

Complicity in International Criminal Law

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having distinct physical and mental elements. Aiding and abetting genocide consisted in a failure to act or refraining from action, combined with the accused possessing a genocidal intent, while complicity in genocide required that the accused engage in an overt act with the mere knowledge of the actual perpetrator's intent.²³³ The second approach, adopted in *Stakić* and *Semanza*, held that aiding and abetting genocide and complicity in genocide are identical.²³⁴ Finally, the most authoritative approach is that of *Krstić* Appeals Chamber, which held that 'complicity' and 'accomplice' may encompass conduct broader than that of aiding and abetting. The court characterised *Krstić*'s conduct as that of aiding and abetting genocide.²³⁵ The Appeals Chamber did not require an aider and abettor to possess a specific intent; mere knowledge of the intent of the physical perpetrator sufficed.²³⁶

It appears that the most reasonable way of delineating these two overlapping norms is to distinguish them functionally: 'complicity in genocide' shall be regarded as a substantive offence because it is located in an article dealing with the crime of genocide, while various modes of liability in Articles 7 and 6 of the ICTY and ICTR Statutes serve the different purpose of attaching liability and characterising the conduct of the accused. The consequence of the functional approach is to treat the substantive crime provision on complicity in genocide as embracing all forms of participation in the *actus reus* and *mens rea* of the offence itself. The *Krstić* approach endorses the functional distinction between complicity in genocide as a substantive crime and complicity in genocide as a mode of responsibility and a crime.

II. PROBLEMS WITH BUILDING A COHERENT ACCOUNT OF COMPLICITY

The above discussion concerned the legal requirements for modes of liability in international criminal law. It seems that the judges of the ad hoc tribunals and the hybrid courts often resort to predetermined formulas to discuss the ways in which the accused are involved in crimes. Different forms of complicity are frequently utilised by the ad hoc tribunals and hybrid courts: a table demonstrating the correlation between liability modes and sentencing provided in Appendix II of this book shows that

²³³ *Akayesu* Trial Judgment (n 109) paras 485, 538, 548, as cited in Boas, Bischoff and Reid (n 11) 294.

²³⁴ *Semanza* Trial Judgment (n 121) para 394; *Stakić* Trial Judgment (n 93) para 31, as cited in Boas, Bischoff and Reid (n 11) 294.

²³⁵ *Krstić* Appeal Judgment (n 27) para 139, as cited in Boas, Bischoff and Reid (n 11) 297.

²³⁶ *ibid*, para 140.

situations of instigating, ordering, aiding and abetting, and planning arise in approximately one-third of the ICTY cases and approximately two-thirds of the ICTR cases. The SCSL employed the joint criminal enterprise in one case and various forms of complicity as well as superior responsibility in the other cases, while the ECCC chose to refer to all available forms of participation aside from 'committing' in its first and second judgments, although the second judgment placed most emphasis on the joint criminal enterprise.²³⁷

The joint criminal enterprise, commission, extended commission and superior responsibility are the alternative legal tools used by courts to address international criminality, sometimes alongside and sometimes instead of complicity. This section reflects on four problems preventing coherent application of the liability doctrines, in particular complicity, in international criminal law.

A. Fragmentation

An overview of the jurisprudence of the ad hoc tribunals and hybrid courts shows that each body applying international criminal law adopts its own approach to the modes of participation. The ECCC seems to adhere to the unitary model of participation and resembles the Nuremberg prototype. Its judgments assessed the conduct of the accused under every mode of liability available under the ECCC Law aside from committing.²³⁸ The ICTY frequently used the concept of the joint criminal enterprise to address collective criminality, while the ICTR adopted its own notion of commission, namely the extended one.

Various forms of complicity also frequently make an appearance in the jurisprudence of the ad hoc tribunals and the hybrid courts, but the way in which they are applied to the facts are entirely different. The ICTR often employs several modes of responsibility to address the same conduct, whereas the ICTY and the SCSL are more selective, in that they usually prefer a particular form of responsibility.²³⁹ Even within one institution, the legal standards differ from case to case. The ICTY extended aiding and abetting to include liability for omission. It convicted Šljivančanin as an aider and abettor for failing to prevent the implementation of an unlawful order in the absence of any formal position of authority. It then

²³⁷ See Appendix II; *Chea et al* Trial Judgment (n 115) ss 15 and 16; D Cohen, M Hyde and P van Tuyl, 'A Well-Reasoned Opinion? Critical Analysis of the First Case against the Alleged Senior Leaders of the Khmer Rouge (Case 002/01)', WSD HANDA CENTER for Human Rights and International Justice, Stanford University (EastWestCentre.org 2015) 6.

²³⁸ *Duch* Trial Judgment (n 32) paras 486, 516, 521, 526, 531, 537, 549.

²³⁹ See Appendix II.

dramatically restricted aiding and abetting liability by introducing the requirement of 'specific direction' in *Perišić* and *Stanišić and Simatović*.

The recent *Taylor* and *Šainović et al* and *Popović et al* appeal judgments, which reject the specific direction requirement as an element of the actus reus of aiding and abetting, are the most vivid examples of the fragmentation of international criminal law. The rejection of the specific direction requirement by the SCSL and the ICTY is a double-edged sword. On the positive side, it upholds the appropriate standard of complicity for the purposes of international criminal law. The negative side is the lack of coherence and coordination between different courts and tribunals applying international criminal law.²⁴⁰ The discipline is becoming highly fragmented as it is pulled apart by a multitude of considerations, many of which are extra-legal.

