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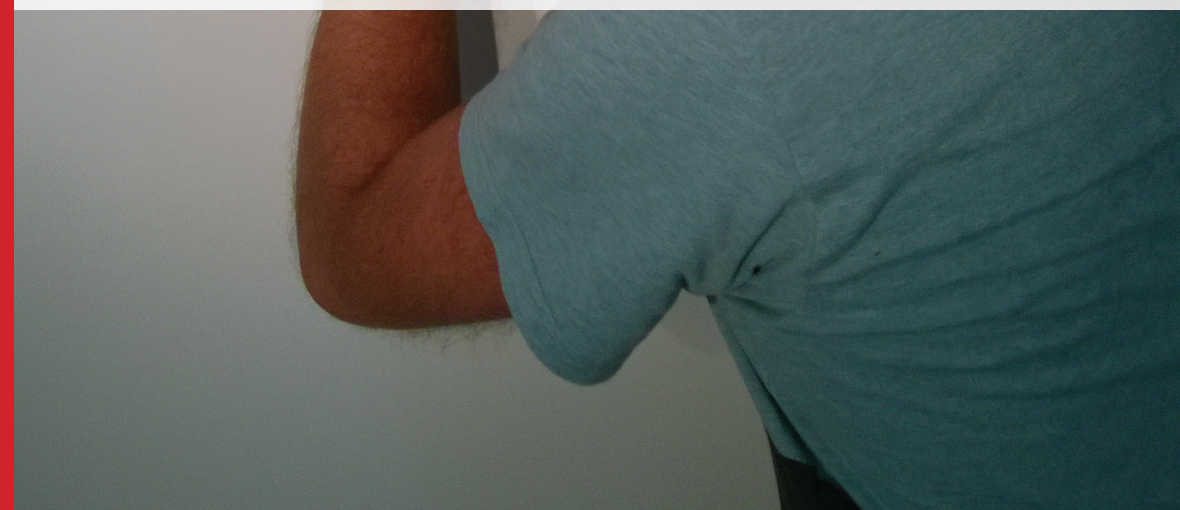

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Front cover: *Alberto Gandolfi inspects his fresco of Hugo Grotius in Florence. Trained for years in fresco painting and restoration, including at the Accademia di Belle Arti di Firenze, he employs the fresco techniques used since the 1400s in Florence, including preparing ingredients such as the lime plaster himself. An exceptional level of quality control of the preliminary stages is required for the paintings to stand the test of time. Photograph: © CILRAP 2017.*

Back cover: *Section of a Roman street close to where the Statute of the International Criminal Court was negotiated, paved with 'sampietrini' cobblestones of trimmed, black basalt-cubes. When each stone is precisely cut and placed, they make up a robust and attractive whole, with the ability to withstand pressure and inundation. Preliminary examination is similarly made up of numerous small steps, each of which should be undertaken with proper quality control. Photograph: © CILRAP 2018.*

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Make the ICC Relevant: Aiding, Abetting, and Accessorizing as Aggravating Factors in Preliminary Examination

Christopher B. Mahony*

21.1. Introduction

To date, preliminary examinations by the International Criminal Court ('ICC') have focused on the culpability of local actors. There is scarce evidence on any deterrent effect of international criminal justice. This chapter considers the absence of empirical basis for the ICC's objective of deterring atrocity by considering whom the Court targets for prosecution, and whom it implicates in its preliminary examinations. It places this consideration in the context of the increased prevalence of intra-State conflict with external actors supporting various parties. The chapter argues that conduct enabling conflict and *jus in bello* crimes should constitute a key aggravating criterion for opening a formal investigation, particularly after the activation of the crime of aggression. It further argues that in making reports on preliminary examination, the ICC Office of the Prosecutor

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('OTP') is also duty-bound to report on credible evidence of conduct that constitutes aiding, abetting or otherwise acting as an accessory ('accessorizing') to international criminal conduct.

The chapter will consider if the OTP adequately considers the role of external aiders, abettors and accessories in key situations under preliminary examination. Is this conduct, which is criminalized by the Rome Statute, attracting sufficient attention from the OTP and domestic criminal justice actors?

The chapter will start by considering literature on the effect of international criminal justice on the inclination of actors to use force and commit core international crimes. It will then consider the nature of violent conflict and the role of external actors, highlighting the emblematic case of Syria.

Then, it will turn to the process and criteria for making a determination regarding a preliminary examination. In describing the process, it will discuss where aiding, abetting and accessorizing fit, and should fit, in this process. After that, it will consider the jurisprudence on the technical elements on the modes of liability of aiding, abetting and accessorizing. It will then consider the ICC's preliminary examination of Afghanistan. Finally, it will assess the ICC-OTP's conduct in this respect, how it has evolved, its efficacy, and where it could go for the greatest impact to those at risk of core international crimes.

It is argued that an effective prosecutorial strategy that advances the interests of justice, peace, and security must not abstain from pursuing the external actors that fuel conflict. Focusing on aiding, abetting and accessorizing is a strategy that marries *jus in bello* with *jus ad bellum.* This chapter will identify how the prevalence of international humanitarian law violations in conflict means that prosecuting the conduct of aiding, abetting and accessorizing allows a prosecutor to effectively prosecute the crime of aggression. This is so where the aggressive behaviour is apparent in external actors' support of "armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State".[1] In relation to the crime of aggression, this applies only to external State support for non-State actors on another territory. However, this chapter will

[1] Rome Statute of the International Criminal Court, 17 July 1998, Article 8*bis*(2)(g) ('ICC Statute') (http://www.legal-tools.org/doc/7b9af9/).

also consider the peace and security implications of targeting all external actors aiding, abetting and accessorizing to government actors as well as other domestic actors.

Lastly, the chapter will survey some of the situations under investigation and those under preliminary examination before the OTP. The situations, it is argued, indicate that those engaged in aiding, abetting and accessorizing are not attracting the attention they deserve. Given the public policy positioning of some aiding, abetting and accessorizing conduct, it is further argued that the omission brings into question the authenticity of preliminary examination objectives stated by the OTP, including enhanced efficiency and independence.

21.1.1. Considering the ICC's Deterrent Effect

At the heart of this chapter is the idea that violent conflict is often accompanied by international humanitarian law violations. The first judgement at Nuremburg stated:

> To initiate a war of aggression is not only an international crime; it is the supreme international crime, differing only from other war crimes in that it contains within itself the accumulated evil of the whole.[2]

Today, battle deaths remain high. However, as the United Nations and World Bank have noted in their flagship study on conflict prevention,

[2] International Military Tribunal (Nuremberg), 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. Hermann Wilhelm Göring, Rudolf Hess, Joachim von Ribbentrop, Robert Ley, Wilhelm Keitel, Ernst Kaltenbrunner, Alfred Rosenberg, Hans Frank, Wilhelm Frick, Julius Streicher, Walter Funk, Hjalmar Schacht, Gustav Krupp von Bohlen und Halbach, Karl Dönitz, Erich Raeder, Baldur von Schirach, Fritz Sauckel, Alfred Jodl, Martin Bormann, Franz von Papen, Artur Seyss-Inquart, Albert Speer, Constantin von Neurath, and Hans Fritzsche, individually and as members of any of the following groups namely: Die Reichsregierung (Reich Cabinet); Das Korps der Politischen Leiter der Nationalsozialistischen Deutschen Arbeiterpartei (Leadership Corps of the Nazi Party); Die Schutzstaffeln der Nationalsozialistischen Deutschen Arbeiterpartei (commonly known as the 'SS ') and including Der Sicherheitsdienst (commonly known as the 'SD '); Die Geheime Staatspolizei (Secret State Police, commonly known as the 'GESTAPO '); Die Sturmabteilungen der N.S.D.A.P. (commonly known as the 'SA ') and the General Staff and High Command of the German Armed Forces, Judgment, 1 October 1946, in *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg, Germany*, Part 22 (22 August 1946 to 1 October 1946), 25 (421), para. 426 (http://www.legal-tools.org/doc/45f18e/).

violence increasingly targets urban areas and public spaces. Civilians, therefore, are becoming more and more vulnerable, despite (if not because of) technological advancement.[3] Between 2010 and 2016, the number of civilian deaths in violent conflicts had doubled just as the ICC expanded its situations and indictments.[4]

Reviews of the ICC's impact have at times sought cause for incremental optimism. Jo and Simmons find that neither ICC ratification nor domestication of the Rome Statute appears to reduce rebel killing of civilians.[5] They also find, at a low level of significance, that rebel groups appear to respond to ICC actions.[6] They find that ratification of the ICC may be associated with increased violence among rebel groups.[7] They find that relative strength and government behaviour are the most consistent predictors of rebel intentional killing.[8] They note a stronger effect attributable to the ICC on governments than rebels, including "weak yet notable improvements" on domestic reforms in Uganda, Kenya and Côte d'Ivoire.[9] They also observe that the Court has had little effect in situations such as Sudan and Libya,[10] which also appears to be the case in the Democratic Republic of Congo and the Central African Republic. A simplistic observation identifies that in four of the seven countries where suspects have been indicted, violent conflict has recurred.

