questions of accountability for international crimes. Inherent in that communitarian response was the driving Kantian notion of a moral legal order through which a universal law could apply to all moral agents.[1054] In this regard one may consider the words of the preamble of the Charter of the United Nations[1055], that strove to "save succeeding generations from the scourge of war,"[1056] or the comments of Justice Jackson in his

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[1053] Ibid para 109; and *Bosnian Genocide* (n 3) para 209.
[1054] Kemerling, 'Kant the moral order' (n 38); Kant, *Groundwork for the Metaphysics of Morals* (n 38).
[1055] UN Charter (n 44).
[1056] Ibid.

opening speech at Nuremberg[1057] in which he asserted that guilt was charged on conduct that involved a moral and legal wrong,[1058] and the host of other statements made on behalf of States affirming this high universal tradition that sought to embed this strong "moral" component to the creation of relevant treaty machinery to address the responsibility for atrocities committed during the Second World War through lawful process.[1059] Since there is this deeper rationale of a communitarian search to use the law and legal methods to address responsibility, the two regimes are simply branches of the same tree and the better question to ask is how can the methods of one inform the methods of the other without creating confusion in the law or destabilising formal legal structures that have been put in place?

6.3 The limitations of the current approach in international accountability

This may be of more immediate concern than is currently acknowledged both at an academic and a judicial level. With the current focus on the formal distinction between the two regimes and the emphasis on current interpretations as being almost the final statement on the situation, it has unnecessarily given pre-eminence to a set of tests that were formulated in a different context that did not address State support of armed groups. The end result is that there is a gap in accountability, a legal hole, in which there seems to be no law in place to address the role of States in these circumstances.[1060] The end result is that the way is being paved for continued State impunity in circumstances where they offer crucial and determining support at various levels, but fall short of actually giving the orders for or directing the operations in which international crimes occur or their support falls short, however minimally, of being enough to satisfy proof of complete dependence.

[1057] 'Robert H. Jackson: Opening Statement Nuremberg Trials, 1945' (The Supreme Court, PBS) <www.pbs.org/wnet/supremecourt/personality/sources_document12.html> [accessed 7 August 2016]
[1058] Ibid.
[1059] *Convention on the Prevention and Punishment of the Crime of Genocide* (n 42) note especially the Preamble.
[1060] This phrase "a legal black hole" was utilised by S Borelli, 'Casting Light on the Legal Black Hole: International Law and Detentions Abroad in the 'War on Terror' (2005) 87 *Int'l Rev. Red Cross* 39 in relation to a different area on non-accountability. The phrase has been utilised in this context.

As was discussed in Chapter Three, *Nicaragua*[1061] was decided upon facts that were distinguishable from those in the *Bosnian Genocide* case.[1062] Although the United States provided the Contra rebels with considerable aid and support for operations, they were assisting the Contra rebels in their objectives. There was not the parallel level of influence in the decision-making that was evident as noted in the *Bosnian Genocide* case, where the armed groups operating in Bosnia–Herzegovina and their Serbian patrons shared the common goals for a Serbian State being created on the territory of Bosnia–Herzegovina.

Evidence for the *Bosnian* Genocide case was obtained from independent findings from Dutch and Western intelligence that was of the opinion "July 1995 operations were co-ordinated with Belgrade."[1063] In addition, there was evidence from Bildt, the EU negotiator, who noted that Milošević, post the massacre maintained strong influence over Mladić's decisions. This was distinguishable from the situation in *Nicaragua*[1064] where the only evidence of a US control in the operations in which international crimes were committed by Contra rebels was in the finding of "the Manual," a circulation by a low-ranking officer with references to psychological warfare tactics,[1065] which was condemned by US authorities. The two factual scenarios were markedly different in terms of the circumstances in which the international crimes occurred and the nature of the relationship between the supporting States and the armed groups.

As was noted in this thesis, international crimes are situated against a complex interaction of historical and social factors,[1066] and this was no more evident than in the SFRY. Since the 1930s, there were strong ethnic and religious tensions brewing, as with the disintegration of the Kingdom of Yugoslavia in the mid-1940s, and the further disintegration following Tito's death there was a struggle to restore

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[1061] *Nicaragua* (n 3).
[1062] *Bosnian Genocide* (n 3).
[1063] Ibid para 411.
[1064] *Nicaragua* (n 3).
[1065] See discussion at section.3.3.2.
[1066] See discussion at section 2.2.

what was perceived to be a dissolution of the Serbian identity.[1067] Thus the assistance rendered by Serbia was in a different context to assistance offered by the USA to the Contras. Thus in the *Bosnian Genocide* case, the *Nicaragua* test was applied without consideration of a key aspect to the test as outlined in Nicaragua, ie that an assessment must be made of the "relationship between the person taking action and the State to which he is so closely attached."[1068]

As has been argued, examination of the tests of control without an examination of the social and political factors impacting on the crimes committed by Bosnian-Serb armed groups creates an artificial disconnection. As a consequence, reconsideration of the tests of attribution of conduct is necessary because the tests are not being applied with examination of the factual matrix in which these international crimes occurred and the result is that States can support and even fuel international crimes and yet remain beyond the pale of legal responsibility. Thus questions of State responsibility for international crimes has become a relevant topic in legal discourse.

6.4 Current solutions to mitigating against these limitations that arise from the current tests attribution of conduct from the academic literature

The proposals that have emerged from the academic commentary thus far to address State responsibility for international crimes committed by armed groups or their individual members have been varied and multidisciplinary. As noted in Chapter Two, while the criminal trial satisfies retributive impulses, in the human psyche, once the trial is completed there is very little than can be done to ensure sustained prevention of suppression of criminal acts beyond the deterrent effect of sentencing the international criminals and using that as a warning to potential offenders. Moreover, it is impossible to try all those implicated in the commission of an international wrong, so commentators have found that in the end the trial process

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[1067] M Scharf and V Morris, *An Insider's Guide to the International Criminal Tribunal of the Former Yugoslavia; A Documentary History and Analysis* (Transnational Publishers 1995) 18.
[1068] *Bosnian Genocide* (n 3) para 392.

is selective,[1069] partial[1070] and unable to address juridical actors.[1071] Thus even if States have participated in international crimes through varying degrees of complicit assistance to those members of armed groups committing international crimes, the capacity for redress under positive international law is limited. There is the further problem with States and State agents establishing relationships with armed groups as there is an increasing importance of armed groups in current conflicts and thus it is necessary that international law address State roles in these situations.