Why do we need coherence in international criminal law? Why not allow each international judicial body to adopt its own set of rules? The answer to this question is threefold. First, differential treatment of offenders across various courts and tribunals violates the principle of the equality of punishment. This principle is at the heart of the retributive rationale adopted as one of the guiding principles by international criminal justice.²⁴¹ As Kant framed it, the punishment should be commensurate to whatever undeserved evil one inflicts on another person.²⁴² In modern retributive thinking, the measuring is done according to the principle of proportionality—the sentence must be proportionate to the gravity of criminal conduct.²⁴³ The idea behind this principle is that individuals should be treated as rational beings capable of making choices, and it is the choice to offend that is punished, not the individual himself; consequently, the punishment must be commensurate to the evil inflicted.²⁴⁴ In Dworkinian terms, individuals have a right to equal concern and respect in the administration of the political institutions that govern them.²⁴⁵ Acceptance of the differential treatment of offenders in international criminal law requires, at a minimum, some adjustments to the retributive punishment

²⁴⁰ Judge Tuzmukhamedov disagreed with the majority in *Šainović et al* on exactly this point. He argued that the case at hand did not merit consideration of the 'specific direction' issue for factual reasons—Lazarević's assistance was not remote. He also maintained that the reasons of legal certainty, stability and predictability required the majority to furnish cogent reasons for deviating from the *Perišić* judgment. See *Šainović et al* Appeal Judgment (n 218) Dissenting Opinion of Judge Tuzmukhamedov, paras 43, 45, 47.

²⁴¹ For a detailed discussion of the retributive rationale in domestic and international criminal law, see Ch 7.

²⁴² I Kant, *The Metaphysics of Morals* (Cambridge, Cambridge University Press, 1991 [1797]) 141.

²⁴³ A von Hirsch, 'Proportionate Punishment: A Desert Perspective' in A von Hirsch, A Ashworth and J Roberts (eds) *Principled Sentencing*, 3rd edn (Oxford, Hart Publishing, 2009) 117.

²⁴⁴ Ashworth (n 63) 26.

²⁴⁵ R Dworkin, *Taking Rights Seriously* (Cambridge, Mass, Harvard University Press, 1977) 180.

rationale extensively cited as one of the main sentencing goals in international criminal law.²⁴⁶

The matter is further complicated if one focuses on a particular legal concept: that of complicity. The law of complicity distorts the principle of the equality of punishment on a conceptual level, making it ever more important to maintain a uniform approach to the matter. The common law position illustrates this bias of complicity. Common law translates the principle of the equality of punishment for all parties into treating principal perpetrators and accomplices alike.²⁴⁷ Reconciling this principle with complicity's derivative nature required many changes and refinements in English law, including the adoption of the broad notion of presumed causality for complicity.²⁴⁸ While these modifications allowed for the principle of the equality of punishment in English law, the matter is by no means free from controversy.

Second, there is a pragmatic reason militating against fragmentation. The judgments in the area of international criminal law are often criticised for being too lengthy and requiring significant time and financial input. One way to improve the efficiency is to facilitate a better dialogue between different international courts and within each institution. For example, it appears that both the *Taylor* and the *Šainović et al* Appeals Chambers undertook essentially the same exercise of trying to determine whether specific direction as an element of aiding and abetting is part of customary international law. It seems reasonable, for the purposes of judicial efficiency, to promote cross-referencing and collaboration across the field with the view of reducing the extra workload for individual Chambers.

The final reason for maintaining some level of internal coherence in international criminal law arises from the need to preserve the principle of legality. This fundamental principle, sometimes expressed by the maxim *nullum crimen sine lege* or the 'rule of law', has both procedural and substantive implications.²⁴⁹ The specific aspects of the principle of legality that are eroded by fragmentation are the principle of maximum certainty in defining offences (also termed 'fair warning') and the principle of 'fair labelling', concerned with providing a fair representation of the nature and the magnitude of the law breaking.²⁵⁰ The reason for maintaining the distinctions is again the principle of proportionality—one of the aims of criminal law is to provide a proportionate response to offending by accurately describing the criminal conduct.²⁵¹

²⁴⁶ For a discussion on the adjustments that international criminal law should make in relation to the domestic punishment goals, see Ch 7.II.C.

²⁴⁷ Smith (n 35) 73.

²⁴⁸ *ibid* 90.

²⁴⁹ Ashworth (n 63) 67.

²⁵⁰ *ibid* 73, 86.

²⁵¹ *ibid* 86.

These principles in domestic law do not exist unchecked, but are balanced by current pragmatic and political considerations.²⁵² Ashworth noted that the principle of legal certainty runs counter to the policy of social defence, a position that some vagueness in criminal law is beneficial because it allows the enforcement authorities and the judiciary to deal flexibly with new variations in misconduct without awaiting the legislature.²⁵³ The principle of fair labelling is balanced by the considerations of increasing efficiency in the administration of criminal justice—fewer and broader categories of offence make it easier to secure convictions and lead to the reduction in spending on the court system.²⁵⁴

The examples provided are from the domestic system of criminal justice. International criminal law has yet to define its objectives, as well as the policy considerations that shape judicial reasoning in an international context. How can procedural fairness be balanced with the completion strategy? How can mass atrocities be made to ‘fit’ individual indictments? How can economic efficiency be maintained? How can the line be drawn between a ‘general war effort’ and a war crime?²⁵⁵ These are some of the problematic questions with policy implications. It is difficult to answer these while international criminal law still searches for its identity and purposes.²⁵⁶ Without an understanding of what this field of law aspires to achieve, it is difficult to conceptualise how the policy considerations counterbalance different aspects of the principle of legality in the context of international criminal law. Fragmentation should be avoided to the maximum extent possible, pending the resolution of the general problems of policy and purposes. Undermining coherence requires more justification than is currently provided.

B. Unclear Standard of Causation

The jurisprudence emanating from the ad hoc tribunals and hybrid courts appears ambiguous when it comes to defining the standard of causation for complicity. The fact that some chambers held that instigation, in contrast with aiding and abetting, ordering and planning, requires a causal

²⁵² *ibid* 67.

²⁵³ *ibid* 75.

²⁵⁴ *ibid* 89.

²⁵⁵ It seems that one emerging trend is the pragmatic approach to war, which manifests itself in the acceptance of the inevitability of some level of wrongdoing during the hostilities. The recent ICTY acquittals in *Gotovina*, *Perišić* and *Stanišić and Simatović* have this consideration in common. See *Gotovina* Appeal Judgment (n 27); *Perišić* Appeal Judgment (n 195); *Stanišić and Simatović* Trial Judgment (n 208).