Jo and Simmons' language suggests a level of confirmation bias in their research. They state that:

> prosecutorial deterrence theory implies that investigations, indictments and especially successful prosecutions *should* trigger a reassessment of the likelihood of punishment and a boost to deterrence – a result consistent with Kim and Sik-

3 United Nations and World Bank, *Pathways for Peace: Inclusive Approaches to Preventing Violent Conflict*, Washington, D.C., 2018, p. xix (http://www.legal-tools.org/doc/7bb4c2-1/).

4 Uppsala University, Department of Peace and Conflict Research, "UCDP Data for download" (available on the University's web site).

5 Jo Hyeran and Beth A. Simmons, "Can the International Criminal Court Deter Atrocity?—CORRIGENDUM", in *International Organization*, 2017, vol. 71, no. 2, pp. 419–21.

6 *Ibid*.

7 *Ibid*.

8 *Ibid*.

9 *Ibid*.

10 *Ibid*.

> kink's study of national human rights trials in transition countries.[11]

Jo and Simmons cite the work of Kim and Sikkink, which tests for the association of prosecutions with repression instead of conflict recurrence.[12] Further, the theory has long been debunked by what Simon calls the counter-intuitive behaviour of social systems.[13] After correcting a mistake in the data, Jo and Simmons observed that:

> ratification of the ICC [Statute] may be associated with *increased* violence among rebel groups, which differs from our initial conclusion of "no effect" and is contrary to theoretical expectations of prosecutorial deterrence.[14]

Sikkink suggests that domestic prosecutions are associated with human rights improvements.[15] Olsen, Payne and Reiter find that a combination of amnesties and prosecutions are associated with improvements in human rights and democracy.[16] However, they do not consider recurrence or non-recurrence of conflict. The link of domestic processes to the ICC occurs via the principle of complementarity, where the ICC cedes primacy of jurisdiction to States unless those States are unable or unwilling genuinely to prosecute crimes themselves. Jo and Simmons claim that ICC complementarity increases the quality of domestic criminal processes, and that better criminal trial processes are likely to have a more positive effect on conflict non-recurrence.[17] They identify the situations in Uganda, Kenya and Côte d'Ivoire, where domestic processes were established to prosecute crimes. They concede the weakness of those processes, but the critical element is that, in each case, the process is deferential to power. Ra-

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11 *Ibid*.

12 Hunjoon Kim and Kathryn Sikkink, "Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries", in *International Studies Quarterly*, vol. 54, no. 4, pp. 939–63.

13 Herbert Alexander Simon, *Models of Bounded Rationality: Empirically Grounded Economic Reason*, MIT press, 1997, vol. 3.

14 Jo and Simmons, 2017, see *supra* note 5.

15 Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics (The Norton Series in World Politics)*, W.W. Norton & Company, 2011.

16 Tricia D. Olsen, Leigh A. Payne and Andrew G. Reiter, *Transitional Justice in Balance: Comparting Processes, Weighing Efficacy*, United States Institute of Peace Press, Washington, D.C., 2010.

17 Jo and Simmons, 2017, see *supra* note 5.

ther than enhance the rule of law and the confrontation of impunity, the cited cases embed it by building into the international system expedient domestic processes that reflect power. Those cited processes pursue only government adversaries or low-hanging fruits. At the same time, the processes provide legitimacy to the governments of States subject to ICC investigation based upon the States' ostensible co-operation with the ICC.[18]

The joint United Nations–World Bank *Pathways for Peace* study took the first step towards identifying the relationship between domestic prosecutions of international crimes and conflict (non-)recurrence. The UN-commissioned background study found that the rate of conflict recurrence decreases by approximately 70% when trials are pursued in respect of mid- and low-level actors while prosecution of high-ranking individuals is associated with a 65% increase in the rate of conflict recurrence.[19]

Like common international criminal justice approaches, the high-ranking individuals that are prosecuted in domestic courts are all persons within situations. However, the countries experiencing violent conflict are rarely themselves the manufacturers of weapons. International criminal justice tends to attribute responsibility very narrowly and without regard to the evidence about the true nature of violent conflict. The following section highlights the nature of conflict and queries whether international criminal justice targets the right people.

21.2. Globalization, Liberalism and Proxy-War's Enablement

Grievances relating to exclusion of social groups from political power, access to land and resources, access to justice and security, and access to services, are not novel.

[18] Christopher B. Mahony, "If You're Not at the Table, You're on the Menu: Complementarity and Self-Interest in Domestic Processes for Core International Crimes", in Morten Bergsmo and SONG Tianying (eds.), *Military Self-Interest in Accountability for Core International Crimes*, 2nd edition, Torkel Opsahl Academic EPublisher, Brussels, 2018, pp. 229–60 (http://www.toaep.org/ps-pdf/25-bergsmo-song-second).

[19] Leigh Payne, Andrew G. Reiter, Christopher B. Mahony and Laura Bernal-Bermudez, "Conflict Prevention and Guarantees of Non-Recurrence", Background paper for United Nations-World Bank Flagship Study, *Pathways for Peace: Inclusive Approaches to Preventing Violent Conflict*, World Bank, Washington, D.C., 2017.

Two historical 'functions' affecting the increased phenomena of local conflict's 'transnationalization' can be observed. The first is the breaking down of State sovereignty via the economic liberalism that accompanies globalization. The second is that the United Nations Security Council, the critical infrastructure for managing armed conflict, is focused upon managing conflict between States – particularly conflict between its five permanent members.[20] It is not designed to prevent domestic violent conflict. The decline in inter-State conflict indicates the emergence of adherence to certain norms and law. Since the post-World War II establishment of the United Nations, the United Nations Security Council's five veto-wielding permanent members have also constituted the world's largest military powers and arms manufacturers.[21] They have peacefully managed and mitigated the risk of direct violent conflict between themselves. Yet, particularly since the end of the Cold War, they have (albeit to variant degrees) unanimously come to embrace economic liberalism as a foundation for inter-State commerce.

21.2.1. Conflict's Multi-dimensional Causes

After the last great inter-State armed conflict – World War II – anti-colonial and post-colonial violent conflicts and Cold War proxy-wars came to affect a number of African and Asian States.[22] At the end of the Cold War, new proxy-contestations emerged in the Third World, particularly in Africa, where the United Kingdom, the United States and France contested spheres of influence via proxies.[23] A comparative surge in

[20] Simon Chesterman, "The UN Security Council and the Rule of Law", 7 May 2008, NYU School of Law, Public Law Research Paper No. 08-57; Annex to the letter dated 18 April 2008 from the Permanent Representative of Austria to the United Nations addressed to the Secretary-General, Doc. A/63/69-S/2008/270, 7 May 2008.

[21] Adam Roberts, "The United Nations and International Security", in *Survival*, vol. 35, no. 2, pp. 3–30; Adam Roberts and Benedict Kingsbury (eds.), *United Nations, Divided World: The UN's Roles in International Relations*, 2nd edition, Clarendon Press, 1994.

[22] See, for example, Frederick Cooper, *Africa since 1940: The Past of the Present*, Cambridge University Press, Cambridge, 2002; Cemil Aydin, *The Politics of Anti-Westernism in Asia: Visions of World Order in Pan-Islamic and Pan-Asian Thought*, Columbia University Press, 2007; Shashi Tharoor, *An Era of Darkness: The British Empire in India*, Aleph Book Company, 2016.

