

Returning to Complicity for Core International Crimes

By Marina Aksenova

FICHL Policy Brief Series No. 17 (2014)

1. Introduction

Complicity is an essential mode of liability for core international crimes. It is particularly well-suited to attach liability to those who do not physically perpetrate the crime. In the context of international criminal justice such persons include senior members of military and political leadership.

The statutes of the *ad hoc* tribunals, hybrid courts and the International Criminal Court (ICC) expressly provide for different forms of complicity. Domestic legal systems recognize it in one form or another. Complicity in the statutes of the *ad hoc* tribunals and hybrid courts includes planning, instigating, ordering,¹ aiding and abetting.² The ICC Statute encompasses a slightly different list of complicity variations: ordering, soliciting, inducing, aiding and abetting, and contributing to the commission of a crime by a group of persons acting with a common purpose.³

Aside from various forms of complicity, there are alternative modes of liability implied from the statutes to address the situations with multiple accused removed from the scene of the crime: (in)direct co-perpetration, extended perpetration and the joint criminal enterprise. These ‘custom-made’ modes of participation have dominated the terrain of international criminal justice until recently.

At the time of writing in early 2014, there is a revival of interest in complicity in international criminal justice. The ICC Trial Chamber in *Katanga* changed the legal characterization of facts relating to Germain Katanga’s mode of participation from indirect co-perpetration under Article 25(3)(a) of the ICC Statute, to complicity in the commission of a crime by a group of persons acting with a common purpose under on the basis of Article 25(3)(d).⁴ The ICTY lately examined whether the aiding and assistance of the accused must be directed towards the specific offence. The Appeals Chamber in *Perišić* and the Trial Chamber in *Stanišić* and *Simatović* answered this question in the positive, thereby acquitting the accused on the basis of the lack of the specific direction of their contribution towards the crimes.⁵ In contrast, the recent *Šainović et al.* appeal judgment concluded that ‘specific direction’ is not an element of aiding and abetting liability under customary international law or the Statute of the Tribunal.⁶

¹ ‘Ordering’ as a form of complicity should be distinguished from ‘superior responsibility’. The former, unlike the latter, does not require superior-subordinate relationship between the order giver and the perpetrator so long as it is demonstrated that there existed the authority to order. Responsibility of the order giver derives from the wrongful act of the principal rather than the formal link between the two participants in the crime.

² Article 7(1) Statute of the International Criminal Tribunal for the Former Yugoslavia (‘ICTY Statute’), 25 May 1993, S/RES/827 (<http://www.legal-tools.org/doc/dc079b/>); Article 6(1) Statute of the International Criminal Tribunal for Rwanda (‘ICTR Statute’), 8 November 1994, S/RES/955 (<http://www.legal-tools.org/doc/8732d6/>); Article 6(1) Statute of the Special Court for Sierra Leone (‘SCSL Statute’), 14 August 2000, S/RES/1315 (<http://www.legal-tools.org/doc/aa0e20/>); Article 29 The Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (‘ECCC Law’) as promulgated on 27 October 2004 (NS/RKM/1004/006) (<http://www.legal-tools.org/doc/9b12f0/>).

³ Article 25(3) Rome Statute of the International Criminal Court (‘Rome Statute’), 17 July 1998 (<http://www.legal-tools.org/en/doc/7b9af9/>).

⁴ Prosecutor v. *Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07, Trial Chamber II, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, 21 November 2012, § 7 (<http://www.legal-tools.org/doc/51ded0/>).

⁵ Prosecutor v. *Perišić*, ICTY Case No. 04-81-A, Appeal Judgement, 28 February 2013, § 73 (<http://www.legal-tools.org/doc/f006ba/>); Prosecutor v. *Stanišić* and *Simatović*, ICTY Case No. IT-03-69-T, Trial Judgment, 30 May 2013, § 2360 (<http://www.legal-tools.org/doc/066e67/>).

⁶ Prosecutor v. *Šainović et al.*, ICTY Case No. IT-05-87-A, Appeal Judgement, 23 January 2014 § 1649 (<http://www.legal-tools.org/doc/81ac8c/>).

The Special Court for Sierra Leone (SCSL) also rejected the ‘specific direction’ requirement when convicting Charles Taylor of planning and aiding and abetting murders, rapes and other acts of violence committed during the Sierra Leonean civil war.⁷ These developments prompted the ICTY Office of the Prosecution to file a motion to reconsider the acquittal in *Perišić*.⁸ The Appeals Chamber denied the request failing to find “cogent reasons in the interests of justice” for the reconsideration of a final judgement.⁹ Conflicting views on the specific direction issue demonstrate certain degree of ambiguity regarding both the scope of complicity and the weight of precedents in international criminal law.