²⁵⁶ D Robinson, ‘The Identity Crisis of International Criminal Law’ (2008) 21(4) *Leiden Journal of International Law* 925. For more discussion on the purposes and limitations of international criminal law, see Ch 8.

link between an act of instigation and the commission of a crime exemplifies the lack of clarity in this sphere.²⁵⁷

The classification by Sanford Kadish of the consequences of human actions is helpful in understanding causation in the context of complicity. Kadish explained that a person's actions might result in two outcomes: first, they may lead to the subsequent chain of events governed by the laws of nature, as for example with setting a house on fire by lighting a match; and, second, the consequence of a person's action may also consist in actions of other people, in the situations of instigation, persuasion, etc.²⁵⁸ In the first case, responsibility follows for the harm that is *caused* by the freely chosen action, while in the second instance, the basis of responsibility is whether help or persuasion renders an accomplice accountable for another's actions and their effect.²⁵⁹ Kadish wrote:

[W]hether I am to be blamed for the other person's action would not be assessed by asking whether I caused his action in the same sense that his lighting the match caused the fire. Rather, my responsibility would be determined by asking whether my persuasion or help made me accountable for the other person's actions and what they caused.²⁶⁰

Causation *stricto sensu* manifests itself only in the first case, when the events happen in the natural world, through its two components: the 'cause in fact' requirement and the 'proximate' or 'legal' cause requirement.²⁶¹ The first requirement refers to causation in the scientific or factual sense and the dominant test for the cause in fact is the 'sine qua non' or 'but-for' test, which implies that the defendant's action was a necessary condition for the harm to occur.²⁶² The second, legal, requirement of causation is evaluative in nature and involves determining whether the defendant is culpable of causing certain harm based on a number of policy considerations; protected social interests, foreseeability, deterrence and directness of the contribution.²⁶³ The synergy of these two requirements allows us to establish causation in the narrow sense of the word. However, the process is not a clear-cut exercise: the unified view of causation conceives causation as a matter of *degree*—one thing can be more of a cause of a certain event than another.²⁶⁴ Consequently, even establishing causation in the physical

²⁵⁷ See section I.E above.

²⁵⁸ Kadish (n 129) 334.

²⁵⁹ *ibid* 334.

²⁶⁰ *ibid* 332. On the nature of derivative liability, see also Fletcher (n 101) 583.

²⁶¹ M Moore, 'Causation in the Criminal Law' in J Deigh and D Dolinko (eds), *The Handbook of Philosophy of Criminal Law* (Oxford, Oxford University Press, 2011) 169.

²⁶² *ibid* 170.

²⁶³ *ibid* 170, 179–85.

²⁶⁴ M Moore, *Placing Blame: A Theory of the Criminal Law* (Oxford, Oxford University Press, 1997) 359.

world, between the harm and the perpetrator, requires some flexibility and an evaluative assessment.

In the second scenario discussed by Kadish, the causal chain is interrupted by the freely chosen acts of others.²⁶⁵ It is therefore not necessary to establish that the crime would not have been perpetrated without the accused's involvement; the *sine qua non* test is not applicable in this situation.²⁶⁶ The accomplice is only able to influence the conduct of the actual perpetrator, but he cannot be said to have caused the crime. This understanding of complicity is in line with its derivative nature. The secondary party incurs the liability by virtue of the violation of the law by the primary party to which the secondary party contributed.²⁶⁷ Accomplice liability therefore depends on the liability of the primary perpetrator.²⁶⁸ This is not to suggest that the language of causation is inapplicable to complicity. Kadish admitted that complicity and causation are cognate issues—they fix blame for a result characterized by a but-for relationship to the actor's contribution, although complicity allows for a weaker version of that relationship'.²⁶⁹ Furthermore, causation '*broadly conceived*, concerns the relationship between successive phenomena, whether they have the character of events or happenings, or of another person's volitional actions' (emphasis added).²⁷⁰

The key distinction is that causation in complicity is different from physical causation. It is essential that international judges stress and clarify this difference. Kutz conceptualised complicity as avoiding individual inquiries into causation by treating harm intended (as opposed to harm caused) as the basis of criminal responsibility.²⁷¹ For Kutz, the essential shift that complicity entails is from objective causation to the subjective intent; from actual harm to risk.²⁷² Gardner contended that 'the difference between principals and accomplices is a causal difference, i.e. a difference between two types of causal contribution, not a difference between a causal and a non-causal contribution'.²⁷³ The link between an accomplice and the

²⁶⁵ C Kutz, 'The Philosophical Foundations of Complicity Law' in J Deigh and D Dolinko (eds) *The Handbook of Philosophy of Criminal Law* (Oxford, Oxford University Press, 2011) 154.

²⁶⁶ Kadish ((n 129) 357) explained: 'In causation, the requirement of a condition *sine qua non* assures this sense of success, since the requirement means that without the act the result would not have happened as it did. In complicity, however, a *sine qua non* relationship in this sense need not be established. It is not required that the prosecution prove, as it must in causation cases, that the result would not have occurred without the actions of the secondary party.'

²⁶⁷ *ibid* 337.

²⁶⁸ *ibid*.

²⁶⁹ *ibid* 366.

²⁷⁰ *ibid* 334.

²⁷¹ Kutz (n 265) 157.

²⁷² *ibid*.