[23] See John Dumbrell, *A Special Relationship: Anglo-American Relations from the Cold War to Iraq*, Palgrave Macmillan, 2006; Bruce Russett, "The Democratic Peace", in *Conflicts and New Departures in World Society*, Routledge, 2017, pp. 21–43; Adda Bruemmer Bozeman, *Conflict in Africa: Concepts and Realities*, Princeton University Press, 2015.

peacekeeping and prevention, among other factors, helped reduce conflict in a post-Cold War global order until the mid-2000s.[24] Intra-State conflicts proliferated, commonly driven by resource scarcity, demographic pressures, and group-specific grievances surrounding exclusion from access to political power, land and resources, justice and security, and services.[25] At the same time, a window of opportunity opened to focus the international system on its capacity to manage and mitigate intra-State conflicts in the same way the system has managed the risk of direct conflict between P5 actors. However, in 2005, the number of persons killed in violent conflict reached a low point, signalling a different turn as the scope and fatalities of conflict began to increase – a trajectory that accelerated in 2010 (see Figure 3 below).

The level of global contextual risk is currently increasing because of the emergence of 'stressors', which are cumulative for two reasons: (1) increasing complexity due to greater interconnectedness of people, and (2) faster rates of economic, social and technological change. With regard to violent conflicts, multi-dimensional risks could simultaneously affect geographic, infrastructural, societal, political and economic dimensions. Some of the most prominent areas of risk that interface with risks and effects of violent conflicts include climate change, natural disaster, epidemics, economic shocks, demographic expansion, and so on.

Financial liberalization and transnationalization of capital embed inequality of access to capital and consequently, to economic, educational and other sources of economic mobility. It also enables transnational support for armed groups engaged in violent conflict. For example, in the second half of 2010, before the Arab Spring, key staple food prices had risen by over 25%, acting as a shock multiplier to the drought that Syria encountered.[26] Economic historians cite increasing deregulation of capital markets as increasing the frequency and severity of boom and bust eco-

[24] World Bank, 2018, p. 11, see *supra* note 3.

[25] *Ibid*.

[26] Elena I. Ianchovichina, Josef L. Loening and Christina A. Wood, "How Vulnerable are Arab Countries to Global Food Price Shocks?", in *The Journal of Development Studies*, vol. 50, no. 9, pp. 1302–19; George Joffé, "The Arab Spring in North Africa: Origins and Prospects", in *The Journal of North African Studies*, vol. 16, no. 4, pp. 507–32.

nomic cycles.[27] Increasingly regular and severe global economic adjustments themselves drive up commodity prices, fuelling speculation, disproportionately affecting marginalized communities, and elevating grievances relating to social groups about their exclusion from power, resources, justice, security and services.[28]

21.2.2. Syria: A Permissive Global System's Emblematic Proxy-War

The conflict in Syria has by far the highest number of conflict-related deaths (see Figure 1). It is worth considering, therefore, the impact of the transnational phenomena described in the previous section on the situation in Syria.

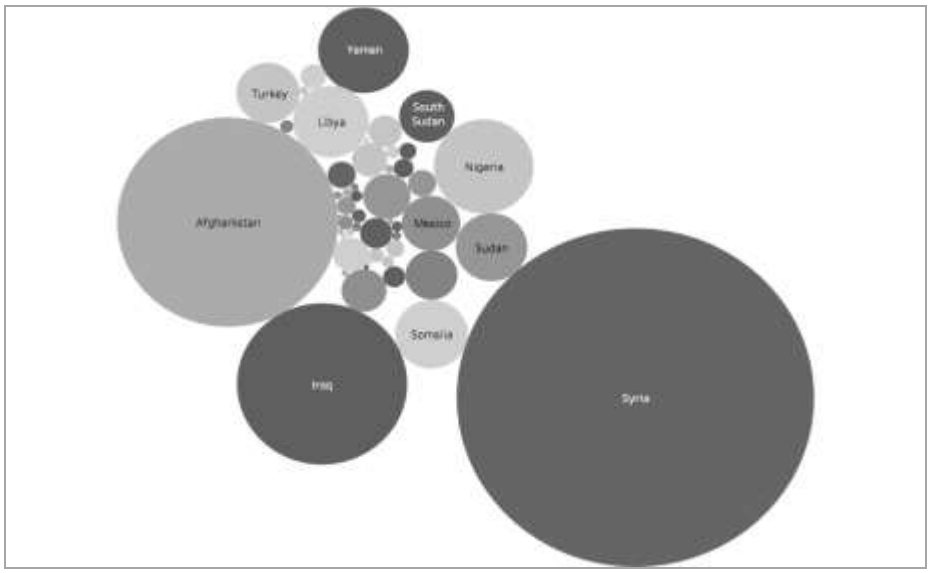

Figure 1: Number of Conflict-Related Deaths Worldwide, by Country, 2016

27 Hyman P. Minsky and Henry Kaufman, *Stabilizing an Unstable Economy*, McGraw-Hill, New York, 2008, vol. 1.

28 For example, fiscal space in Saudi Arabia allowed the government to rapidly deploy USD 130bn in social spending at the outset of protests in that country. See F. Gregory Gause III, "Why Middle East Studies Missed the Arab Spring: The Myth of Authoritarian Stability", in *Foreign Affairs*, 2011, vol. 90, no. 4, pp. 81–90; Neil MacFarguhar, "In Saudi Arabia, Royal Funds Buy Peace for Now", in *New York Times*, 8 June 2011.

Between 2005 and 2010, the Fertile Crescent[29] witnessed the worst drought in recorded history, which intensified during the winter of 2006-2007.

Syria's drought and its economic and social implications are uncommon themes among influential explanations of Syria's conflict. The conflict's onset occurred in the context of the Arab Spring protests, influenced by the demonstration effect of organized protests and local conditions, including "microfoundations and emotions".[30]

It has been indicated that the drought cannot be explained by natural causes, instead, it is consistent with models of anthropogenic climate change. The drought affected, with particular intensity, Syria's territory. Agriculture collapsed in the north-eastern region of Syria – the breadbasket of the country that produces two-thirds of the country's cereal output. Food prices went through the roof, more than doubling between 2007 and 2008. However, violent conflict did not occur in 2006 or 2007. The population in the northeast provinces of Syria witnessed a dramatic increase in nutrition-related diseases in children due to their inability to afford food as a result of a combination of high prices and deprivation of income and livelihood. School enrolment also dropped by 80%. An aggravating factor accompanying these socio-economic conditions was migration of displaced persons. As many as 1.5 million people were internally displaced in Syria, moving, along with many Iraqi refugees, to the periphery of urban areas.

[29] Civilization emerged for the first time in the 'Fertile Crescent' more than 10 millennia ago. Crops and animals were domesticated, institutions were created, agriculture and technology flourished. The interactions between humans and ecosystems that enabled civilization to emerge have sustained populations in the region since then.

[30] Wendy Pearlman, "Emotions and the Microfoundations of the Arab Uprisings", in *Perspectives on Politics*, 2013, vol.11, no. 2, pp. 387–409.