With a view to discussing this, as noted in Chapter Two, the academic commentators have proposed some constructive solutions within which the clear role of States could be identified and more properly addressed. These solutions are based on three main schools of thought. Firstly, there is a suggestion that the two independent regimes of responsibility for addressing international crimes – the regime of State responsibility and regime of individual criminal responsibility – can interact with each other. In this way, each regime can mutually support the other, so that the deficiencies of one can be supplemented in the other.[1072] The advocates of this school see all actors both juridical and natural, being addressed through concurrent application of process, so that in this way no one actor will escape the net of responsibility.[1073] Secondly, there is the suggestion that the criminal justice system should look outside of the conventional judicial structures of individual or State responsibility and towards other reconciliation measures or even towards tort, restitution and contract law for appropriate redress.[1074] Thirdly, others have

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[1069] Cryer, *Prosecuting International Crimes – Selectivity in the International Criminal Law Regime* (n 119) 203.
[1070] Okowa, 'State and Individual Criminal Responsibility in Internal Conflicts: Contours of an Evolving Relationship' (n 127) 145.
[1071] The current framework of criminal responsibility only addresses natural persons. See discussion at section 1.1.
[1072] See Nollkaemper, 'Concurrence between Individual Responsibility and State Responsibility in International Law' (n 106) and Bonafé, *The Relationship between State and Individual Responsibility for International Crimes* (n 243).
[1073] See Nollkaemper, 'Concurrence between Individual Responsibility and State Responsibility in International Law' (n 106) and Zegveld, *Accountability of Armed Opposition Groups in International Law* (n 274).
[1074] See Drumbl, *Atrocity, Punishment and International Law* (n 1), and Luban, 'State Criminality and the Ambition of International Criminal Law' (n 220) 77.

suggested that the complicity of States in the crimes committed by armed groups can be treated as a *lex specialis*, under the human rights regime particularly as regards addressing the question of accountability for armed groups.[1075] This thesis focussed on situating itself in the first school of thought. The question of non-legal mechanisms though rich, must be fruitfully discussed elsewhere given the parameters that this thesis undertook.[1076] Additionally, the creation or argument in favour of creation of a *lex specialis* to deal with State complicity in the support of armed groups has sought to address the lacuna in armed group accountability from a different angle to this thesis. The author does not see the role of the State as a direct participant, but, as with this thesis, is aware of the limitations involved in seeking to address State responsibility through the law of complicity because the law of complicity addresses State-to-State relationships only and has sought to provide a solution as well. While that is one option, this thesis suggests another, that is the role of States is better addressed through subtle variations to the tests of attribution of conduct of individuals to States.

Thus this present thesis has distinguished itself from these two latter approaches to the vexed questions of State responsibility for mass atrocities and concentrated on contextualising itself within the first school.

With the first school the emphasis has been on concurrent application of institution of process. Thus, as Zegveld has so clearly presented the positive law in her work, there are three concurrent means through which the armed group is liable in international law. As outlined in Chapter Two, Zegveld[1077] suggested, that accountability applied at three levels – that of the individual, the group and the State. According to Zegveld,

> [a]t the first and lowest level, individuals who actually committed the crime can be held accountable. At the second level, superiors are potentially accountable on the basis of command responsibility. At the third level, the

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[1075] Jackson, *Complicity in International Law* (n 295).
[1076] Note research question at section 1.3.
[1077] Zegveld, *Accountability of Armed Opposition Groups in International Law* (n 274).

> State itself may be accountable, in that it is responsible for the acts of its agents…[1078]

Thus her suggestion is that there is no impunity as the members of the armed groups are prosecuted and personally responsible, but more critically her solution also identifies attribution of conduct as a potential solution.[1079] Her suggestion is that there could be attribution under Articles 10 and 11 of the rules of international law reflected in the ARSIWA. As discussed in Chapter Three, both rules may be of limited assistance as Article 11 is only applied when the State adopts the acts of the armed groups as was demonstrated in the *Tehran Hostages* case[1080] and Article 10 can only be applied if the armed group later becomes the governing power of the State in which it was previously operating as a rebel group.[1081] However, the likelihood of the armed group assuming power does not address the situation of groups, for example, those fighting in Bosnia–Herzegovina during the Balkan wars in the 1990s will never assume power. Moreover, State support can be insidious when it comes to armed groups, so an adoption of the acts, is unlikely. Other commentators[1082] have even suggested further enhanced models of accountability whereby the organisational modes of responsibility developed after the Second World War under Articles 9 to 11 of the Charter of the IMT could be fruitfully deployed with appropriate modifications to address the group dynamic of armed groups and in this way the group would be treated along the similar lines of a conspiracy so that there would be an assigning of criminal responsibility on the basis of affiliation liability theories.[1083] So too, there was the suggestion that crimes among multiple participants be approached as through a corporate model.[1084] Thus those making decisions for the group or embodying the ethos of the groups could be

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[1078] Ibid 3.
[1079] Ibid 155.
[1080] *Tehran Hostages* (n 397).
[1081] See section 3.3.
[1082] Jørgensen (n 226).
[1083] Brenner, 'Civil Complicity: Using the Pinkerton Doctrine to Impose Vicarious Liability in Civil RICO Actions' (n 642).
[1084] Note that the suggestion was made by N Jørgensen but made in the context of States, discussion at section 2.5.2.

charged and their individual convictions serve as an indictment to the whole group, at least on a moral level.

This can be further augmented through proposals such as those from Nollkameper[1085] whereby enhanced use of particular modes of responsibility such as joint criminal enterprise or command responsibility can properly detect the role of State agents as the designers or main power partners in complexly organised international crimes and thus trials at the individual level can mean that there can be concurrent or dual attribution, ie there can be an assigning of criminal responsibility in the regime of individual criminal law and in tandem, a case can be brought on the basis of violation of international obligations at the ICJ.[1086]

All told, these suggestions provide a useful set of solutions to address the question of State support. However, the fundamental piece of the puzzle that is missing is that without identifying the link between the criminal conduct of armed groups and the supporting State, there can be no mutual attribution. Therefore, as the law stands, the responsibility of armed groups falls to be decided by the regime of individual responsibility and there are copious limitations to this regime that have been discussed in Chapter Two. The most critical limitation is that the regime of individual criminal responsibility has no power to coerce States into appropriate action such as surrender or transfer of criminals, nor does it have the ability to monitor compliance.[1087]

Thus the only way forwards is to reassess the tests of attribution of conduct because this is the hole in the net of responsibility and a considered approach towards a change of judicial policy towards the assessment of threshold of controls under the current tests is vital. So far the proposals for change of policy have come from judicial commentary as opposed to academic proposals.

[1085] Nollkaemper, 'Systemic Effects of International Responsibility for International Crimes' (n 107).
[1086] Ibid 615, 618-619, 627-631.
[1087] Okowa, 'State and Individual Criminal Responsibility in Internal Conflicts: Contours of an Evolving Relationship' (n 127) 188.

6.5 Current solutions to mitigating against these limitations that arise from the current tests attribution of conduct from jurists

The first proposal for a modification of the test of attribution of conduct of individuals to States came in the *Tadić* Appeals Chamber Decision of the ICTY as noted in Chapter Four. Here, the Appeals Chamber considered whether the conflict on the territory of Bosnia–Herzegovina, after the withdrawal of Serbian regular armed forces, still remained international in character so that the Tribunal could exercise jurisdiction over alleged grave breaches of Article 2 of the Fourth Geneva Convention.[1088] This prompted a necessary discussion on the question of attribution of conduct.