²⁷³ J Gardner, 'Complicity and Causality' in *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford, Oxford University Press, 2007) 58.

harm for Gardner lies in the subjective sphere of reasoning as to why one engages in criminal conduct—justifying one’s wrongs by claiming that they make no impact is not cancelling them, but showing one committed them for a sufficient reason.²⁷⁴

According to KJM Smith, English law adopted the broad notion of causality for complicity doctrine as a compromise between the strict theoretical demands of causality and the limitations of proof.²⁷⁵ Smith maintained that the problem stems from the need to distinguish causal roles of the principals and accessories on the basis of immediacy and directness of causal contribution to the actus reus.²⁷⁶ The accessory contributes only indirectly by influencing the principal. This peculiarity, the distance of an accomplice from the actual harm and the practical difficulty of showing causation, prompted English courts to adopt the implicit rule of the presumed cause—a theoretical adjustment driven by policy demands for a wide-ranging coverage of complicity.²⁷⁷ This rule embraces the limitations of causation in the context of complicity: an accomplice may not be said to have ‘caused’ the principal to act in the same way as the principal causes certain crime to occur in the physical world through his voluntary act.²⁷⁸ This is so because interpersonal relations lack predictability; they lack the sequence of cause and effect.²⁷⁹ At the same time, if the accomplice’s acts have no effect on the crime, no liability follows.²⁸⁰ Consequently, the operating basis of complicity, according to Smith, is not positively established causal contribution, but the ‘assumed cause’, which is the product of tension between what could feasibly be proved and the breadth of conduct that should be covered by complicity law pursuant to policy demands.²⁸¹

The theoretical discussion about the nature of causation in the sphere of complicity leads to three conclusions that are pertinent to international criminal law. First, all forms of complicity, instigation included, share the same derivative basis, so they may not be distinguished on the basis of present or absent causal connection to the crime.²⁸² One may safely

²⁷⁴ *ibid* 73.

²⁷⁵ Smith (n 35) 87. For more on the modes of liability in English law, see Ch 2.II.C.

²⁷⁶ Smith (n 35) 89.

²⁷⁷ *ibid*.

²⁷⁸ Kadish (n 129) 326; Hart and Honoré (n 176) 388.

²⁷⁹ Smith (n 35) 83.

²⁸⁰ *ibid* 87.

²⁸¹ *ibid*.

²⁸² ‘Instigation’ in domestic law appears to be a form of complicity that entails a stronger link between the instigator and the primary perpetrator than that between the aider and abettor and the primary perpetrator. For example, in Germany, the instigator increases the likelihood of the principal committing an offence, while aiding and abetting only furthers the acts of the principal in some way. Consequently, it is understandable why some international judges sought to highlight the significance of the influence of the instigator on the principal with strengthening the causal link between his act and the crime. For the domestic law take on the issue, see Appendix I.

assume that no causation in the strict sense of the word is required for any form of complicity. The standard of international criminal law that the relationship between the contribution of the accomplice and the crime does not need to be *sine qua non* is correct. However, it seems that this test does not belong with complicity at all because it deals with events happening in the natural world and cannot be strictly applied to the acts of other people in light of the presumption of the freedom of choice and individual autonomy.

Second, it is possible to construct a wider concept of causation so as to include the effect of accomplice's aid or influence on the voluntary act of the primary perpetrator. The artificial nature of the link between accessory's contribution and the crime follows from the distinct moral importance of the perpetrator's role, regardless of the scale of the accessory's contribution.²⁸³ The process of expanding the ordinary meaning of causation requires further elaboration.

One way to conceptualise causality in the sphere of complicity is to focus on the distinction found in the domestic legal systems between unitary and differentiated participation. The unitary model presupposes that any involvement whatsoever on the part of an actor in any offence establishes his connection to the crime, while the differential model requires connecting the liability of accomplices to the conduct of the principal perpetrator.²⁸⁴ Thus, the unitary model allows for more flexibility when it comes to the causation standard—any contribution to the crime establishes the connection. The peculiarity of this model is that the liability of each crime participant stands on its own; in other words, it is not derivative. It seems, however, that the ICTY, the ICTR and the SCSL recognise the derivative nature of complicity.²⁸⁵ The ECCC's conception of the forms of participation in the *Duch* judgment is perhaps a step closer to the unitary model of participation: the ECCC judges adopted a factual approach to the evidence. They established the responsibility of Kaing Guek Iev, or Duch, for every liability mode available under the ECCC Law, aside from 'committing' on the basis of his position as the head of the extermination centre Toul Sleng (S-21). The ECCC Trial Chamber did not elaborate on the

²⁸³ Smith (n 35) 81.

²⁸⁴ A Eser, 'Individual Criminal Responsibility (Article 25)' in A Cassese et al (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford, Oxford University Press, 2002) 788. For a detailed discussion of the difference between the unitary and differentiated perpetrator models, see Ch 2.I.B.

²⁸⁵ This conclusion follows from the fact that various forms of complicity are defined with reference to the act of the principal perpetrator. For instance, an aider or abettor is one who provides 'practical assistance, encouragement, or moral support' to the principal. *Furundžija* Trial Judgment (n 126) para 235.

specific crimes committed by Duch's subordinates, the prison staff, but focused on the responsibility of Kaing Kek Iev himself.²⁸⁶

There is room for constructed causation even within the differential participation model. It appears that the jurisprudence of the ad hoc tribunals requires that the contribution of the aider and abetter has a substantial effect upon the perpetration of the crime.²⁸⁷ Likewise, planning or instigation must be a factor that contributes substantially to the conduct of another person committing the crime.²⁸⁸ The terms 'substantial effect' or 'substantial factor' present some conceptual difficulties if one views the will of the principal as autonomous. How does one measure the effect of the aid or influence on the primary perpetrator if he is an independent moral agent?