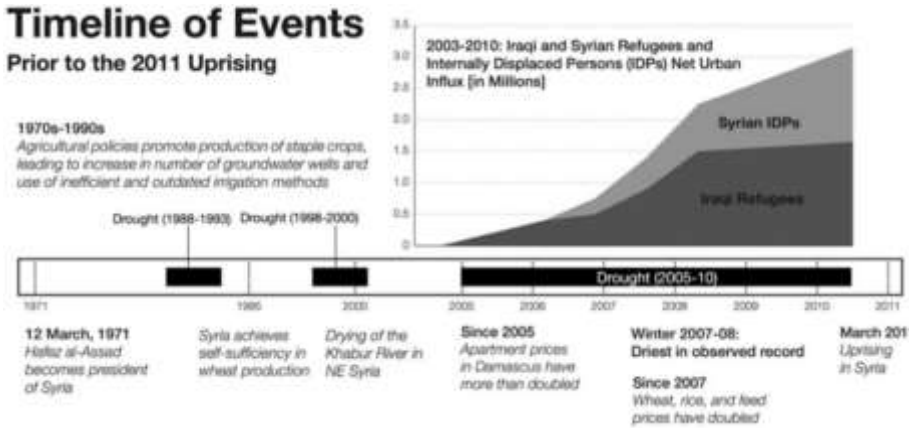

Figure 2: Syrian Conflict Timeline

By 2010, 20% of Syria's urban population was composed of internally displaced persons and Iraqi refugees, mostly on the urban periphery. The displaced population had no legal settlement options, and was faced with overcrowding, lack of basic services, rampant unemployment, and rising crime.[31] These peripheral urban areas became the cradle of the civil unrest that began to intensify in March 2011, which was inspired by the examples of Tunisia and Egypt but also supported by an influx of arms and foreign nationals supported by regional and global governments.[32] As the conflict unfolded, it became clear that Saudi Arabia, co-ordinating with the United States, began importing arms and people into Syria to fight the Syrian government. Similarly, the Russian and Iranian governments provided significant support to the Syrian government to repel the rebels. The direct engagement of one superpower in a conflict appeared, in the eyes of another, to be a decision between either inevitably engaging with that superpower or accepting that non-direct engagement would constitute concession of the military imperative to that superpower. Goldberg,

31 Colin P. Kelleya, Shahrzad Mohtadib, Mark A. Canec, Richard Seagerc and Yochanan Kushnirc, "Climate change in the Fertile Crescent and implications of the recent Syrian drought", in *Proceedings of the National Academies of Sciences*, 2015, vol. 112, no. 11, pp. 3241–46.

32 Ambrose Evans-Pritchard, "Saudis offer Russia secret oil deal if it drops Syria", in *The Telegraph*, 27 August 2013; Mark Mazzetti, Anne Barnard and Eric Schmitt, "Military Success in Syria Gives Putin Upper Hand in U.S. Proxy War", in *New York Times*, 6 August 2016.

who had an interview with the then US President, Barak Obama, described it as follows:

> "When you have a professional army," he once told me, "that is well armed and sponsored by two large states" – Iran and Russia – "who have huge stakes in this, and they are fighting against a farmer, a carpenter, an engineer who started out as protesters and suddenly now see themselves in the midst of a civil conflict …" He paused. "The notion that we could have – in a clean way that didn't commit U.S. military forces – changed the equation on the ground there was never true."[33]

He further described Obama's view on the regional contestation between Iran and Saudi Arabia that feeds many violent conflicts in the Middle East:

> At one point I observed to him that he is less likely than previous presidents to axiomatically side with Saudi Arabia in its dispute with its arch-rival, Iran. He didn't disagree.
>
> Iran, since 1979, has been an enemy of the United States, and has engaged in state-sponsored terrorism, is a genuine threat to Israel and many of our allies, and engages in all kinds of destructive behavior," the president said. "And my view has never been that we should throw our traditional allies" – the Saudis – "overboard in favor of Iran.
>
> But he went on to say that the Saudis need to "share" the Middle East with their Iranian foes. "The competition between the Saudis and the Iranians – which has helped to feed proxy wars and chaos in Syria and Iraq and Yemen – requires us to say to our friends as well as to the Iranians that they need to find an effective way to share the neighborhood and institute some sort of cold peace," he said. "An approach that said to our friends 'You are right, Iran is the source of all problems, and we will support you in dealing with Iran' would essentially mean that as these sectarian conflicts continue to rage and our Gulf partners, our traditional friends, do not have the ability to put out the flames on their own or decisively win on their own, and would mean that we have to start coming in and using our military power to settle scores.

[33] Jeffrey Goldberg, "The Obama Doctrine", in *The Atlantic*, April 2016.

> And that would be in the interest neither of the United States nor of the Middle East.

The United Nations Security Council encourages permanent members to settle disputes between themselves without coming into direct military conflict. However, there is no such mechanism to deter proxy-war.

21.2.3. How the Global System and Its Leadership Ignore Contemporary Conflicts

The joint United Nations and World Bank flagship study on conflict prevention does not consider prevention issues that appear at the forefront of the mind of the former US President. Obama failed to consider how the risk of violent conflict may be lowered by development of norms and rules that stigmatize, dissuade, deter or even prevent external actors from inserting weapons, armed actors, and other material support of armed groups into situations of instability.

Conflicts with increasing non-State armed groups also reduces formal State involvement, rendering traditional dispute resolution less appropriate. The plurality of armed groups and their diverse nature (from rebels, militias and violent extremist groups to traffickers and other organized criminal groups) adjust the political economy of conflict. The function of international criminal justice has failed to respond appropriately.

As the international criminal justice system is preoccupied with more expedient indictees located within domestic military and political structures, both internationalized conflicts where external actors are engaged and the number of non-State groups have increased dramatically (see Figures 3–4).

Figure 3: Number of Internationalized Violent Conflicts, 1946-2016[34]

Figure 4: Number of Non-State Groups Active in Violent Conflict Worldwide, 1989-2016[35]

[34] World Bank, 2018, p. 18, see *supra* note 3.

The UN–World Bank *Pathways for Peace* report acknowledges the existence of the increased incidence of internationalized conflict and the role of the United Nations Security Council in resolving disputes between States. Obama acknowledged the engagement of external actors, including himself in his capacity as US President. However, he failed to consider the efficacy of global peace and security for this type of behaviour, or the efficacy of potential collective responses by nations.

The following section considers the role of the modes of liability of aiding, abetting and accessorizing, where they might sit in the preliminary examination process, and where the legal threshold lies for aiding, abetting and accessorizing international crimes.

21.3. Prosecuting Aiding, Abetting and Accessorizing as a Response to Proxy-War

The OTP enjoys an opportunity to play a role in dissuading actors, or at least momentarily disrupting, delaying, or adjusting the incentives and disincentives of actors from waging war. It can do so by adopting an approach that focuses on the conduct of external enabling actors.

Confronting the self-interest of States that seek to permit war by proxy, something which is prohibited under international law, could constitute a much more substantive contribution to the prevention of violent conflict than dealing with the crimes that occur only after conflict has started. This approach considers the interaction of the crime of aggression of supporting a party to a conflict in another State (where an external actor is supporting a non-State actor) along with the conduct of the party being supported (given the commonality of international crimes committed by non-State actors).

External actors play a prominent role in causing the onset, escalation and persistence of violent conflict with which core international crimes are associated. For the prevention of violent conflicts, employing available means to prosecute those actors is equally important as prosecuting local direct perpetrators and persons with command responsibility.

[35] *Ibid*., p. 16.

21.3.1. Gravity in Preliminary Examination and the Aiding, Abetting and Accessorizing of Crimes

As noted elsewhere in these volumes, the OTP receives and analyses referrals and communications to determine whether there is a reasonable basis to investigate and prosecute persons responsible for crimes under the Statute before the Court. The factors and procedures applied by the Office to carry out a preliminary examination are outlined in its 2010 Draft Policy Paper on Preliminary Examinations.[36]

In determining whether a reasonable basis to proceed with an investigation exists or not, the Prosecutor considers jurisdiction, admissibility and interests of justice.[37] Presuming a situation moves to Phase 3, admissibility under Article 17[38] requires consideration of the role of aiding, abetting and accessorizing. Firstly, in considering complementarity,[39] it should determine whether a domestic process has jurisdiction over the modes of liability of aiding, abetting and accessorizing, and whether investigations are credibly pursuing such persons. Secondly, it should consider aiding, abetting and accessorizing to third parties as a significant aggravating factor in determining gravity[40] regarding the most serious crimes and those bearing greatest responsibility for them.[41]

Finally, the OTP should, where there are positive determinations on both jurisdiction and admissibility,[42] consider the role of aiding, abetting

36 ICC OTP, *Draft Policy Paper on Preliminary Examinations*, 4 October 2010, p. 1 (http://www.legal-tools.org/doc/bd172c/).

37 *Ibid*.

38 ICC Statute, Article 53(1)(b), see *supra* note 1.

39 *Ibid*., Article 17(1)(a)–(c). The Court is intended to complement national criminal justice systems, hence in general a case will be inadmissible if it has been or is being investigated or prosecuted by a State with jurisdiction. However, a case may be admissible if the investigating or prosecuting state is unwilling or unable to genuinely carry out the investigation or prosecution.

40 *Ibid*., Article 17(1)(d).