2. Why Complicity?

The reason for distinguishing between different forms of liability stems in part from the principles of legality and fairness. The principle of legality implies an advance specification of the conduct that is subject to criminal law. Fairness demands that offenders are labelled and punished in proportion to their wrongdoing. Distinctions ensure an adequate response of the society to the crime.¹⁰ In the context of international criminal justice, reinforcing the principles of fairness and legality also becomes a question of attaining a higher degree of perceived legitimacy of international courts and tribunals at the domestic level.

Thus, there is a compelling argument in favour of describing the conduct and the mental state of the accused in the most precise terms. Secondary liability¹¹ is frequently the most appropriate mechanism for dealing with offenders removed from the crime scene. Different forms of complicity are explicitly provided for in the ICC, ICTY/ICTR, and the SCSL statutes and ECCC Law, and are deeply rooted in domestic legal systems, granting complicity an extra degree of legitimacy in contrast with the alternative modes of participation.

3. Improving Current Practices of Attaching Liability for Complicity

Complicity is a fluid legal notion. Its application to the facts of the case implies some degree of uncertainty. There are a number of considerations that could contribute to a better understanding of complicity in the domestic and international context.

3.1. Understanding the Context of Political Violence

Historically one of the main challenges of international criminal justice is attributing individual criminal responsibility for collective wrongdoings.¹² Because international criminal law targets organized large-scale offending, the distance between the accomplice and the harm is usually greater in comparison with ordinary crimes. The factual scenarios of mass atrocities are diverse but are all equally complex. They presuppose co-operation of individuals at different levels of military and political apparatus. It is essential to establish the links between different actors. Culpability in criminal law is individual but should be assessed in relation to the acts of the other perpetrators.

From the criminological point of view, the context of political violence bears on the culpability of the accused – offending often stems from obedience rather than defiance. This aspect has to be accounted for when assessing accomplice culpability. Which factors shaped the accomplice’s faulty decisions? What were the courses of action available to the suspect?

3.2. Defining the Legal Requirements of Complicity

International criminal law is ultimately rooted in domestic criminal law. Thus complicity, as a notion borrowed from national legal systems, shall be understood to embrace all modes of participation apart from ‘committing’.¹³ This conclusion follows from the theoretical underpinning of complicity as a form of secondary participation, which is derivative in nature: responsibility of one party derives from the wrongful act of another. Domestic criminal codes and jurisprudence recognize different forms of complicity, aiding and abetting and instigating being the most common ones. The wide acceptance that complicity enjoys at the national level also grounds it, in legal

⁷ Prosecutor v. *Taylor*, SCSL-03-1-A, Appeal Judgment, 26 September 2013 (<http://www.legal-tools.org/doc/3e7be5/>).

⁸ Statement of Prosecutor Serge Brammertz in relation to the motion for reconsideration submitted by the Prosecution in the *Perišić* case, available at <http://www.icty.org/sid/11447>, last accessed 3 April 2014.

⁹ Prosecutor v. *Perišić*, ICTY Case No. 04-81-A, Decision on Motion for Reconsideration, 20 March 2014 (<http://www.legal-tools.org/doc/6cd5d5/>).

¹⁰ Andrew Ashworth, *Principles of Criminal Law*, 2nd ed., Clarendon Law Series, 1995, p. 87. See also The Prosecutor v. *Mathieu Ngudjolo Chui*, ICC-01/04-02/12-4, Trial Chamber II, Concurring opinion of Judge van den Wyngaert to Judgment Pursuant to Article 74 of the Statute, 18 December 2012, § 28 (<http://www.legal-tools.org/doc/7d5200/>).

¹¹ Secondary liability arises in respect of those who do not directly perpetrate the crime but contribute to its commission in one way or another.

¹² The precursors of the modern courts and tribunals – the International Military Tribunal, the International Military Tribunal for the Far East and the courts established pursuant to Control Council Law No 10 – employed different mechanisms to solve the problem of collective criminality. The solutions ranged from ignoring the distinctions between crime participants in favour of a fact-based approach to holding the accused responsible under the broad umbrella of conspiracy. Under the influence of continental lawyers – in particular those coming from France – complicity also made its way into international criminal law.