One potential solution to this problem is shifting the focus from the actual harm caused by the accessory's actions to the risk that he took by providing assistance or encouragement to the principal. This is in line with the proposition by Kutz that the basis for the accomplice's responsibility is not the harm caused, but the harm intended.²⁸⁹ This conceptualisation of complicity leaves room for the extended form of causation, which may be called the 'subjective' causation: what matters is the internal perception of the risk of harm by the accomplice and the actions that he undertakes to further his plans. This is a shift from the objective causation required for primary perpetration.²⁹⁰ It seems reasonable that international judgments should focus more on the accomplice's state of mind and his culpable contribution to the crime rather than seeking an objective, close cause-effect relationship between the accessory and the crime. It is essential not to conflate conduct and fault requirements of complicity, for these should be assessed separately and balanced against each other. The suggested approach shifts the emphasis from the end result, the crime, to the accomplice, his conduct and his intentions. When evaluating the culpability of an accomplice, it is also essential to bear in mind the specific type of criminality involved in international offending—a criminality that stems from obedience rather than deviance.²⁹¹

²⁸⁶ For example, the finding on aiding and abetting is just one paragraph: 'In light of the Chamber's previous findings, it is clear that the practical assistance, encouragement and moral support provided by the Accused to his staff had a substantial effect on their perpetration of crimes at S-21 (Section 2.3.3.5). The Chamber further finds that the Accused was aware that his conduct assisted in the commission of these crimes. Moreover, having trained his staff to consider all detainees as enemies of the CPK (Section 2.3.3.5.2), the Accused was aware of the discriminatory intent of the perpetrators in committing these crimes.' *Duch Trial Judgment* (n 32) para 537.

²⁸⁷ eg, *Blaskić Appeal Judgment* (n 27) para 48.

²⁸⁸ eg, *Kordić and Čerkez Appeal Judgment* (n 109) paras 26–27.

²⁸⁹ Kutz (n 265) 157.

²⁹⁰ *ibid.*

²⁹¹ S Milgram, *Obedience to Authority: An Experimental View* (Tavistock, Pinter & Martin, 1974). For more discussion on the type of criminality involved, see Ch 8.

Third, causation is a matter of degree and not a 'yes' or 'no' question. Even the causal link between the primary perpetrator and the harm implies attributing *relative degrees* of significance. The event is usually caused by a number of factors and each of them contributes to its occurrence to some extent.²⁹² When it comes to complicity, the effect of the influence of the accomplice on the primary perpetrator is subject to even more relativity. Predicting the principal's behaviour in the absence of the contribution by the accomplice is a speculative exercise. Consequently, it is essential to undertake a case-by-case assessment of the connection between the accomplice and the crime. The *Taylor* Appeals Chamber correctly held that 'the causal link between the accused's acts and conduct and the commission of the crime is to be assessed on a case-by-case basis'.²⁹³ Domestic law provides for similar indications: in *Maxwell*, the UK House of Lords strongly emphasised the desirability of indictments that indicate the true factual nature of the case presented against the defendant.²⁹⁴ The rationale is that, because all forms of behaviour have a certain potential to produce an encouraging effect on the principal perpetrator, complicity is not determined by literal constructions. Its limits are conceptual and lie elsewhere in causal expectations and the fault requirement.²⁹⁵

The level of influence on the principal varies from case to case and from one form of complicity to another. An instigator who uses threats or lies to induce the commission of a crime is closer to 'causing' a crime in the actual sense of the word than an aider who merely provides the means that could allow the principal to commit an offence if he wished to do so.²⁹⁶ It is difficult to assess the impact of accessory's contribution on the primary perpetrator and ultimately on the offence in the context of international criminal law due to the scale of criminality involved and significant spatial and temporal gap between the crime and factors contributing to it. This lack of proximity has to be compensated by enhancing the fault requirement or conduct requirement, depending on the circumstances of the case.²⁹⁷

The problem of the specific direction in the ICTY jurisprudence partially stemmed from the lack of the well-defined causation standard for complicity. The justification for the introduction of the 'specific direction' element in the actus reus of aiding and abetting is the need to expressly establish the link between the accomplice's contribution and the wrongdoing in cases when the accused is removed from the offence. The assumption is that

²⁹² Kutz (n 265) 156; Moore (n 261) 186.

²⁹³ *Taylor* Appeal Judgment (n 114) para 391.

²⁹⁴ *Maxwell v DPP* [1978] 1 WLR 1350, 1352, 1357 and 1360, as cited in Smith (n 35) 33.

²⁹⁵ Smith (n 35) 33–34.

²⁹⁶ Hart and Honoré (n 176) 388.

²⁹⁷ For more discussion on balancing the two elements of complicity, see section II.C below.

the link is implied when the accomplice is physically close to the crime.²⁹⁸ However, physical proximity is often a false friend for establishing this connection—even when an accomplice is present at the scene of the crime, he is not directly perpetrating it and his contribution to the offence is often inferred from the evidence.²⁹⁹ The same conclusion follows from the fact that the causal link between the accomplice and the crime is constructed: the connection stems from the risk that the secondary party envisages and undertakes rather than the actual harm that his actions cause. Hence, it is the mental state of the accomplice that grounds his relationship to the offence rather than his conduct. If one accepts that distance is not essential for establishing the effect of accessory's contribution on the offence, then the whole *raison d'être* for the specific direction fails. It is no longer necessary to compensate for the distance by adding additional requirements to the actus reus of complicity, ie, that aid is specifically directed towards the crime.

C. Mismatch between Facts, Law and Forms of Liability

In an ideal world, the facts of the case, the definition of substantive offences and the legal requirements of the liability modes function as a single unit.³⁰⁰ The harmonious collaboration of these three elements leads to the fair assessment of conduct of the accused in the particular circumstances of the case. However, in real life, matters are never simple, especially in cases where responsibility is something to be *decided* rather than simply *discovered*.³⁰¹ Joel Feinberg pointed out that often the questions of legal responsibility cannot be simply 'read-off' the facts and solved in a mechanical fashion, for they require a normative assessment of the fault of the defendant, whether he made sufficiently important contribution to an outcome and a number of ulterior practical considerations that the judges must keep in mind when arriving to a certain conclusion.³⁰² This complex process is open to 'glitches'.

Due to the high complexity of issues presented in international courts and the evolving nature of international criminal law, international judgments are usually very voluminous, with the structure reflecting a clear

²⁹⁸ *Perišić* Appeal Judgment (n 195) para 38.

²⁹⁹ For example, Furundžija's contribution was inferred from his position of authority.