41 ICC OTP, *Draft Policy Paper on Preliminary Examinations*, 2010, para. 51, see *supra* note 36.

42 ICC OTP, *Report on activities performed during the first three years (June 2003 – June 2006)*, 12 September 2006, p. 2 (http://www.legal-tools.org/doc/c7a850/).

and accessorizing in identifying the "countervailing consideration"[43] of the interests of justice.

In relation to gravity, there is a specific guiding consideration for determining if the gravity threshold is met in respect of war crimes.[44] Article 8(1) states that these crimes exist when they are "committed as part of a plan or policy or as part of a large-scale commission of such crimes".[45] This means that the role of external actors would suggest a degree of planning. Therefore, a perpetrating group or actor would be more likely to have a plan or a policy.

The prosecutor enjoys a great deal of discretion in interpreting "gravity", which is not defined in the Rome Statute. This opens the door to employing the modes of liability of aiding, abetting and accessorizing as an interpretive mechanism of aggravation.[46] In determining whether to open an investigation, the OTP's intention is to establish a basic standard that is not overly restrictive.[47] At the stage of initiating an investigation, there is not yet a 'case'. Preliminary examination, therefore, should consider situations generally, with awareness of likely cases. Given the role of external actors in materially (and often lethally) supporting perpetrators, a part of this general consideration includes consideration of aiding, abetting and accessorizing. It may also better inform the Prosecutor as to the perpetrator's extent of responsibility during case selection.[48]

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43 ICC OTP, *Draft Policy Paper on Preliminary Examinations*, 2010, para. 10, see *supra* note 36.

44 ICC OTP, "OTP Response to Communications received concerning Iraq", 9 February 2006, p. 8 (http://www.legal-tools.org/doc/5b8996/).

45 ICC Statute, Article 8(1), see *supra* note 1.

46 See William A. Schabas, "Prosecutorial Discretion *v.* Judicial Activism at the International Criminal Court", in *Journal of International Criminal Justice*, 2008, vol. 6, no. 4, p. 731, at pp.736–41. For a wider discussion of gravity, including information on the origins of the gravity threshold and an analysis of Pre-Trial Chamber I's approach to Article 17, see War Crimes Research Office, *The Gravity Threshold of the International Criminal Court*, American University Washington College of Law, 2008.

47 ICC OTP, *Draft Policy Paper on Preliminary Examinations*, 2010, at para. 68, see *supra* note 36.

48 Fabricio Guariglia, "The Selection of Cases by the Office of the Prosecutor of the International Criminal Court", in Carsten Stahn and Goran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Martinus Nijhoff Publishers, Leiden/Boston, 2009, pp. 209–17, at p. 213.

The OTP provides a number of criteria for determining gravity that are relevant to the role of persons that aid and abet or act as accessories to international crimes.[49] The role of external actors goes in particular to the 'nature' of crimes, particularly high-level killings, the manner of commission of crimes (in terms of participation), and abuse of power (where external actors experience comparatively little consequence). Similarly, external aiding, abetting and accessorizing has a long-term 'impact' because conflicts involving external actors last longer, thus increasing the possibility of cross-border conflicts.

If the OTP makes a positive determination on admissibility, the OTP will weigh the gravity and victims' interests to determine the "interests of justice".[50] This includes consideration of the interests of the victims, the conflict parties' views, victims' interest in seeing justice done, and witnesses' physical and psychological well-being, as well as the dignity and privacy of victims and witnesses.[51] In making such a determination, in particular of the victims' interest, the role of external actors is significant.

In weighing the above considerations, the OTP should provide, in its reports on preliminary examinations, an outline of credibly alleged external actors with potential criminal liability. It should also lay out how the credibly alleged conduct relates to the aforementioned preliminary examination considerations.

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49 ICC OTP, *Draft Policy Paper on Preliminary Examinations*, 2010, at para. 70, see *supra* note 36. For more information regarding the origins of these criteria, see Paul Seils, "The Selection and Prioritization of Cases by the Office of the Prosecutor of the International Criminal Court", in Morten Bergsmo (ed.), *Criteria for Prioritizing and Selecting Core International Crimes Cases*, 2nd edition, Torkel Opsahl Academic EPublisher, Oslo, 2010 (http://www.toaep.org/ps-pdf/4-bergsmo-second).

50 ICC Statute, Articles 53(1)(c) and 53(2)(c), see *supra* note 1. Article 53(1)(c) provides: "Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice". Article 53(2)(c) additionally requires consideration of the particular circumstances of the accused.

51 ICC OTP, *Policy Paper on the Interests of Justice*, September 2007, at p. 5 (http://www.legal-tools.org/doc/bb02e5/).

21.4. The Legal Threshold of Aiding, Abetting and Accessorizing

The mode of liability of aiding and abetting in international criminal law was first established at the International Criminal Tribunal for the former Yugoslavia ('ICTY'). Article 7(1) of the ICTY Statute ascribes criminal responsibility where an actor "aided and abetted in the planning, preparation or execution of a crime".[52] The mode of liability was not present in the Charters of the Nuremburg or Tokyo tribunals.[53] It has taken on normative acceptance in international criminal law and has been included in the Statutes of all the post-Cold War international criminal courts and tribunals. The existence of this mode of liability has facilitated successful prosecution of political leaders and external commercial or State actors because it is not necessary to show command responsibility over perpetrators.[54] In effect, the mode of aiding, abetting and accessorizing also criminalized the conduct of waging war by proxy (where proxy forces commit crimes).[55]

The ICTY in *Perišić* preferred a *mens rea* element that demands that the aider or abettor specifically intend for support to be used for the specific acts that occurred (known as 'specific direction').[56] However, it was rejected by later jurisprudence at the ICTY and at the Special Court for Sierra Leone.[57]

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52 Statute of the International Criminal Tribunal for the Former Yugoslavia, adopted 25 May 1993, amended 17 May 2002, Article 7(1) ('ICTY Statute') (http://www.legal-tools.org/doc/b4f63b/).

53 Charter of the International Military Tribunal, 8 August 1945 (http://www.legal-tools.org/doc/64ffdd/); Charter of the International Military Tribunal for the Far East, adopted 19 January 1946, amended 26 April 1946 (http://www.legal-tools.org/doc/a3c41c/).

54 Andrew Clapham, "Extending international criminal law beyond the individual to corporations and armed opposition groups", in *Journal of International Criminal Justice*, 2008, vol. 6, no. 5, pp. 899–926.

55 *Ibid*.

56 ICTY, *Prosecutor v. Perišić*, Appeals Chamber, Judgment, 28 February 2013, IT-04-81-A, para. 44 (http://www.legal-tools.org/doc/f006ba/).

57 ICTY, *Prosecutor v. Šainović et al.*, Appeals Chamber, Judgment, 23 January 2014, IT-05-87-A, paras. 1648–49 (http://www.legal-tools.org/doc/81ac8c/); ICTY, *Prosecutor v. Popović et al.*, Appeals Chamber, Judgment, 30 January 2015, IT-05-88-A, para. 1758 (http://www.legal-tools.org/doc/4c28fb/); ICTY, *Prosecutor v. Stanišić and Simatović*, ICTY Appeals Chamber, Judgment, 9 December 2015, IT-03-69-A, paras. 104–07 (http://www.legal-tools.org/doc/198c16/).

21.4.1. Aiding and Abetting under the Rome Statute

Article 25(3)(c) of the Statute[58] provides for criminal liability if a person:

> For the *purpose of facilitating the commission of such a crime*, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission […]

The Pre-Trial Chamber has noted that a "substantial" contribution to the crime may be contemplated.[59] The Rome Statute, unlike the jurisprudence of the *ad hoc* tribunals, does not require the aider and abettor to share the perpetrator's intent to commit the crime.

However, the threshold remains unclear, as the language "or otherwise assists" is novel to the ICC. It suggests that the provision of means for the commission of a crime may simply constitute an example of assistance, and perhaps a lower threshold than the "substantial" contribution threshold.

Future ICC defendants may argue that Article 25(3)(c) expressly adopts a 'specific direction' standard because assistance must be given "for *the purpose* of facilitating the commission of such crime".[60] They may argue that the Article 25(3)(c) language of "otherwise provides" adds a mental element that must be proved in addition to intention and knowledge under Article 30.[61] This view is held by multiple observers,

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58 ICC Statute, Article 25(3)(c), see *supra* note 1; Special Court for Sierra Leone ('SCSL'), *Prosecutor v. Charles Taylor*, Appeals Chamber, Judgment, 26 September 2013, SCSL-03-01-A, para. 207 (http://www.legal-tools.org/doc/3e7be5/).