The *Tadić* Appeals Chamber argued in favour of a flexible approach to the issue of attribution[1089] and found that non-State actors can be regarded as *de facto* organs of the State in some circumstances.[1090] In this regard, the Appeals Chamber also opined that control may be of an "overall character" and not merely emanate from financial or military assistance.[1091] They further noted that,

> [t]his requirement, however, does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation. Under international law it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations and any alleged violations of international humanitarian law. The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) has a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group…[1092]

The rationale behind this approach according to Judge Cassese was that it was legally correct to apply the test as formulated by the Appeals Chamber and also

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[1088] *Tadić* Appeal (n 78) para 199.
[1089] Cassese, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment in Bosnia' (n 18) 658.
[1090] *Tadić* Appeal (n 78) paras 137, 162.
[1091] Ibid para 137.
[1092] Ibid.

that they were policy-bound to do so.[1093] According to Judge Cassese, it was legally correct because the ILC in its Commentaries urged that each case be approached on a case-by-case basis,[1094] and the Court was also bound to consider all rules belonging to other bodies of law with the purpose of construing a part of a corpus of rules it must consider.[1095] Moreover, in light of the context in which the course of the conflict operated, this may have been the only way to perceive the true effects of the support rendered and help assess if that support was of such influence to be considered as control over the armed opposition group. He further argued that this would address the current trends in international law whereby States support armed groups both nationally and internationally and this has a potential to lead to conflict that can seriously threaten international peace and security. A modified test of control could create a legal Standard to hold States accountable.[1096]

This proposed test of attribution was rejected by the ICJ in the *Bosnian Genocide* case, in which the Court noted that the ICTY had not been called upon to make such pronouncements.[1097] The Court instead reaffirmed the tests outlined in *Nicaragua*, requiring proof that the Respondent State had effective control over the operation during which the unlawful acts occurred.[1098] However as Judge Cassese noted, would the "oracular"[1099] pronouncement by the ICJ be sufficient to exclude consideration of other methodologies towards the issue? Should there be more willingness to probe and consider other proposals?

Judge Al Khasawneh supported this call for a renewed examination of the tests of attribution. He did not amplify further in this regard, but both his Dissent and the Decision of Judge Cassese have influenced the unique proposal suggested in this

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[1093] Cassese, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment in Bosnia' (n 18) 666.
[1094] Ibid 665.
[1095] Ibid 663.
[1096] Ibid 666.
[1097] *Bosnian Genocide* (n 3) para 405.
[1098] Ibid para 406, in particular fn. 61.
[1099] Cassese, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment in Bosnia' (n 18) 652.

thesis to accept the suggestion that the tests of attribution should be subtly varied and to suggest the variation.

6.6 The variation of the tests of attribution of conduct of armed groups to States

The proposal suggested by Vice President Al Khasawneh was for a subtle variation of the current tests of attribution of conduct. Taking this forwards, this thesis proposes in the next few sections a cadre of variations. These suggestions are set within the context that they must specifically only relate to the secondary rules of attribution and not venture beyond that parameter into the realm of positive obligations, so as to avoid the risk of conflation of the two distinct areas and thereby confuse that demarcation that was so long and so hard fought for.[1100]

As outlined in the research question,[1101] the variation suggested is not the test per se, but the approaches towards consideration of the critical components of "direction," "control" and "complete dependence" within that test and offer examples as to how a less literal, more purposive interpretation of these critical concepts can be made so as to achieve a more nuanced and context driven approach to their assessment. This is not done with the goal that the threshold of proofs would somehow be automatically lowered and there would be subsequent findings of attribution of conduct. Indeed, the suggestion is far from that. Instead the thesis suggests that the different ways in which these critical concepts have been examined elsewhere should be applied to the future ratios at the ICJ, so that there is a more holistic examination of the true nature of these core components of "direction," "control" and "complete dependence" with a view to assessing the extent to which armed groups can be considered *de facto* State agents. This would mean that the test is less under-inclusive and examines a wider range of control relationships between the supporting State and the armed group.

[1100] Milanović, 'State Responsibility for Genocide' (n 17) 586.
[1101] See research question at section 1.3.

If at the end of the day, there is no finding that supports the attribution of conduct of individuals to the State, then at least there would be the *ratio* of the trial to show that the issues were examined in a less literal way and that the subtle power chains and forms of control or dependence did not go unexamined. The variation this thesis suggests is for an enhanced model of attribution that focusses more on complex examinations. There are four main ways in which these examinations can occur. The question of "direction" and "control" can be examined through the lens of joint criminal enterprise and the two main streams of perpetration doctrine – "co-perpetration" and "indirect perpetration." Further questions of "direction" and "control" and "complete dependence" can be examined through the lens of the human rights approach towards a finding of jurisdiction in cases where there has been an alleged violation of rights, on the basis that support of armed groups or private entities effectively established jurisdiction.

If examinations as to proof of these core elements can be undertaken by the ICJ in a parallel manner to the approaches by these two different international courts, for assessment of these concepts arising on similar facts, that might provide a more thorough examination of the issues involved. These different "lenses" are now looked at.

6.6.1 The joint criminal enterprise model

As discussed in Chapter Five, this mode of responsibility operates on the premise that where international crimes are "pursued at the collective level by gangs, militias and criminal organisations, their intention to commit the crime and their culpability resides at the collective level."[1102] The responsibilities of all the participants are distributed equally under a unitary model of participation to all participants for the purposes of attribution or assigning responsibility, so that the individual who formulated the plan is equally guilty as the individual who executed the plan.

[1102] Ohlin, 'Three Conceptual Problems with the Doctrine of Joint Enterprise' (n 657) 70.

This emphasis on the collective aspects of international crimes was at the heart of the Dissenting Opinion of Vice President Al Khasawneh. In this regard, as discussed in Chapter Five, international crimes do not occur randomly but are embedded into a wider social policy that supports or encourages the action.[1103] Thus the pursuit of crimes by gangs, militia and organisations cannot occur in a vacuum and there must be a controlling entity that has directed or controlled the acts in some form or the other. This was a point that was recognised as early as the 1940s when the Charter of the IMT was drafted. There, a decision was made to prioritise the assigning of criminal responsibility to powerful individuals. Article 6 of the IMT Charter provided for this assigning of criminal responsibility by ascribing fault for both the "formulation and execution" of international crimes.[1104] This was notwithstanding that the execution of international crimes was carried out but by lower-order military officers. There is thus that awareness that large-scale crimes occur as a result of a clear plan and thus there was a link between the formulation of a criminal plan and its execution. Although there are no direct lines of command that are sometimes visible from the creation of a plan, the joint criminal enterprise model considers the more subtle forms that such control can take.

Thus as was discussed in Chapter Five, JCE as a mode of responsibility was able to address "the complex relationships and deliberative structures"[1105] involved in "[t]he use of the paramilitary group by the higher-level group of political and military leaders."[1106] Under this mode of responsibility, the complex and sometimes insidious ways in which a high-level perpetrator, such as a military or political leader, could control or effectively direct the commission of international crimes from a remote seat of power can be appreciated by examining that question of control through the concepts of collective participation.

[1103] Vetlesen, *Evil and Human Agency: Understanding Collective Evildoing* (n 4) 32.
[1104] *Justice* (n 717) and see discussion at section 5.4.1.
[1105] Ohlin, 'Three Conceptual Problems with the Doctrine of Joint Enterprise' (n 657) 69-70.
[1106] Gustafson, 'The Requirement for an Express Agreement for Joint Criminal Enterprise Liability: A Critique of Brdjanin' (n 659) 149.