³⁰⁰ This is not to suggest that other factors are not part of the overall assessment. Defences, for instance, also form part of the analysis, but are not discussed in this book. Sentencing and the aims of punishment (discussed in Ch 7) also appear to be detached from the rest of the discussion—they are usually found in a separate part of the judgment.

³⁰¹ J Feinberg, *Doing and Deserving: Essays in the Theory of Responsibility* (Princeton, Princeton University Press, 1974) 27.

³⁰² *ibid* 26–29.

division between 'the law', 'the facts' and 'the sentencing'. This rigidity in the way in which international judgments are constructed and the autonomous nature of each distinct part of the document sometimes leads to the 'missing links' between the mode of liability and the substantive offence, between the facts of the case and the legal definitions, or among all three elements. It follows from the description of the liability modes furnished in the previous section that the wording that one finds in the case law of international tribunals and hybrid courts is frequently mechanical. We observe an engagement with the forms of responsibility as the simple application of certain labels. These labels are often not linked to the actual facts of the case or to the substantive offence.

The missing link between the substantive offence and the mode of responsibility is revealed in the lack of a distinction between the legal requirements of the liability modes, conduct requirement and fault requirement, and the *actus reus* and *mens rea* of the substantive crimes.³⁰³ Historically, the interplay between the two sets of elements has not been straightforward. The IMT and the IMTFE did not distinguish them, instead opting for a fact-based approach to attributing responsibility. The later case law and the work of the ILC show more awareness of the issue, divorcing the mode of liability and the substantive offence to which this liability attaches.³⁰⁴

The interplay between the offence and the form of responsibility is essential in developing a comprehensive theory of individual criminal responsibility in international criminal law. Forms of participation and substantive offences consist of elements and, to secure conviction, the prosecution has to prove both sets of elements.³⁰⁵ To further complicate matters, the prosecution must also establish the existence of the so-called *chapeaux* elements or the 'general' or 'preliminary' conditions characteristic of a certain type of offence (for example, the existence of an armed conflict for war crimes, or the widespread or systematic attack for crimes against humanity).³⁰⁶ This complexity makes it difficult to link different elements in one judgment, leading to a situation where the ad hoc tribunals and the hybrid courts treat the definition of crimes and the modes of liability for crimes as separate questions, with the ICTY, the ICTR, the SCSL and the ECCC discussing the substantive crimes and the forms of individual criminal responsibility in different parts of the judgments.³⁰⁷

³⁰³ See section I.A above.

³⁰⁴ See Ch 3.IV.

³⁰⁵ Appendix II to this book shows for each accused the mode of responsibility and the crimes for which he is convicted in separate columns.

³⁰⁶ Mettraux (n 14) 30.

³⁰⁷ A Zahar and G Sluiter, *International Criminal Law: A Critical Introduction* (Oxford, Oxford University Press, 2008) 220.

Complicity in genocide—a provision that exists in the ICTY and ICTR Statutes as a substantive offence—showcases the difficulties encountered by the ad hoc tribunals in distinguishing the legal requirements of liability forms and the elements of the substantive offence.³⁰⁸ The inclusion of ‘complicity in genocide’ as a substantive crime in the ICTY and ICTR Statutes is problematic in its own right—it creates an overlap between Articles 7/4 and 6/2, respectively, dealing with various forms of complicity, and covering the offence of genocide, including ‘complicity in genocide’. However, the point to be made here is that until the *Krstić* appeal judgment, which distinguished ‘complicity in genocide’ as a substantive offence from aiding and abetting genocide as a combination of the mode of liability and the substantive offence, there existed little clarity on the matter.³⁰⁹ Arguably, the root of the problem—the existence of the two sets of requirements in respect of every incident that the prosecution has to prove—is still not sufficiently spelled out in the jurisprudence of the ad hoc tribunals and the hybrid courts.

The other frequently missing link is between the facts of the case and the legal labels attached to them. A critical report on the ECCC trial judgment in Case 002/01 issued by the East-West Center highlighted a number of deficiencies in the way in which evidence was treated in this case. In particular, the report argues that the Trial Chamber used untested statements as a basis for conviction under the theories of joint criminal enterprise and command responsibility, without any corroborating evidence relating to the conduct of the accused vis-a-vis specific criminal acts.³¹⁰ This concern is especially pressing with regard to complicity, which is a highly fluid legal concept that has no rigid definition.³¹¹

The legal requirements of various forms of complicity—the conduct requirement and the fault requirement—provide only the initial framework for the assessment in each individual case. The abstract formulas utilised by the ad hoc tribunals and hybrid courts in respect of various forms of complicity seem to allow a flexibility to place more emphasis on the level of contribution of the accused *or* his knowledge of the crime. *Furundžija* provides a good example of balancing the two elements in establishing the case of aiding and abetting rape. The accused witnessed the crime happening. Presence at the scene of the crime was a ‘strong’

³⁰⁸ See section I.H above.

³⁰⁹ *Prosecutor v Krstić*, ICTY Case No IT-98-33-A, Appeal Judgment, 19 April 2004, paras 139–140.

³¹⁰ Cohen et al (n 237) vii, 17.