59 ICC, Situation in the Democratic Republic of the Congo, *Prosecutor v. Mbarushimana*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 16 December 2011, ICC-01/04-01/10-465-Red, para. 279 (http://www.legal-tools.org/doc/63028f/); ICC, Situation in the Democratic Republic of the Congo, *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Judgment Pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842, para. 997 (http://www.legal-tools.org/doc/677866/).

60 Defendants may argue that "the Court was established to try the most serious crimes of international concern", which demand high thresholds: Sarah Finnin, *Elements of Accessorial Modes of Liability: Article 25(3)(b) and (c) of the Rome Statute of the International Criminal Court*, Martinus Nijhoff Publishers, 2012, p. 203. See also ICC Statute, Preamble, Articles 1 and 5(1), see *supra* note 1.

61 Albin Eser, "Individual Criminal Responsibility", in Antonio Cassese (ed.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, New York, 2002, p. 767, at pp. 798–801; Finnin, 2012, p. 180, see *supra* note 60; K.J.M. Smith,

who argue that the inclusion of the "for the purpose" language would be otherwise meaningless.

However, David Scheffer and Caroline Kaeb argue that the word "purpose" indicates only the *de minimis* and neutral *mens rea* element of acting in a manner that has the consequence of facilitating the commission of crimes.[62] Their view is that the language "for the purpose of" reflects a lack of drafting consensus regarding *mens rea*. It is worth noting, in this relation, that Scheffer was present at the drafting. They conclude that the *mens rea* element of aiding and abetting is informed by Article 25(3)(d)(ii) requiring "knowledge" of the "near certainty" of a crime "in the ordinary course of events" because drafting consensus existed in that provision.[63] They argue that if the drafters intended that an accessory must share a perpetrator's intent, aiding and abetting would have been a co-perpetrator mode of liability under Article 25(3)(a).[64] Their argument may be supported by tracing the drafting of Article 25(3)(c) to the US Model Penal Code, which does not require specific direction.[65] Further, their argument is normatively supported by the Rome Statute's own intent to "put an end to impunity" via interpretations that "close accountability gaps".[66] When read alongside the existence of the crime of aggression, a specific direction interpretation of aiding and abetting becomes incompatible with the

A Modern Treatise on the Law of Criminal Complicity, Oxford University Press, Oxford, 1991, p. 142.

62 David Scheffer and Caroline Kaeb, "The Five Levels of CSR Compliance: The Resiliency of Corporate Liability under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory", in *Berkeley Journal of International Law*, 2011, vol. 29, no. 1, pp. 349–57.

63 *Ibid*.

64 *Ibid*.

65 Finnin, 2012, p. 187, at p. 200, see *supra* note 60. It is beyond the scope of this chapter to fully engage with how "purpose" should be interpreted. For a helpful introduction, see SCSL, *Prosecutor v. Charles Taylor*, Appeals Chamber, Judgment, 26 September 2013, p. 5, at paras. 446–51, see *supra* note 58.

66 ICC, Situation in the Democratic Republic of the Congo, *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", 8 December 2009, ICC-01/04-01/06-2205, at para. 77 (http://www.legal-tools.org/doc/40d015/).

Rome Statute due to the impossibly high standard. The ICC is also likely to find that *Perišić* draws a false distinction between different 'types' of degree of contribution and awareness for remote actors. To argue that 'substantial contribution' before the ICC is, as per the ICTY, inadequate at the ICC is to presume a *mens rea* threshold of perceived inadequacy of knowledge,[67] despite the Rome Statute's adoption of purpose and knowledge together. Given that volition and cognition are demanded together, a specific direction element can reasonably be perceived as a further unstated, and therefore non-existent, component of Article 25(3)(c).

Defendants may cite Appeals Chamber Judge Silvia Fernández de Gurmendi's dissenting opinion in *Mbarushimana* as a recognition of *Perišić* that rejects the degree of contribution for interpreting Article 25(3)(d):

> I am not persuaded that such contributions would be adequately addressed by adding the requirement that a contribution be significant. Depending on the circumstances of a case, providing food or utilities to an armed group might be a significant, a substantial or even an essential contribution to the commission of crimes by this group. In my view the real issue is that of the so-called "neutral" contributions. This problem is better addressed by analysing the normative and causal links between the contribution and the crime rather than requiring a minimum level of contribution.[68]

Defendants, invoking Fernández de Gurmendi, will argue that the "normative and causal links" between the contributions of the accused, on the one hand, and the crimes' commission, on the other, must reflect the requirements of 'specific direction', or at least demand the crimes are the reason for assisting the accused. To reinforce that claim, defendants will

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67 James G Stewart, "The ICTY Loses Its Way on Complicity", *Opinio Juris*, 3 April 2013. But see Kevin Jon Heller, "Two Thoughts on Manuel Ventura's Critique of Specific Direction", *Opinio Juris*, 10 January 2014.

68 ICC, Situation in the Democratic Republic of the Congo, *The Prosecutor v. Callixte Mbarushimana*, Appeals Chamber, Separate Opinion of Judge Silvia Fernandez de Gurmendi, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled "Decision on the confirmation of charges", 30 May 2012, ICC-01/04-01/10-514, at para. 12 (http://www.legal-tools.org/doc/6ead30/). Importantly, the rest of the bench in the Appeals Chamber decided the appeal without engaging the question of contribution. As such, Judge de Gurmendi's statement of principle should be considered persuasive.

likely emphasise that both Fernández de Gurmendi and the 'specific direction' jurisprudence at the ICTY were concerned with establishing an approach that appropriately responded to 'neutral contributions' or, as *Perišić* put it, "general assistance" that can be used for lawful or unlawful purposes.[69]

Given that the language of Article 25(3)(d) makes clear the level of contribution and knowledge, an interpretation in line with specific direction that contradicts the Article's intent (when read within the intent of the Rome Statute)[70] is unlikely to be adopted. The Court is also more likely to read the above paragraph in de Gurmendi's dissent as a guide for considering if a defendant's contribution was significant, rather than being specifically directed.[71] The jurisprudence advancing the *mens rea* element of specific direction has also been rejected by subsequent jurisprudence. The *Taylor* appeal judgement found that "aiding and abetting liability under customary international law is not limited to direct intent or […] purpose".[72] At the ICTY, the *Šainović* appeal judgment, *Popović* appeal judgment, and *Stanišić and Simatović* appeal judgment all rejected specific direction.[73]

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69 ICTY, *Prosecutor v. Perišić*, Appeals Chamber, Judgment, 28 February 2013, at para. 44, see *supra* note 56.

70 ICC, Situation in the Democratic Republic of the Congo, *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", 8 December 2009, at para. 77, see *supra* note 66.

71 ICC, Situation in the Republic of Kenya, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Trial Chamber V, Defence Response to Prosecution's Submissions on the law of indirect co-perpetration under Article 25(3)(a) of the Statute and application for notice to be given under Regulation 55(2) with respect to William Samoei Ruto's individual criminal responsibility, 25 July 2012, ICC-01/09-01/11, at p. 3 (http://www.legal-tools.org/doc/be4424/); Randle C. DeFalco, "Contextualizing *Actus Reus* under Article 25(3)(d) of the ICC Statute", in *Journal of International Criminal Justice*, 2013, vol. 11, no. 4, at pp. 730–32.

72 SCSL, *Prosecutor v. Charles Taylor*, Appeals Chamber, Judgment, 26 September 2013, para. 207, see *supra* note 58.

73 ICTY, *Prosecutor v. Šainović et al.*, Appeals Chamber, Judgment, 23 January 2014, paras. 1648–49, see *supra* note 57; ICTY, *Prosecutor v. Popović et al.*, Appeals Chamber, Judgment, 30 January 2015, para. 1758, see *supra* note 57; ICTY, *Prosecutor v. Stanišić and*

In the ICC Trial Chamber's decision in *Bemba et al.*, the Chamber noted the word 'purpose' introduced a "higher subjective mental element" demanding "assistance with the aim of facilitating the offence".[74] The accessory's facilitation (not the principal offence) must be made with the knowledge of the assistance to the principal perpetrator in the commission of the offence.[75] With regard to the principal offence, knowledge of the offence in the ordinary course of events and its essential elements is required.[76] However, knowledge of the precise offence intended and committed in the specific circumstance is not required.[77] The *Bemba* decision at the Trial Chamber may not necessarily be adopted at the Appeals Chamber.