In Chapter Five, the relevant tests for applying three categories of JCE were examined and some core cases were used by way of illustration of the point, but in the main the *Tadić* Appeal,[1107] the *Brdjanin* Trial Chamber Decision,[1108] and the *Rwamakuba*[1109] and *Gacumbitsi* Appeals Decisions.[1110]

Common to all cases was the discussion of the application of particular objective elements required to prove whether a joint criminal enterprise actually existed namely, that there was a "plurality of persons"[1111], a "common plan which involved the commission of a crime under the statute or whether such plan could be inferred from the actions of the plurality".[1112] In determining whether there was that participation in a common plan, the Appeals Chamber distilled three categories of mental or subjective elements with a view to using them as a means of proving either expressly or implicitly the state of mind of the Accused when they participated in that common plan. With the illustrative cases that were used in Chapter Five to discuss the tests to determine the various elements, both objective and subjective, there was an emphasis on individuals who were in different positions of leadership and whose participation took the form of settling ideologies or plans for the creation of a Greater Serbia, ie a Serbian controlled territory, or as with the *Gacumbitsi* or *Rwamakuba* Decisions, a Hutu controlled Rwanda.

The idea of the joint enterprise was distinguishable from the conspiracy that was a feature of the early trials at Nuremberg. While the conspiracy confined responsibility to be assessed based on the explicit terms of the plan, with joint criminal enterprise, responsibility could be further assessed on the basis of the foreseeable consequences that were logically predictable. The question then is how can this be applied when considering the requirements of direction and control under the present tests of attribution of conduct?

[1107] *Tadić* Appeal (n 78).
[1108] *Brdjanin* (Trial Judgment) (n 79).
[1109] *Rwamakuba* (n 673).
[1110] *Prosecutor v Sylvestre Gacumbitsi* (Trial Judgment) (n 974).
[1111] *Tadić* Appeal (n 78) para 227.
[1112] Ibid.

With regard to this, under the regime of State responsibility questions of "direction" or "control" are objectively analysed as they are assessed on an objective standard, ie from the perspective of an impartial third party, namely the ICJ or the Court applying the test. In international criminal law, the question of whether a remote high-level political or military actor shared a common intention with the low-level paramilitary member executing international crimes, although a subjective requirement as it addresses the Accused's state of mind, is nevertheless also assessed objectively by the Tribunal of fact. Thus an appreciation of the circumstances in which the more disconnected or remote actor can be considered to have had an intention to participate in the international crimes committed by lower-level paramilitary members on the basis of an objective inference of shared intent is relevant to the overall proposal in this thesis to suggest variations to the approach of assessment of "direction" or "control," since the objective approach to the assessment of the situation is a common denominator in both situations. Thus the approach used to determine intention under this mode can usefully inform the approach towards an assessment of the evidence by the ICJ

There were three ways of assessing intention. With JCE 1, intention was assessed on the basis that there was a sharing of intention or a common intention evidenced by a division of roles, with each role supporting the final commission of an international crime.[1113] With JCE 2 intention is inferred from the knowledge of a particular situation and with JCE 3 knowledge is inferred on the basis that crimes not immediately planned but which were committed in excess of those actions that were planned, meant that there would be an automatic inference of culpability once they were foreseeable.

Intention under JCE 1 is based on a shared intention evidenced by a distribution of roles in a common plan. As the case law discussed in Chapter Five showed, the distribution of roles was not formal as per an agreement between the

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[1113] *Tadić* Appeal (n 78) para 192; in this regard also see the justification for the doctrine offered by Wilson, 'A Rational Scheme of Liability for Participating in a Crime' (n 622).

relevant physical perpetrators and those who formulated the criminal policy, but could have arisen naturally. As was discussed both in Chapters Two and Five, international crimes are ideologically motivated and driven. The unique nature of these crimes are that they are intensive in terms of scale and participation. A *modus operandi* that was noted in cases like *Tadić,* for instance, is that the crimes are committed by groups of individuals, who self-organise, as, for example, Tadić who on a spontaneous basis organised and executed the commission of the crime. However, unlike domestic crimes, which represent social deviance,[1114] these spontaneous and violent crimes are condoned by the State. There is thus a point at which the State's leadership formulates a particular policy and disseminates that information through different organs and this in turn allows a mushrooming of operations by either armed forces or paramilitary groups which either work independently or in conjunction with each other, but which subscribes to the policies articulated by that State. These policies can be formulated even on an extra territorial basis as, for example, with Serbia and the Serbian Republic of Bosnia–Herzegovina. To elaborate, although Milošević died before his trial completed, he was initially indicted on the basis that he participated with armed groups operating on the territory of Bosnia–Herzegovina.[1115] Thus even though there is superficial autonomy to these armed group operations, in that they are executed by the groups separately, they are not truly autonomous, as they are controlled by the initial plan or policy that was devised by the leadership or relevant high-level perpetrators. Although it is an indirect form of control, it is still powerful as it is that initial plan or policy that guides or informs the operations in which the international crimes occur.

In assessing this, the Appeals Chamber in the *Brdjanin* case was at pains to note that there does not have to be an agreement for the execution of the crimes between the relevant physical perpetrators and those who formulated the policy,[1116] simply a shared intention. Further even though there may be autonomous and

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[1114] Drumbl, *Atrocity, Punishment and International Law* (n 1).
[1115] *Milošević* (Indictment) (n 806).
[1116] *Brdjanin* (Appeal Judgment) (n 79) paras 423, 482.

spontaneous criminal plans whereby different armed groups carry out international crimes they are still connected to a single controlling exercise by a collection of State agents thereby begging the question asked by Luban in Chapter Two, is there a Prince without a Denmark, ie if the State agents are responsible on the basis of an inferred intention by application of a similar process of reasoning their States should be as well.[1117]

This autonomous execution of a centrally formulated plan amounts to what is described by van Sliedregt as the process of delinking. In by far one of the most elucidating explanations as to how international crimes are realised, van Sliedregt notes that there are 'interlinked JCEs', with policy makers on one hand and executors or foot soldiers on the other hand.[1118] Inherent in her argument is that each group is linked to the other by a shared common goal directed by the State.[1119] Regardless of the conclusions that will be drawn at the end of such an assessment, this thesis suggests that a similar approach towards questions of direction and control might be able to discern the controlling hand of a State in the crimes perpetrated on this system-wide basis, by examining whether the policy goals and formulation of plans by the Supporting State to effect such goals together with their support for the execution of those plans provided direction over the operations in which international crimes occurred.

Intention is also assessed under this mode by the inference of knowledge in particular circumstances. Under the JCE 2 category, the so-called "systemic" category, knowledge of the criminal acts of a group inculpated the accused persons. While these cases concerned international crimes committed in the context of concentration camps, here knowledge of ill treatment and acquiescence or failure to control it allowed for an inference of intent.[1120]

[1117] Luban (n 220) 77.
[1118] van Sliedregt (n 740) 195.
[1119] Ibid.
[1120] *Kvočka et al* (Appeal Judgment) (n 80) para 203.