³¹¹ Chapter 2 explains that the dividing line between complicity and perpetration shifts even within one legal system, depending on the facts of the case. Likewise, the scope of complicity is fluid.

indicator of Furundžija's culpable mental state; this allowed for a 'weaker' conduct requirement—his contribution was inferred from the position of authority.³¹²

Thus, the two constituent parts of complicity are interconnected—they cannot be assessed independently—something that the *Perišić* Appeals Chamber tried to do by stressing that it will only focus on the actus reus of aiding and abetting.³¹³ A more solid approach in the view of the constructed nature of complicity appears to be balancing the fault and the conduct requirement based on the facts of the particular case. As Smith put it, 'complicity's derivative quality must convincingly reside *at least* in either *mens rea* or *actus reus* components ... diminution in demands on the *mens rea* side have repercussions for the causal element as part of the *actus reus*; and vice-versa' (emphasis added).³¹⁴

The need to perceive the fault and conduct requirement of complicity as one mechanism is relevant for the discussion on specific direction as part of the actus reus of aiding and abetting. It seems that making the requirements for the conduct element more stringent, without simultaneously lessening the fault requirement or getting rid of the requirement that the contribution of the accused must be substantial, skews the construction of complicity. The *Taylor* appeal judgment hinted at a more balanced approach to the two elements of aiding and abetting by drawing on the example of the US MPC that requires 'purpose'—instead of a more widely accepted 'knowledge'—as a mental element for aiding and abetting because it allows for *any* contribution to crime to qualify as a conduct element instead of a significant or substantial contribution.³¹⁵

In sum, a harmonious approach to all three elements—facts, description of the substantive offences and the modes of liability—is preferred. This is achieved by the different parts of the judgments speaking to each other. The process of attribution of responsibility can be made more transparent if the form of responsibility is not used as an instrument for reaching a certain result—conviction or acquittal—but rather as a lens through which the court assesses the circumstances of the case, without any predetermined bias. The legal formulas should be attached to the specific facts and an inferential analysis, such as that which led to the conviction in the *Šljivančanin* case, should be justified at all times.³¹⁶

³¹² *Furundžija* Trial Judgment (n 126) paras 273–74.

³¹³ *Perišić* Appeal Judgment (n 195) para 48: 'The Appeals Chamber also underscores that its analysis of specific direction will exclusively address *actus reus*.'

³¹⁴ Smith (n 35) 195.

³¹⁵ *Taylor* Appeal Judgment (n 114) para 447. Smith (n 35) pointed out that American jurisdictions requiring purposeful accessorial attitudes experience fewer problems with specificity. For a discussion of complicity in the US, see Ch 2.II.D.

³¹⁶ *Šljivančanin* Appeal Judgment (n 165) para 93. See section I.G above.

D. Problem with the Sources

One of the defence teams in *Milutinović et al* raised the question whether the *Tadić* Appeals Chamber was correct in inferring the joint criminal enterprise from the ICTY Statute.³¹⁷ This concern exemplifies the problem with sources in international criminal law. The first judgments of the ICTY, *Tadić* and *Furundžija*, relied extensively on the post-Second World War jurisprudence to establish the existence of a customary rule in international criminal law. However, the analysis in the previous chapter shows that the Nuremberg and Tokyo judgments, as well as the subsequent convictions of the Nazi perpetrators pursuant to Control Council Law No 10, were highly politicised and influenced by domestic law considerations.³¹⁸ International criminal law is not incidental, but is the product of a combination of factors that need to be accounted for.

Most of the considerations that shaped international criminal justice at the time of its conception are extra-legal. Shklar referred to the environment that led to setting up the IMT in the following terms: ‘a very rare situation in which there is no law, no government, no political order, and people have committed acts so profoundly shocking that something must be done about them’.³¹⁹ In spite of this, the early ICTY judgments seem to ignore the context in which the precedents they are relying on came into existence. The first steps of the ICTY can be characterised by uncritical adherence to the post Second World War jurisprudence. Boas argues that the most worrying characteristic of *Tadić* is the methodology used to establish the rules of customary international law. International judgments pursuant to Control Council Law No 10 supporting in *Tadić* the existence of common purpose liability do not amount to state practice.³²⁰

Custom is a very problematic source of international criminal law: tribunals often avoid making a distinction between the two constituent elements of the custom—*opinio juris* and state practice. This is understandable because the discipline is very peculiar in that the state practice element of the custom often points to an undesirable outcome (ie, a violation).³²¹ In addition, the field of international criminal law is relatively

³¹⁷ See section 1.C above.

³¹⁸ See Ch 3.

³¹⁹ J Shklar, *Legalism: An Essay on Law, Morals and Politics* (Cambridge, Mass, Harvard University Press, 1964) 153.

³²⁰ Boas, Bischoff and Reid (n 11) 21–22.

³²¹ *First Report on Formation and Evidence of Customary International Law* by Michael Wood, *Special Rapporteur*, 17 May 2013, UN Doc A/CN.4/663, para 70. See also L van den Herik, ‘Using Custom to Reconceptualise Crimes against Humanity’ in S Darcy and J Powderly (eds), *Judicial Creativity at the International Criminal Tribunals* (Oxford, Oxford University Press, 2010) 101.

new and is still evolving, making it difficult to assess whether a particular provision has crystallised as a custom or not.³²²

A certain discomfort with the customary nature of the modes of liability in international criminal law is discernible in the jurisprudence of both hybrid courts. The Co-investigative judges at the ECCC scrutinised the cases that *Tadić* relied on in support of the three forms of the joint criminal enterprise.³²³ The judges found sufficient support in the customary international law for the first and second forms of the joint criminal enterprise,³²⁴ but not the third, extended, form.³²⁵ The Trial Chamber confirmed these findings a year later and, after having reviewed the domestic legislation of several states, rejected the proposition that the extended form of the joint criminal enterprise finds support in another source of international law, namely the general principles of law.³²⁶

The SCSL in the *Taylor* appeal judgment showed its unwillingness to directly engage with custom. The *Taylor* Appeals Chamber attempted to circumvent the difficulty related to the fragmentation of international criminal law by framing the discussion about the specific direction not along the lines of shaping the custom, but as a rejection of the ICTY precedent that is only internally binding.³²⁷ As Kevin Jon Heller pointed out, this reasoning is unconvincing.³²⁸ International courts and tribunals operating in the field apply the sources of international law—treaty, custom and the general principles of law.³²⁹ Their statutes do not expressly mention the specific direction requirement for complicity. The question is therefore whether it is a custom or a general principle. However, the *Perišić* Appeals Chamber was on equally feeble ground when it entered the discussion in the first place.³³⁰

In modern international criminal law, a uniform approach by different courts and tribunals to a particular issue may serve as the evidence of a

³²² *First Report on Formation and Evidence of Customary International Law* by Michael Wood (n 321) para 68.