21.4.2. Accessorizing under the Rome Statute

A similar mode of liability, but with a different *mens rea* element, is that of acting as an accessory to crimes committed by a group under Article 25(3)(d) (herein referred to as 'accessorizing').[78] This is where a person makes an 'intentional' contribution to a crime.[79] Unlike aiding and abetting, Article 25(3)(d) does not refer to a 'purpose', but rather requires either a shared intent for the group's crimes, or *knowledge* of the group's crimes, including knowledge that they are likely to occur in "the ordinary course of events".[80] "Knowledge of the intention of the group to commit a

Simatović, Appeals Chamber, Judgment, 9 December 2015, paras. 104–07, see *supra* note 57.

74 ICC, Situation in the Central African Republic, *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Trial Chamber VII, Public Redacted Version of Judgment pursuant to Article 74 of the Statute, 19 October 2016, ICC-01/05-01/13-1989-Red, paras. 97–98 (http://www.legal-tools.org/doc/fe0ce4/).

75 *Ibid*.

76 *Ibid*., para. 98.

77 *Ibid*.

78 ICC Statute, Article 25(3)(d), see *supra* note 1.

79 *Ibid*.; Roger S. Clark, "*The Mental Element in International Criminal Law*", in *Criminal Law Forum*, 2001, vol. 12, no. 3, pp. 291, 320–21; Kai Ambos, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd edition, C.H. Beck/Hart/Nomos, München/Oxford/Baden-Baden, 2008, pp. 743–70.

80 ICC Statute, Article 30(3), see *supra* note 1.

crime"[81] is therefore a low bar to meet. The Appeals Chamber ruled that for 'mere' knowledge of a consequence "in the ordinary course of events", "*virtual* certainty" of the consequence is necessary.[82]

The ICC Pre-Trial Chamber has also found that criminal liability exists when a crime is attempted or committed, the crime was carried out by a group with common purpose, and the accused intentionally made a "significant" [83] contribution to the crime with the knowledge of the group's intention to commit the crime.[84]

Where a group is party to a conflict, which has carried out crimes over a number of years, as alleged by credible observers, the requirement of near certainty that the group will continue to carry out those crimes is met. Where credible organisations like United Nations human rights monitoring bodies, Human Rights Watch and Amnesty International publicly report a groups' previous conduct, the requisite threshold is met. It indicates an awareness of a high probability of existence of a fact.[85] The existing fact in such circumstances is that the intentionally supported group is nearly certain to continue to commit crimes in the ordinary course of events.

21.5. Aiders, Abettors and Accessories in Afghanistan

Afghanistan's conflict has significantly contributed to loss of life and global instability over the past three decades. There are also violent conflicts with a significant number of external actors supporting parties to conflict.

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81 *Ibid*., Article 25(3)(d)(ii).

82 ICC, Situation in the Democratic Republic of the Congo, *Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, 1 December 2014, ICC-01/04-01/06-3121-Red, para. 447 (http://www.legal-tools.org/doc/585c75/) (emphasis in the original).

83 ICC, Situation in the Democratic Republic of the Congo, *Prosecutor v. Mbarushimana*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 16 December 2011, para. 283, see *supra* note 59.

84 ICC, Situation in the Democratic Republic of the Congo, *Prosecutor v. Mbarushimana*, Pre-Trial Chamber I, Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana, 28 September 2010, ICC-01/04-01/10-1, para. 39 (http://www.legal-tools.org/doc/04d4fa/).

85 Ambos, 2008, p. 870, see *supra* note 79.

Record numbers of battle-related deaths were observed in 2016, increasing ten-fold from 2005, the low point since the end of the Cold War.[86] The three countries with the most casualties in 2016 are also conflicts with a high number of external actors: Afghanistan, Iraq, and Syria.[87] This section of the chapter considers some of the conduct that might be considered by an OTP that incorporates the accused in its preliminary examinations and related reports.

The United States has been involved in Afghanistan for the past 17 years. Much of that time has been spent fighting insurgent groups such as the Taliban and the Haqqani Network. Despite a successful ground campaign, the United States has been unable to defeat the Taliban. This is in large part due to the large international backing that the Taliban has from both foreign governments and private individuals who serve as donors. The governments of Iran and Pakistan have served as the Taliban's primary backers. In October 2017, the Taliban attacked the cities of Farah and Lashkar Gah in Western Afghanistan.[88] Afghan National Security Forces were barely able to contain the offensive. The Taliban withdrew only after the Afghan forces requested a series of US airstrikes. Afghan intelligence found four dead Iranian commandos after the attack.[89] March 2018 saw yet another Taliban offensive to capture Farah. Evidence suggests that Iran's Islamic Revolutionary Guard Corps provided support to the Taliban during the lead-up to the attack.[90] Iran has an interest in keeping the western province of Farah unstable because it is a focal point for the Saudi financed TAPI (Turkmenistan, Afghanistan, Pakistan and India) pipeline. Additionally, Iran holds an interest in preventing the construction of the

86 Marie Allansson, Erik Melander and Lotta Themnér, "Organized Violence, 1989–2016", in *Journal of Peace Research*, 2017, vol. 54, no. 4, pp. 574–87; Ralph Sundberg, Kristine Eck and Joakim Kreutz, "Introducing the UCDP Non-State Conflict Dataset", in *Journal of Peace Research*, 2012, vol. 49, no. 2, pp. 351–62.

87 Mihai Croicu and Ralph Sundberg, *UCDP GED Codebook version 17.1*, Department of Peace and Conflict Research, Uppsala University, Uppsala, 2017; Ralph Sundberg and Erik Melander, "Introducing the UCDP Georeferenced Event Dataset", in *Journal of Peace Research*, 2013, vol. 50, no. 4, pp. 523–32.

88 Mujib Mashal and Fahim Abed, "On Their Own, Afghan Forces Strain to Combat Taliban Offensives", in *The New York Times*, 9 October 2016.

89 Carlotta Gall, "In Afghanistan, The US Exits, Iran Comes In", in *The New York Times*, 5 August 2017.

90 Ahmad Majidyar, "Afghans see Iran's hand in Taliban's latest gains in western Afghanistan", Middle East Institute, 14 March 2018.

Bakhshabad dam in Farah province because it would serve to limit Iranian access to Afghanistan's rivers.[91] Iran has allowed the Taliban to cross into Iran so that they may train and replenish their forces before an offensive. The Islamic Revolutionary Guard Corps has additionally become vocal in its support for the Taliban mainly because the Taliban manages to simultaneously fight Daesh/ISIS and US and NATO forces.[92]

Russian support for the Taliban in Afghanistan may seem very surprising given their history with Afghanistan. However, the current US commander in Afghanistan, General John Nicholson, has gone on the record in an interview with the BBC and has publicly accused the Russian Federation of supplying arms to the Taliban. In an interview, General Nicholson states:

> We've had stories written by the Taliban that have appeared in the media about financial support provided by the enemy. We've had weapons brought to this headquarters and given to us by Afghan leaders and said, this was given by the Russians to the Taliban. We know that the Russians are involved.[93]

Russia has conducted numerous counter terrorism exercises with the Tajik Army in southern Tajikistan along the border of Afghanistan. General Nicholson believes that when the Russian military moves weapons and equipment for an exercise they intentionally leave surplus materials behind so that they can be smuggled into Afghanistan for use by the Taliban.[94] While it is currently difficult to determine the quantity of weapons being smuggled in to Afghanistan, the Afghan Police and Afghan National Army believe that Russia is supplying medium and heavy machine guns, night vision goggles and small arms to the Taliban.[95]

Pakistan has long served as a refuge for the Taliban. In 2012, evidence emerged that showed direct ties between Pakistan's Inter-Services Intelligence ('ISI') branch and the Taliban. The report states that the "ISI is thoroughly aware of Taliban activities and the whereabouts of all senior

91 *Ibid*.