Of the three strains, the way in which JCE 2 inferred intention, ie on the basis of acquiescence or failure to prevent crimes of subordinates, is not immediately useful in suggesting a parallel approach towards the determination of direction or control as the State responsibility regime views duties to prevent or punish under primary obligations and thus to suggest an approach that merges the two might conflate the distinction between primary and secondary rules. Where it can have potential to suggest meaningful approaches is to the extent that one State agent was aware of the system of criminality that was either ongoing in another State which he was supporting, or in armed groups under his patronage, or that of the State he was supporting. According to the test clarified in Kvočka, personal knowledge of the system of ill treatment inculpates an Accused, so that even if at the outset, the criminal activities within the system are not proven, once there is an awareness later on that is sufficient to consider intention.[1121] For reasons discussed above, this approach might not be immediately useful as with this mode there were defined power structures and lines of command thereby assisting with questions of complicity through omission. With the questions of direction and control in the context of the regime of State responsibility under consideration in this thesis, there are not these defined lines of command so the inference of knowledge in a structured systemic environment might be an overreaching of the suggestions for subtle variations to the current tests of attribution.

This is not so with JCE 3. Here, there has been a wide inference of knowledge on accused persons so that where they initially formulate a plan for one crime, eg forced removals, and a collateral crime occurs in excess of that, eg genocide, the intention to commit the genocide is automatically inferred and this occurs through the range of participants. Thus if State agents such as Stakić or Brjdanin were party to the initial plan for forced removals and were instructive in the formulation of that plan, they would be equally responsible for the collateral crimes that occurred during the execution of that particular operation.

[1121] Ibid.

The reason for this inference of intent is that "the [crime] was both a predictable consequence of the execution of the common design and the Accused was either reckless or indifferent to that risk."[1122] Intention was thus not pre-meditated but based on recklessness. Either the Accused foresaw the risk and continued with his action or he was indifferent to it. In both cases the assigning of responsibility under this head was based on an appreciation of risk.[1123] Where therefore there is evidence based on the inference of intention that the Accused participated in a plan for one act, for example, forced removals and he promulgated the plan in his capacity as State agent, either through the media, sending supporting troops from the State army or provision of materials, the control exercised over that operation would be sufficient to support another finding of control over the excess crime along the lines of derivative or parasitic liability, ie the control in one instance supports the finding of control in the other.

So far the ICJ has rejected that anything short of direct control over the operations in which international crimes were effected is sufficient. So this suggested inference of intention is problematic. The answer to this problem however lies in the following suggestion. In *R v Jogee*[1124] domestic UK Courts, which have been consistently applying the idea of an extended category of JCE on the basis of foresight of consequence, modified the obvious harshness to such a rule by suggesting that the foresight of consequence be simply evidence to be assessed by a tribunal of fact as to whether there was intention for the further crime. In this way, the foresight of consequences can be productively integrated into a modified approach towards the questions of attribution of conduct thereby producing a more enhanced model for State responsibility in international crimes by examining whether the State role in the forumulation plans for forced removals, and the provision of aid or assistance to allow for execution can on the whole indicate that there was direct control over the operations in which international crimes occurred because the international crimes that occurred during the operations were an obvious

[1122] *Tadić* Appeal (n 78) para 204.
[1123] Summers, 'The Problem of Risk in International Law' (n 829) 681-682.
[1124] *R v Jogee* (n 872).

consequence at all times. This would allow for a less literal and more purposive interpretation of control. Further suggestions follow here.

6.6.2 The co-perpetration model

As with the joint criminal enterprise model the approach used to determine intention under this mode is done with a view to determining the extent to which it can usefully inform the approach towards an assessment of the evidence by the ICJ on the critical components of the attribution of conduct tests. As noted in Chapter Five, co-perpetration has two requirements: an objective requirement that there must have been the execution of a criminal act and a subjective element that there must have been a common plan for this execution.[1125] This mode is particularly useful for three reasons. Firstly, a determination of whether there was an execution of a criminal act it is based on objective factual assessments of whether an accused person exercised control or joint control over particular crimes, through consideration of a "cluster of factors" as opposed to concentration of a single element in assessing this question of control[1126] and secondly, consideration of control over the crime does not consider crimes that logically arise through pursuit of the original criminal plan as being collateral. Instead it assumes once a criminal act is a foreseeable consequence of that initial crime, that it is integrated into the notions of the common plan.[1127]

All three factors hold particular usefulness for assessing the tests of direction and control under the rules of attribution. Since the approach under this mode suggests an assessment of "functional control," more subtle ways of controlling the acts of armed groups are considered. With formal orders and commands control is evident, however, as has been consistently noted in this thesis there are different ways in which an operation can be directed and perhaps instead of overly placing reliance on formal expressions of direction and control a closer look can be made at more "functional" expressions.

[1125] Ibid.
[1126] Ohlin, 'Assessing the Control Theory' (n 1028) 73.
[1127] Jain, 'The Control Theory of Perpetration in International Criminal Law' (n 849) 170.

Under co-perpetration, the language of this doctrine further, is addressed in terms of control and domination over the act, so that questions of derivative liability in the context of criminal law is assessed on the "functional control" the Accused had over the act. This has been done on the basis of an inclusion of Roxin's theories of functional control that have been grafted onto the jurisprudence of the international courts and tribunals applying this mode. So that, for instance, where there is a division of roles, each co-perpetrator "simultaneously controls the total act."[1128] This objective assessment was reliant on an examination of the contributions of the Accused to the criminal act. This was on the basis of an "essential contribution." While there may be critics as to the esoteric nature of the term, Ohlin suggests that the test examines conduct both *ex ante* and *ex post* perspectives.[1129] Not only is there an examination of the importance of the contributions of the Accused before the execution of the criminal act, there is a further analysis of the contributions of the Accused after the execution of the criminal act, so that exactly how the contributions served the execution of the crime and those effecting the execution are examined. It provides a more rigorous examination of the effects of the contributions of the Accused.

This was applied in *Lubanga*[1130] as discussed in Chapter Five. Here, the contributions Lubanga made to plans to exclude the Lendu for Kibali Ituri, were not addressed as defined acts but involved an appreciation of the "cluster of facts" which showed that there was evidence of control over the crime, even if that control emanated from a remote location.[1131] These plans impacted on a complex network of events involving the recruitment and training of child soldiers in Uganda and Bunia.[1132] In this regard, he maintained a controlling role in this crime.

Further to this, was that element of foreseeability of the crimes occurring as a logical consequence to the plan embarked on. As Chapter Five discussed, rebel

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[1128] Ibid 179.
[1129] Ohlin, 'Assessing the Control Theory' (n 1028) 731-732.
[1130] *Lubanga et al* (Trial Chamber) (n 85) paras 330-331.
[1131] Ibid (Decision on the Confirmation of the Charges). Discussed further in section 5.5.1.2.
[1132] See discussion at section 5.5.1.2.

groups may start off with a non-criminal plan, in Lubanga's case military control of an area. Even though no express plan existed to commit international crimes in pursuit of that goal, the nature of the common plan presupposed commission of international crimes as a logical consequence to acts of displacement, or forced removals. With Lubaga, recruitment was pursued to effect military control of Kibali Ituri. If that suggested that the operations could involve the use of children, although this was never the goal, then the risk was foreseen and thus accepted.