³²³ *Prosecutor v Ieng Sary et al*, ECCC, Case No 002/19-09-2007/ECCC/OCIJ, Decision on the Appeals against the Co-investigative Judges Order on Joint Criminal Enterprise, Pre-Trial Chamber, 20 May 2010 ('*Ieng Sary* PTC JCE Decision').

³²⁴ *ibid*, paras 57–71.

³²⁵ *ibid*, paras 75–83.

³²⁶ *Prosecutor v Ieng Sary et al*, ECCC, Case No 002/19-09-2007/ECCC/TC, Decision on Applicability of Joint Criminal Enterprise, 12 September 2011 ('*Ieng Sary* TC JCE Decision'), paras 36–38.

³²⁷ *Taylor* Appeal Judgment (n 114) para 476.

³²⁸ KJ Heller, 'The SCSL's Incoherent—and Selective—Analysis of Custom', *Opinio Juris Blog*, 27 September 2013, <http://opiniojuris.org/2013/09/27/scsls-incoherent-selective-analysis-custom>.

³²⁹ The ICC is possibly an exception because of the special regime created by art 21 of the Rome Statute. UN General Assembly, Rome Statute of the International Criminal Court, 17 July 1998, ISBN No 92-9227-227-6, www.refworld.org/docid/3ae6b3a84.html.

³³⁰ See section I.G above.

consensus on a given topic and thus allow us to speak of the formation of a customary rule. For example, the *Taylor* and the *Šainović et al* Appeals Chambers certainly weakened (if not disposed of) the emerging customary rule requiring the ‘specific direction’ element as a part of the actus reus of complicity, even though the *Taylor* appellate panel was not willing to engage expressly with the issue, and while the analysis furnished in *Šainović et al* is not free from controversy when it comes to assessing what constitutes a custom in international criminal law: not all of the cases cited in support of the absence of the specific direction in customary international law dealt with aiding and abetting liability.³³¹

Looking at the other source of international law, the general principles of law, it seems that the requirement that the aid is directed towards the specific offence, in the sense that the ICTY attributed to it in *Perišić*, also lacks support in the majority of domestic legal systems.³³² In this regard, the initiative of the *Šainović et al* Appeals Chamber to ‘probe’ this third source of international law in order to establish whether domestic law may be of assistance in resolving the ‘specific direction’ problem deserves credit.³³³ The Chamber’s substantive conclusion about the lack of the uniform rule in respect of this particular aspect of aiding and abetting also appears to be correct.³³⁴ However, the methodology employed for assessing domestic law is far from clear. The judgment adopted a reductionist approach when grouping the countries together, without taking into account the specific features of different legal families and individual legal systems.³³⁵ The overview of national case law is cramped together in three paragraphs and several lengthy footnotes.³³⁶

Chapter 2 of this book argues in favour of the more extensive use of the general principles of law as a source of international criminal law. The overview of the case law of the ad hoc tribunals and courts provided empirical support for this claim in demonstrating the weakness of custom as a foundation of the discipline. The acceptance of a certain rule in the majority of national legal systems resonates with the domestic law origin of international criminal law and helps to increase the perceived

³³¹ For example, the *Justice* case, referred to in para 1641 of the judgment, showcases a unitary model of participation rather than any form of accomplice liability. See Ch 3.II.B.

³³² J Stewart, “‘Specific Direction’ is Unprecedented: Results from Two Empirical Studies,” *EJIL Blog*, 4 September 2013, www.ejiltalk.org/specific-direction-is-unprecedented-results-from-two-empirical-studies.

³³³ *Šainović et al* Appeal Judgment (n 218) para 1643.

³³⁴ For a detailed discussion of different elements of aiding and abetting in national law, see Ch 2.II and Appendix I.

³³⁵ For example, *Šainović et al* Appeal Judgment (n 218) para 1645.

³³⁶ *ibid*, paras 1643–46.

legitimacy of international courts,³³⁷ the population of the affected states is more likely to view international judgments as legitimate if the juridical concepts employed in these judgments correspond to what is accepted and understood in a given domestic legal system.³³⁸

CONCLUSION

This chapter has provided an overview of the forms of responsibility that have crystallised in the jurisprudence of the ad hoc tribunals and hybrid courts. The special focus was on the contentious issues in the application of various responsibility doctrines. Different forms of complicity appear to be commonly employed to address the wrongdoing of the accused removed from the scene of the crime. Complicity serves as an alternative to the extended commission as developed by the ICTR and the joint criminal enterprise, used by both international tribunals and hybrid courts. The chapter summarised four main challenges of international criminal law that prevent the coherent deployment of the complicity doctrine: fragmentation, the deficiency in understanding the appropriate causation standard for complicity, the frequent lack of cohesion between factual circumstances and the legal labels attached to them, and the unreliability of some sources utilised by international courts.

How does one achieve a more harmonious integration of complicity into international criminal law? As argued in this chapter, this process is impeded by the absence of well-defined goals of international criminal justice. It is difficult to shape legal concepts and determine their respective weight without answering the question of what international criminal law strives to achieve. The lack of clarity about goals leads to a lack of agreement on the so-called 'policy objectives' of international criminal law, those pragmatic considerations counterbalancing legal concepts in the domestic law context. The last chapter of the book attempts to define an overarching objective of international criminal law and show how a unifying goal may affect the legal definition of complicity.

In the absence of a consensus on its objectives, it is important that international criminal law relies on its domestic law origins when engaging with the modes of responsibility. The need to accurately describe the

³³⁷ Report of the Committee of French Jurists appended to the letter dated 10 February 1993 from the Permanent Representative of France to the United Nations addressed to the Secretary General, UN DOC S/25266, para 50(d). For a discussion on the limitations of international criminal law as a product of two fields, public international law and domestic criminal law, see Ch 8.I.

³³⁸ M Damaška, 'What is the Point of International Criminal Justice?' (2008) 83 *Chicago-Kent Law Review* 329, 350.