¹³ William Schabas, *The U.N. International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*, Cambridge University Press, 2006, p. 305.

terms, in international law as a ‘general principle of international law recognized by civilised nations’ provided by Article 38(1) of the Statute of the International Court of Justice.¹⁴

The *ad hoc* tribunals and hybrid courts define the legal requirements of various forms of liability on a case-by-case basis relying on the existent customary international law.¹⁵ In contrast, the ICC Statute spells out the modes of participation in greater detail, and assigns customary international law a secondary role. This does not mean, however, that Article 25(3) of the Statute is exhaustive when it comes to describing the legal requirements of responsibility modules.

In the process of defining the modes of liability, it is important to distinguish the constituent elements of the offence and the legal requirements of the form of responsibility used in conjunction with this offence. The constituent elements of the offence are the objective element or *actus reus* – an act or omission contrary to a rule imposing the specific behaviour; and the subjective element or *mens rea* – a psychological element required by the legal order for the conduct to be blameworthy and consequently punishable.¹⁶

In cases of direct primary participation (that is, commission), the conduct and fault requirement of the responsibility form ‘mirror’ *mens rea* and *actus reus* of the substantive offence: the conduct of the principal fully corresponds to the elements of the crime. However, when it comes to more complex forms of commission, such as commission through the joint criminal enterprise, as well as different forms of complicity, the requirements of liability supplement the constituent elements of an offence. It is essential to establish that the crime was committed and *the way* in which the suspect was involved in it.

For example, aiding and abetting implies knowledge of the essential elements of the underlying offence as well as the mental state of the primary perpetrator and the intent to assist the commission of this offence. The conduct requirement of aiding and abetting presupposes providing practical assistance, encouragement, or moral support to the principal with the substantial effect on the crime.¹⁷ But it is not necessary that the aider *shares* prin-

icipal’s intent to commit a crime or *causes* the crime to occur.

Legal requirements of complicity – conduct and fault requirement – need to be sufficiently clear and linked to the facts of the particular case. It is essential to treat these two elements not as two autonomous units but as parts of the same vehicle. Complicity is an intricate balancing exercise. It may seem that it casts its net too wide by not requiring that the act of accomplice caused the principal to act. The lack of causation loosens the conduct requirement. The scale is restored to equilibrium by the enhanced fault requirement: the knowledge of the crime and the intent to assist or encourage the commission of the principal’s crime.¹⁸

The practical implication of the balancing exercise is that the further the accomplice is removed from the scene of the crime, the more emphasis has to be on his mental state. From the evidentiary point of view, this implies avoiding fully inferential analysis when it comes to assessing accomplice’s culpability. Knowledge that the crime is being committed is an essential element of complicity. If the accomplice is found to be close to the scene of the crime, his fault may be implied, while his contribution has to be spelled out. Mental state alone is not sufficient to bring about criminal responsibility. In contrast, in cases of removed assistance or encouragement, knowledge about the crimes and the intent to be involved in their commission become dispositive for attaching responsibility to the accomplice.

3.3. Choosing Between Complicity and the Alternatives

The notable trend in international jurisprudence is the disregard of the traditional forms of liability in favour of the newly developed concepts, not expressly provided in the legal instruments establishing international courts and tribunals.

The ICC leans towards the German-inspired ‘(in)direct co-perpetration’ model inferred from Article 25(3) (a) of the Rome Statute dealing with commission.¹⁹ For a long time, the ICC viewed commission as the most appropriate form of responsibility for addressing mass crimes. The explanation for this is the alleged hierarchy of the forms of participation implicit in the Rome Statute, which, in turn, creates a pressure on the Court to utilize the ‘stronger’ form – commission – to reflect the gravity of the crimes in the jurisdiction of the ICC.

The same belief that various forms of complicity (ordering, planning or instigating) do not, taken alone, fully

¹⁴ In addition to that, Article 21(1)(c) of the Rome Statute assigns ‘general principles of law derived from state laws of legal systems in the world’ the role as a secondary source of law in the ICC. Consequently, the survey of domestic legal systems asserts the foundation of complicity as a general principle of law.

¹⁵ See, for example, Prosecutor v. *Delalić et al.* (‘Čelebići Appeal Judgment’) ICTY Case No. IT-96-21-A, Appeal Judgment, 20 February 2001, § 178 (<http://www.legal-tools.org/doc/051554/>).

¹⁶ Antonio Cassese, *International Criminal Law*, 2nd ed., Oxford University Press, 2008, p. 53.

¹⁷ Prosecutor v. *Vasiljević*, ICTY Case No. IT-98-32-T, Trial Judgment, 29 November 2002, §§ 70-71 (<http://www.legal-tools.org/doc/8035f9/>); Prosecutor v. *Furundžija*, ICTY Case No.

IT-95-17/1-T, Trial Judgment, 10 December 1998, §§ 245, 249 (<http://www.legal-tools.org/doc/e6081b/>).