As was suggested in the discussion as to the application of the approaches from the JCE modes, the suggestion here is that the approach towards the assessment of control be used in a similar manner when assessing the tests for attribution of conduct to States. Where plans for particular military operations are discussed and during the course of that plan, it is evident that there is certain risk involved that international crimes are likely to occur in the execution of those operations, where a State has been party to those plans, even if it did not through its agents direct the operation in which the international crimes occurred, considered look should be made as to the nature of its contributions to the operation. This should be done from two angles and assessment of the likely effect of the contribution at the time of the plan and an assessment after the crimes occur to determine the effect of that contribution on a qualitative basis. In this way, if there was a functional control over the operation in the absence of a formal one, it will prevent a State escaping responsibility on the basis that the acts of individuals under its control could not be established, since the proof of the essential contribution could render the individuals committing international crimes *de facto* State agents. As mentioned before, the variation will not automatically terminate in a finding of attribution but it will assist in a more realistic and context-specific examination of the facts under consideration. This also holds true for the suggested modifications via the mode of indirect perpetration.

6.6.3 The indirect perpetration model

The concept of indirect perpetration initially seems perhaps best suited towards suggested tests for variations to the current approaches towards attribution, as it specifically addresses the assigning of responsibility on an individual for his use

of another organisation, for example, armed groups for the perpetration of international crimes.[1133] As discussed in Chapter Five, it addresses the commission of international crimes through the control exercised over another and there are two categories under this mode, commission through the mistake of another or commission via an organisational apparatus.[1134] The second category of this mode assigns criminal responsibility to the indirect perpetrator, ie the Hintermann, because he has the ability to maintain control over an organisational apparatus, or *Organisationsherrschaft*,[1135] which he deploys to commit crimes because he is relying on the organisational structure of the armed groups to execute the crime. As identified in Chapter Five, there are three elements that exist through this mode – "power," ie there are established hierarchical structures, "fungibility," ie those directly committing the act can be exchanged, and "detachedness," ie the organisation must operate outside the law.[1136]

It apparently suggests a solution to the current problems associated with attribution of conduct of individuals who go on to commit international crimes to States who had a relationship with these groups but in a more remote sense from a detached seat of power. However, as noted in Chapter Five, the ability to assess control in this way allows for the persons who acted behind the scenes, who organised, planned, instructed or instigated others to carry out international crimes,[1137] to be responsible. It thus maintains important features that could assist in working out the details of "direction" or "control" in complex situations along the same broad lines as the other two modes of responsibility discussed above.

According to the interpretation of the doctrine in the Pre-Trial Confirmation of the Charges against Kenyatta et al, the Chamber introduced a more subtle interpretation of control, namely circumstances where there was use of a pre-existing

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[1133] See discussion at section 5.5.5.2.
[1134] Ibid.
[1135] Jain, 'The Control Theory of Perpetration in International Criminal Law' (n 849) 171.
[1136] Ibid 174.
[1137] *Prosecutor v Sylvestre Gacumbitsi* (Trial Judgment) (n 974) para 9.

hierarchical and organised structure within an armed group,[1138] so that although control is ceded to the group to act autonomously as regards to the execution of operations, in advance of that there is a common criminal plan and although an express command or order is not given to direct crimes in the course of operations, leeway is given to the groups to act freely, as the will of the group is subjugated to the control exercised by the original masterminds, ie those who formulated the initial plan. The thrust of this mode of responsibility is the use of a pre-existing organisational apparatus to effect the international crimes.

The Pre-Trial Chamber Decision suggested that the intention to share in the crimes committed by the armed group existed where there was either a *dolus directus*, ie direct intention for the crime, or a *dolus directus* in the second degree, ie the crimes of the organisation can occur in the usual course of things. As noted before the questions of intent can be addressed, there must be proof of a criminal plan. Although there was evidence of this produced through a particular witness, who was a former member of the Mungiki, this witness was not available at Trial and the case ultimately collapsed.

This mode of responsibility as discussed in Chapter Five was not tested further. It however together with JCE and co-perpetration maintains a key theme, ie they all address questions of control from a functional as opposed to formal perspective and they all relate control to an original plan that may or may not have identified the crimes committed by the armed groups, but which to any objective bystander was a natural and foreseeable consequence. In this regard the question of control, as regards determination of intent for collectively perpetrated crimes, is not based on simply direct expressions of control but contemplate the range of actions that are logically predictable on the initial common plan. This way an Accused is inculpated on an objective basis either due to his recklessness in the initial control he exercised or due to his understanding that such collateral crimes will occur.

[1138] *Prosecutor v Kenyatta et al* (n 89) para 409.

Translating that into the regime of State responsibility, thus requires a fuller examination of the essential contributions States made to armed groups and whether there were initial plans that had the potential to escalate into international crimes. In addition, where the relationship between the State and the group evidences that that the relationship between the two was such that there was control through shared goals, ideologies, creation of infrastructure that created the right atmosphere for the international crimes, even if there was no direct evidence that the State controlled exact operations, this relationship of control should be a factor in assessment.

What these discussions show is that the detailing and the approaching of the different relationships between individual agents are complex and require a unique method towards assigning responsibility. This method draws on three key approaches, a holistic review of power apparatus, the connection between power structures of the State and armed group and a realistic assessment as to the consequences of any plans arranged between the armed group and the State. Where international crimes are the logical consequence of these plans, further examination is required to assess the effect of contributions to the commission of those crimes by analysing the power network between the two either diffused or direct and bring to bear those concerns in the assessment of control or direction over the relevant operations.

6.6.4 The human rights model

As this thesis has argued, there are strong policy objectives behind consideration of the tests for attribution of conduct of individuals to States from Human Rights Courts, notwithstanding the distinction in the objectives of the tests at the ICJ and the Human Rights Courts at present. Crucially, the Human Rights Courts have been interpreting questions of dependence and control very differently to the ICJ as discussed in Chapter Four. Both the IACtHR and the ECtHR have attributed conduct of individuals to States on the basis of a different approach towards the evaluation of control.

The international human rights regime is distinctive in that its aims and objectives are to protect the rights of individuals under its jurisdiction. Thus the processes for determining attribution of conduct to States relate to the establishment

of jurisdiction. There have been examples in the ECtHR whereby in circumstances where States have created and sponsored entities that the conduct of individuals from these entities were attributed to the State. In these circumstances, control and influence seem to be equated with each other. Thus whereas the distinction between the two obtains at the ICJ and influence falls short of proof of control, substantial levels of influence has been sufficient to attribute conduct of individuals to the State. In one example used in Chapter Four, *Ilaşcu v Moldova*, the ECtHR opined that the level of administrative control offered by the Russian Federation to the MRT, ie the level of military, financial and political support offered, led the ECtHR to conclude that the MRT survived by virtue of the Russian Federation.[1139] The same principle applied in the cases brought by Turkey and as discussed in Chapter Four.

While the test of attribution of conduct of individuals in international law is settled, the considerations used to prove the components of the test of attribution need to be reviewed. There are degrees to influence and there is a point at which influence becomes an act of control. The sustained manner of analysis used by the ECtHR in addressing the questions associated with determining the degree of influence that results from State support should not be underestimated and should be included as part of a revised agenda in considering how assessments of control or dependence under the current tests of attribution as defined by the ICJ should be approached.