92 *Ibid*.

93 Justin Rowlatt, "Russia 'arming the Afghan Taliban', says US", in *BBC*, 23 March 2018.

94 *Ibid*.

95 *Ibid*.

Taliban personnel".[96] The report also claims that ISI agents were able to sit in on the "Quetta Shura" (the Taliban's top leadership council). Observers claim that support of the Taliban is part of the ISI's official policy.[97] The United States government has requested that UN-proscribed NGOs al Rashid Trust, al Akhtur Trust and all successor organizations stop funnelling money and providing other forms of support to the Taliban and LeT (Lashkar-e-Taiba) from Pakistan.[98] The US has also identified the Pakistan-based Haqqani network as a conduit for funnelling weapons and fighters across the Afghan and Pakistan border.[99]

Saudi Arabia has long praised Pakistan's support to the Taliban while simultaneously supporting the United States in their efforts to defeat the Taliban in Afghanistan. Agha Jan Motasim, the former finance minister of the Taliban explained that he travelled to Saudi Arabia two to three times a year to raise funds and gauge support for the Taliban among donors.[100] Motasim accomplished all of this while on pilgrimage to Saudi Arabia's holy sites. Motasim would appeal to wealthy Saudi Sheikhs and other wealthy Muslims and urge them to donate to the Taliban as private individuals. Once Motasim raised money he would move it to Pakistan through a series of regional banks or through the 'Hawala' (an Islamic custom of informal money transfers). The amount of money raised by the Taliban in Saudi Arabia was so significant that Secretary of State Hillary Clinton said that Saudi Arabia was the "most significant source of funding to Sunni terrorist groups worldwide".[101] US diplomatic cables further disclosed fears and suspicions that that the Taliban were able to raise millions of dollars from private individuals during annual pilgrimages in Saudi Arabia.

The United States has been funding the fledging government of Afghanistan since its establishment after the Bonn Agreement in 2001. The

96 Azmat Khan, "Leaked NATO Report Alleges Pakistani Support for Taliban", in *Frontline*, 1 February 2012.

97 "Pakistani agents 'funding and training Afghan Taliban'", in *BBC*, 13 June 2010.

98 United States Secretary of State, *Terrorist Finance: Action for request for senior level engagement on terrorism finance*, 30 December 2009, STATE 131801.

99 *Ibid*.

100 Carlotta Gall, "Saudis Bankroll Taliban, Even as King Officially Supports Afghan Government", in *The New York Times*, 6 December 2016.

101 *Ibid*.

United States has taken a special interest in shaping and training the Afghan National Security Forces so that they may become a self-sustaining force capable of fighting against insurgents. From 2002-2015 the US Department of Defense has spent a total of USD 778.1 billion on the war in Afghanistan.[102] In 2016, the US State Department approved a USD 60 million arms sale to Afghanistan through the Defense Security Cooperation Agency, which specializes in foreign military sales. This arms package includes 4,891 M16A4 assault rifles, 485 M240B machine guns and 800 M2 machine guns listed under the Major Defense Equipment ('MDE') category. Non-MDE procurements include M249 light machine guns, M110 sniper rifles, MK-19 grenade launchers, machine gun mounts, spare parts, and repair kits.[103] A press release from the Defense Security Cooperation Agency on the sale further elaborates:

> The proposed sale will enhance the foreign policy and national security objectives of the United States by helping to improve the security of a strategic partner by providing weapons needed to maintain security and stability, as well as to conduct offensive operations against an ongoing insurgency. A stable and secure Afghanistan is vital to regional stability. This proposed sale will also demonstrate the U.S. commitment to Afghanistan's security.

However, the OTP has included Afghanistan as a part of its preliminary examination activities in 2017. In the report, the Afghan National Security Forces were accused of "[w]ar crimes of torture, outrages upon personal dignity and sexual violence".[104] The other major parties to the conflict are also accused of crimes.

21.6. Conclusion

As ICC observers begin to confront the institution's movement towards a status of irrelevance, an urgency surrounding the need for real and per-

[102] Ian S. Livingston and Michael O'Hanlon, *Afghanistan Index: Also including selected data on Pakistan*, Brookings Institute, 2017.

[103] Defense Security Cooperation Agency, "Afghanistan - Individual and Crew Served Weapons", 18 August 2016.

[104] ICC OTP, *Report on Preliminary Examination Activities 2017*, 4 December 2017 (http://www.legal-tools.org/doc/e50459/).

ceived integrity and impact emerges.[105] The post-Cold War re-emergence of international crimes prosecutions at the international level is at risk of capture by realist State self-interest.[106] A part of that capture is the exclusion from substantive international criminal justice jurisdiction of the crime of aggression – the focus on *jus in bello* crimes. Such a change demands change from a situation where those that fight wars be accountable to certain conduct but that those that start wars may do so with impunity. As identified, this status quo focuses international criminal justice on the symptoms of the problem – how war is fought – and not the problem – the waging of war. Further, the current practice of international criminal justice focuses accountability on local actors for the conduct of war while avoiding the conduct of those enabling it via material support.

The deterrence effect of international criminal justice and in particular of the ICC, has not been demonstrated. New approaches, aligned with the nature of the escalation in violent conflict, are required. Civil society, which has refrained from focusing on external actors' international criminal law liability, must also play its role in providing credible evidence to substantiate reports on preliminary examination.

As the situation in Afghanistan is considered, there is an opportunity to take a bold and meaningful step towards accountability for the conduct of local Afghan actors as well as those that enable it. Similarly, in Colombia, the US government provides military support to the Colombian government for its operations. Secret US assistance, such as eavesdropping, is funded via a multi-billion black budget. Since 2000, this secret support has been supplemented by a public USD 9 billion package of mostly military aid called 'Plan Colombia'.[107]

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[105] See, for example the identification of the ICC as increasingly irrelevant in; Morten Bergsmo, Wolfgang Kaleck, Sam Muller and William H. Wiley, "A Prosecutor Falls, Time for the Court to Rise", in FICHL Policy Brief Series No. 86 (2017), Torkel Opsahl Academic EPublisher, Brussels, 2017 (http://www.toaep.org/pbs-pdf/86-four-directors/).

[106] Christopher B. Mahony, "The Justice Pivot: US International Criminal Law Influence from Outside the Rome Statute", in *Georgetown Journal of International Law*, 2015, vol. 46, no. 4, p. 1071.

[107] *Idem*, "If You're Not at the Table, You're on the Menu: Complementarity and Self-Interest in Domestic Processes for Core International Crimes", in Morten Bergsmo and SONG Tianying (eds.), *Military Self-Interest in Accountability for Core International Crimes*, Torkel Opsahl Academic EPublisher, Brussels, 2015, pp. 229–59 (http://www.toaep.org/ps-

It is likely that the US will have a hostile response to formal OTP investigations in Colombia and Afghanistan, particularly examination of external actors. However, the OTP's continued apprehensive approach, which avoids conflict with major powers, can be mitigated by pointing the finger at *all* external actors equally. Boxing oneself in by rendering the consideration of external actors a standardized practice, via a policy announcement, would render such an approach a *fait accompli.* Such a status would increase, via standardization, the consideration of external actors. It would establish a stigma around the conduct of providing such support. This is needed not only to provide justice to victims, but most importantly to reintroduce ICC credibility and efficacy for preventing future war and crimes we know accompany it.

pdf/25-bergsmo-song); Dana Priest, "Covert action in Colombia", in *The Washington Post*, 21 December 2013.

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Quality Control in Preliminary Examination: Volume 2

Morten Bergsmo and Carsten Stahn (editors)

This is the second of two volumes entitled *Quality Control in Preliminary Examination*. They form part of a wider research project led by the Centre for International Law Research and Policy (CILRAP) on how we ensure the highest quality and cost-efficiency during the more fact-intensive phases of work on core international crimes. The 2013 volume *Quality Control in Fact-Finding* considers fact-finding outside the criminal justice system. An upcoming volume concerns quality control in criminal investigations. The present volume deals with 'preliminary examination', the phase when criminal justice seeks to determine whether there is a reasonable basis to proceed to full criminal investigation. The book promotes an awareness and culture of quality control, including freedom and motivation to challenge the quality of work.

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