¹⁸ Ashworth, 1995, *supra* note 10, p. 409.

¹⁹ Roxin’s control over crime theory. Claus Roxin, *Täterschaft und Tatherrschaft*, 6th ed, 1994.

capture the accused's criminal responsibility prompted the ICTR to adopt an extended view of commission in several cases. For example, the Appeals Chamber in *Gacumbitsi* held that "direct and physical perpetration" need not be confined to physical killing but can also include other acts including "directing" and "playing a leading role in conducting and, especially, supervising".²⁰

Finally, the mode of liability not explicitly mentioned in the ICTY, ICTR, SCSL statutes or ECCC Law, but that has been frequently used by all courts to address the situations of group criminality, is the joint criminal enterprise, or the 'common purpose' liability. The notion has been introduced early on – in the *Tadić* and *Furundžija* cases – and became one of the most common forms of responsibility in international criminal law.²¹

The tendency to 'downgrade' complicity as a 'lesser' form of responsibility should be avoided. The assumption that the forms of responsibility are ranked does not find support in the provisions of the statutes and or the *travaux préparatoire*.²² The trend to downplay complicity originates from the fact that some domestic legal systems allow for punishment mitigation for accomplices. However, in the majority of countries the sentencing discount for accomplices is discretionary or is based on the minimal level of contribution rather than the formal legal label of accomplice responsibility.²³ The provision of the ICC Statute dealing with sentencing does not distinguish between modes of liability for sentencing purposes.²⁴

Thus, it is not the form of liability alone that should be dispositive in assessing the degree of offender's blameworthiness, but rather the combination of case-specific factors. The degree of blameworthiness shall not

hinge solely upon the legal label attached to the conduct of the suspect. In the context of political violence, the acts of accomplices are often more reprehensible than those of the primary perpetrators. The principals, in contrast with the secondary parties, often lack the benefit of time to reflect on their faulty choices.

3.4. Abandoning the 'Specific Direction' Requirement for Aiding and Abetting

The recent rejection of 'specific direction' as an element of aiding and abetting liability in *Šainović et al.* is to be applauded. The enhanced version of aiding and abetting that includes the requirement that the aid is directed towards the specific offence purports to bridge the temporal and/or spatial gap between the accomplice and the principal perpetrator. However, this is unnatural for the secondary liability that targets precisely the situations where the accused is removed from the scene of the crime.

There are a number of other problems with the latest approach: the 'specific direction' requirement lacks foundation in international law and it brings aiding and abetting in the dangerous vicinity of commission by conflating assistance with performing part of *actus reus* of the offence itself. The former, in contrast with the latter, need not be the direct cause of the crime. Finally, the specific direction requirement is superfluous because it may be viewed as an implied element of the accused's mental state for aiding and abetting, which is knowledge. If the accused knew about the crime and still provided assistance, then logically his acts are directed towards the offence.

Marina Aksenova has worked as a legal assistant for the defence at the ICTY and as arbitration associate in the Moscow office of an international law firm (White & Case LLC). She is currently a Ph.D. Candidate in international criminal law at the European University Institute. Her research focuses on modes of participation in international criminal law and, in particular, on the concept of complicity. She has a Master's Degree in Criminal Justice from the University of Oxford, an LL.M. in Public International Law from Amsterdam University, and a BA (hons) in law from the International University in Moscow. She is admitted to practice in law in Russia. TOAEP thanks the two anonymous peer reviewers. ISBN 978-82-93081-88-3.

²⁰ Prosecutor v. *Gacumbitsi*, ICTR Case No. 2001-64-A, Appeal Judgement, 7 July 2006, § 60 (<http://www.legal-tools.org/doc/8efc3a/>).

²¹ Prosecutor v. *Tadić*, ICTY Case No IT-94-1, Appeals Chamber Judgment, 15 July 1999, §§ 195-226.

²² See Working paper submitted by Canada, Germany, Netherlands and the United Kingdom, A/AC.249/1997/WG.2/DAT1; Report of the ICC Preparatory Committee, DOCUMENT A/CONF.183/2 (<http://www.legal-tools.org/doc/1ca763/>).

²³ For example, the legislation of some Latin American countries (Argentina, Bolivia, Venezuela) provides for a sentencing discount only to those accomplices, whose aid was not indispensable for the commission of the crime. Poland, Bosnia and Herzegovina, Austria, Bulgaria and Estonia provide for discretionary mitigation for accomplices. Cf. Article 27 German Penal Code (<http://www.legal-tools.org/doc/3051df/>).

²⁴ Article 78 Rome Statute.