The question of jurisdiction as noted in Chapter Four was somewhat different under the IACHR as it specifically relates to obligations to protect the *erga omnes* obligations reflected under that Convention. In the cases examined in Chapter Four from the IACtHR, the questions of attribution of conduct to States thus related the questions of State connivance with paramilitary groups to these obligations and thus conduct of individuals from these groups were attributed to the State on the basis of

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[1139] *Ilaşcu v Moldova* (n 92) para 392.

this connivance, or in some cases because the State acquiesced to the criminal acts of the armed groups or failed to guard against them.[1140]

Application of this model to the regime of State responsibility has to be done carefully. With the regime of State responsibility, the question of obligations is distinct to consideration of the rules of attribution and in considering approaches from other courts that distinction should be maintained so that there is no conflation between questions of obligation and questions of attribution. Questions of State acquiescence could relate to the tests of control only insofar as it is suggestive that if a State acquiesced to international crimes being committed, then it had the power to control the situation and failed to exercise that power. Inherent in that is power control. Thus , the consideration of the effects of relationships among State agents and armed groups and whether arms supply or military training etc were forms of control over the operations in which international crimes occurred is important. These considerations allow a full, realistic account of the State's role in the life and existence of the armed groups and submits all aspects of the relatioship to microscopy.

6.7 The variation of the tests of attribution of conduct

In sum, therefore, this thesis has argued that there is a lacuna in the current positive law, whereby the significant and determining assistance rendered by State patrons to armed groups that commit international crimes goes largely unaddressed. The conduct of individuals can only be attributed to States in very limited and exacting circumstances, ie it must have been proven that the State directed or controlled the operation in which the international crimes were committed or alternatively that the armed group was completely dependent on the State.[1141] Anything short of this would not be able to pass this exacting threshold. Moreover, even if one were to argue that a State should not be held directly responsible for the conduct of individuals by support or assistance, but instead simply for complicity,

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[1140] See discussion at section 4.3 in this regard.
[1141] *Nicaragua* (n 3) para 109.

even there, the State escapes the net of responsibility because the present rules on complicity only address State-to-State relationships.

Thus, in an effort to mitigate against State impunity in these circumstances, this thesis suggests subtle variations to the current tests of attribution of conduct to States by consideration of appropriate approaches from the international criminal law regime and the international human rights regime to the current tests for attribution of conduct to individuals. While not seeking to destabilise the defined test established by the ICJ in *Nicaragua* and later applied in the *Bosnian Genocide* case, this thesis has suggested that a more enhanced inquiry could be made by the ICJ in how it assesses these critical tests of "direction," "control" and "complete dependence." This thesis suggests that the way forwards is to present a harmonised picture of what has been, up to now, fragmented areas of international law. Since in most instances these three areas of law – international law, international criminal law and international human rights law – can be applied in a parallel manner to address mass atrocities on a given factual scenario, this thesis suggests that perhaps the ways in which control is assessed in the individual criminal responsibility regime and the human rights regime could inform the approaches towards the assessment of these critical concepts in international law when these cases appear before the ICJ. The present thesis also proposes that the approaches used under the JCE and perpetration modes of responsibility to address the "complex and deliberative structures"[1142] between States and the armed groups they support, can be applied to augment the current approaches used by the ICJ in determining issues of attribution of individual conduct to States.

Additionally, this thesis further proposes that the approaches by the Human Rights Courts towards assessment of the requirements of control to establish jurisdiction can inform the attribution agenda in international law by examining the ways in which "direction," "control" and "complete dependence" has been

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[1142] Ohlin, 'Three Conceptual Problems with the Doctrine of Joint Enterprise' (n 657) 69-70.

understood in those contexts and consequently can be applied *mutatis mutandis* to the present under-inclusive tests of attribution in international law.

These suggestions build on the proposals of different scholars who have suggested that regime coordination or interaction might be better able to address the complex dimension of international crimes and the diversity of actors involved in its commission. The solutions offered in this thesis call for a novel way of addressing a familiar situation by determining what tests or approaches could have informed the suggestions for a modified approach towards determination of the questions of attribution of conduct. This was done with the hope that in some small measure it could start a conversation that others could carry on in this endless quest for better accountability for the commission and participation of international crimes.

6.8 The challenges posed with these suggested solutions

This thesis admits that the proposed variations to the tests of attribution are not without their challenges. The proposed variations do suggest a level of interference with an already established precedent from the ICJ. Also the suggestions for variation draw on the methodologies for appraisal of direction or control from markedly different courts and tribunals, which maintain different objectives to the determination of these questions to the ICJ. The challenge here is that so far, the ICJ, as seen with the application of the *Tadić* test, has been very adverse to the question of consideration of legal tests from these other courts. Moreover, some of the tests, particularly those from the regime of individual criminal responsibility, are driven by strong and convincing levels of evidence being provided so that the courts and tribunals can make informed decisions. Thus the success or failure of those approaches to some may not be due to the strength of the legal approaches, but instead are the result of appropriate evidence being adduced. Each of these challenges is now discussed.

The main criticism of attempting to vary the approach is that to do so will create uncertainty in the law. In his 2007 treatise *Precedent in the World Court*, Judge Shabudeen identified some of the key guiding factors that shape the views of the ICJ in the establishment of a clear, consistent and coherent approach to issues

brought before it. According to him, "the desiderata of consistency, stability and predictability which underlie a responsible legal system, suggest that the Court would not exercise its power to depart from a previous decision except with circumspection."[1143] As a Judge of the ICJ, he noted that the Court in response to this pursues "a policy of not unnecessarily impairing the authority of its decisions."[1144] As was already demonstrated in the outright rejection of the approach towards questions of attribution of conduct demonstrated in the *Tadić* Appeal,[1145] the ICJ appears to not be prepared to consider methods or approaches outside its own jurisprudence.

However, strictly speaking, the ICJ is not bound by doctrines of precedent in the same way a domestic court is and notwithstanding a policy to remain "consistent," it has the potential to reformulate the tests of attribution, to the extent that it has the will to do so. Indeed, while the ICJ should, rightly, strive for consistency, its role is not only that of stating and restating the law, but also to develop it to meet the requirements of a dynamic international society.[1146]

This is being done by other international courts. For instance, while the ECtHR in the cases analysed in Chapter Four was looking at questions concerning the existence of "jurisdiction" within the meaning of Article 1 ECHR, the finding that such jurisdiction existed in those cases was only possible due the European Court giving full effect to the reality of the relationship between the TRNC and Turkey (in *Loizidou*) and between the MRT and Russia (in *Ilaşcu v Moldova*) in its assessment of the nexus between the Respondent State and the self-proclaimed government it supported. In a similar way, the ICJ should also factor in a full understanding of the nature and effect of the relationship between the State and the

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[1143] M Shahabuddeen, *Precedent in the World Court* (Cambridge University Press 2007) 131.
[1144] Ibid 131-132. Here Judge Shahabuddeen noted that "The Court's attitude vis a vis the *Temple of Preah Vihear* case was influenced by the preoccupation of not impairing the Judgment of the *Aerial Incident* case is very probable."
[1145] *Tadić* Appeal (n 78).
[1146] *Competence of the General Assembly for the Admission of a State to the United Nations*: *Advisory Opinion* (n 46).

group and truly grasp the reality of the role the State played in the operations of the groups it sponsored.

Perhaps the most compelling argument for modification of the test is this. In his 2014 publication on State responsibility, James Crawford placed a caveat on his statement that the *Bosnian Genocide* case effectively put an end to the debate as to the correct standard to be applied to Article 8 ARSIWA. Immediately as he noted this, he flagged up in his footnote that this position is in contrast to the position noted in the Dissenting Opinion by Judge Al Khasawneh.[1147] Judge Al Khasawneh as well has himself commented that

> [u]nfortunately, the Court's rejection of the standard in the *Tadić* case fail[ed] to address the crucial issue raised therein – namely that different types of activities, particularly in the ever-evolving nature of armed conflict, may call for subtle variations in the rules of attribution.[1148]

Thus notwithstanding arguments to the contrary, at the judicial level, the tests are not unanimously accepted.[1149] The law on attribution, as it stands, is by no means settled. From several legal standpoints as discussed in this chapter, the issue turns on the understanding of direction and control. While the ICJ has maintained that for the responsibility of a State to be engaged there must be evidence that the State in question directed or controlled the operation in which the international crimes occurred, the ICJ is approaching the question of direction or control by focussing on a very literal construction of direction and control and thus its assessment of evidence reflects that very high threshold. Other international courts and tribunals seem to be viewing the test of direction and control less literally and they suggest a different interpretation of these words. The quest for an enhanced model of

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[1147] Crawford, *State Responsibility: The General Part* (n 98) 156.
[1148] *Bosnian Genocide* (Dissenting Separate Opinion of Vice President Al Khasawneh) (n 3) 241 para 39. Judge Al Khasawneh also suggested that the ILC itself has suggested more work be done on considering this vexed issue of attribution of conduct, as the ILC papers from the Fifty-sixth Session leaves further room for consideration of this lower standard for control as it left the question of control open. See ibid, citing Report of the International Law Commission on the Work of its Fiftieth Session (n 614) para 395.
[1149] Note also the dissent of Judge Mahiouin in *Bosnian Genocide* (Dissenting Opinion of Judge *ad hoc* Mahiou) (n 3) 381 para 116.

attribution is important as there is that loophole of accountability in the current law, but whether those applying the tests are willing to accept the enhanced model will remain an issue that has to be subjected to further academic enquiry.

The other area of challenge lies in the relationship between the legal tests and the evidentiary requirements to prove them. For instance, although there was that optimism at the Pre-Trial Chamber in the case brought against President Kenyatta et al, that the mode of indirect perpetration was sufficient to address the questions that arose from State use of armed groups, all six cases have failed at the ICC. In part some of the failure has been the result of lack of evidence to go forwards. Thus seeking to transpose approaches that have set high evidential thresholds as to their proof could be problematic as the suggested variations do not make it any easier to secure a finding of responsibility and thus the scope for impunity remains.

The response to this is that the suggestion for a reconsideration of the approaches identified under the current tests of attribution was never done with the intention that the modifications will make determination easier. Far from it, the intention was that the modifications will allow for more sustained and systematic analysis of the questions of "direction," "control" and "complete dependence" so that applications of these concepts are examined with reference to facts and circumstances of the varying degrees of assistances, both *ex ante* and *ex post* to the commission of mass atrocities by armed groups. It is hoped that with an examination that looks beyond the surface and which is prepared to look at circumstances where inferences of facts can be supported or where the impact of predictability of the outcome of the plans and collaborations between the State and the armed group is so certain that logic would demand that in those situations, the recklessness of the State as to these consequences could be used as a marker in evaluating the question of attribution of conduct to the State.

The challenge here is that some international criminal jurists are wary of application of tests premised on reckless intent as there is that fear that it will simply

introduce uncertainty through the back door.[1150] The argument against this is that such tests are objective and have to be satisfied to the point that there are no competing inferences. In this way, it is not uncertain as it relies on intense judicial examination of the situation to determine the impact that obvious circumstances had on the questions of control or dependence.

However, despite these challenges, it is hoped that this thesis has raised an inquiry that can start more conversations about the issues raised and thus spur on further research in the quest for dealing with this new actor in international law: the armed group and the level of State responsibility in supporting this violent entity.

6.9 The scope for further research in this area

The scope for further research is deep and wide. In order to take the issues raised on this thesis forwards there are some further areas that will have to be examined both for the legal and social sciences discipline.

The context in which States usually offer support to armed groups as has been discussed, is against complex interactions of historical and psychological factors. Understanding why States support armed groups in these circumstances and whether that has anything to bear on an understanding of the questions of control or support of the group is important. This is because these armed groups cannot sustain a life of their own and the issue as to what motivates the supporting State can be of assistance.

Further research can also arise on the issue as to whether non-legal methods namely those in the field of international peace and security might be of greater assistance to address the questions of State support of armed groups as these political mechanisms might offer more scope for monitoring and compliance. The non-legal methods will be able to stymie the gap of accountability where there are cases of armed groups which are outside the remit of this thesis, such as ISIS which started

[1150] In this regard, note the comments in *Prosecutor v Chui* (n 88) (Concurring Opinion of Judge Christine Van den Wyngaert) para 36.

out with both State and non-State support, now does not seem to have a clear State patron.[1151] Nevertheless, they are effecting international crimes on a vast scale and in fact do not have clear State boundaries. The questions of how to address investigation and evidence gathering in these circumstances is crucial.

Within the framework of the law, further work needs to be undertaken as to processes and procedures within international courts and tribunals as to investigation and evidence gathering. With the suggested modifications to the tests of attribution outlined in this thesis, there is heavy reliance on proof of common plans and the predictability of consequences from these plans: this can only be addressed through appropriate evidence being led. Thus an inquiry into use of immunities and protection to potential witnesses who were participants of the plan, relevant expert testimonies and commissioned empirical work would help in supporting the objective approach towards assessment of control identified in this thesis.

Further study can also be suggested into continued investigation into the creation of a specific court to address armed groups or an expansion of jurisdiction under the ICC to address the armed group as a discrete legal person or any other suitable forum to deal with potential cases. This entails research into capacity for court creation.

The scope for further research is thus manifold. The face of conflict has dramatically changed since the framework of international responsibility developed after the Second World War. The quest for determining the role of States in supporting, creating, organising, administering, collaborating and controlling these groups is important in the wider scheme of things as it might be the only way to address the responsibility of this rogue actor beyond the confines of individual

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[1151] In this regard the following are useful discussions: A Swanson, 'How the Islamic State makes its money' (Wonkblog, *The Washington Post* 18 November 2015) <www.washingtonpost.com/news/wonk/wp/2015/11/18/how-isis-makes-its-money/> [accessed 7 August 2016] and T Brooks-Pollock, 'Paris attacks: Where does Isis get its money and weapons from?' (*Independent* 16 November 2015) <www.independent.co.uk/news/world/paris-attacks-where-does-isis-get-its-money-and-arms-a6736716.html> [accessed 7 August 2016].

criminal responsibility and thereby suppress further use of them in the commission of mass atrocities.

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