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The ILC Draft Convention on Crimes Against Humanity - Criminalization under National Law

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Abstract

This paper discusses Article 6 of the International Law Commission's (ILC) draft articles on crimes against humanity, which deals with criminalization of crimes against humanity in national law. The provision uses neutral and generic terms to describe criminal responsibility. This is appropriate for a treaty like the one which could result from the ILC articles, where it would be left to state parties to enact legislation and to align criminal responsibility for crimes against humanity to existing legal concepts in domestic law. Article 6 is a broad provision, yet it leaves a few gaps. This contribution suggests the insertion and explicit recognition of conspiracy as entailing criminal responsibility for crimes against humanity. Moreover, it proposes a modification of the superior orders defence, allowing reliance on the defence for non-manifestly unlawful orders. The clause on liability of legal persons is welcomed, whereas the provision on superior responsibility is criticized. The latter, mirroring Article 28 of the International Criminal Court's (ICC) Statute, is at the moment vague and unclear. Thus, drafters are encouraged to adopt a 'splitting solution', recognizing a number of separate superior responsibility concepts.

1. Introduction

Ever since the launch of the Initiative for a Convention on Crimes Against Humanity ('the CAH Initiative')[1] in 2010, there has been debate about its relationship *vis-à-vis* the International Criminal Court's (ICC) Statute. The fear was expressed that such a Convention could undermine the ICC, especially when the definition of the crime would deviate from that in Article 7 of the ICC Statute.[2] The decision for such a deviation was not inconceivable since there had been support for proposing a new definition of crimes against humanity ('CAH'). A CAH convention could be an opportunity to 'correct', or make up, for the failure of the Genocide Convention to provide for protection of political and social groups. Having said that, amongst those present at the launch of the Initiative at Washington University, St. Louis, there was a strong commitment to the success of the ICC. The Convention proposed by the Initiative should complement the ICC Statute, which does not impose a duty on States to adopt the CAH definition, let alone adopt measures to ensure inter-State

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[1] The Initiative was launched at the Whitney R. Harris World Law Institute, Washington University School of Law, St. Louis under the leadership of Leila N. Sadat in 2010. See Crimes against Humanity Initiative, *Proposed International Convention on the Prevention and Punishment of Crimes Against Humanity*, February 2012, at http://law.wustl.edu/harris/cah/docs/EnglishTreatyFinal.pdf (last visited 28 April 2018).

[2] See e.g. Statements at the UN GA, 6th Committee, Argentina (UN Doc. A/C.6/70/SR.23, § 72), Australia (UN Doc. A/C.6/72/SR.18, § 87), Japan (UN Doc. A/C.6/70/SR.22, § 130). See also K. Ambos, 'Crimes Against Humanity and the International Criminal Court', in L. N. Sadat (ed.), *Forging a Convention for Crimes Against Humanity,* (Cambridge University Press, 2011) 279-304.

cooperation in prosecuting and trying these crimes.[3] To end impunity for CAH, the ICC and national jurisdictions should work alongside one another. Rather than adopting a different definition, creating a pluralist legal regime that would amount to legal uncertainty, the proposed Convention should reinforce the ICC. This is why the proposed Convention — currently embodied by the International Law Commission's (ILC) draft articles — has, from the outset, mirrored the CAH definition of the ICC Statute.[4]

The provision on criminal responsibility travelled a different route. While the first draft of the proposed Convention contained a *verbatim* copy of Article 25(3) of the ICC Statute on individual criminal responsibility,[5] the provision in Article 6(2) of the ILC draft no longer mirrors the ICC provision. The provision on modes of liability is much more succinct and uses broad, neutral terms to describe the different ways in which responsibility for CAH may arise.[6] There is a good reason for this different approach, as it will be explained below.

This contribution starts by making a few general observations with regard to the provision as a whole (section 2). Subsequent sections will focus on commission and omission liability (section 3); superior responsibility (section 4); the defence of superior orders (section 5); and liability of legal persons (section 6).

2. General observations

Article 6 is a broad provision. Its title 'criminalization under national law' is somewhat misleading. The provision does more than ensuring domestic criminalization of CAH by referring to modes of liability in section (2) and superior responsibility in section (3). It requires states to exclude reliance on the defence of superior orders in section (4).[7] Moreover, section (5) stipulates that the official position of a defendant is not a defence.[8] Section (6) contains a provision on prescription: CAH shall not be subject to statutes of limitation.[9] In section (7) states are required to put into place

[3] M. Cherif Bassiouni, 'Crimes Against Humanity: The Case for A Specialized Convention', 9 *Washington University Global Studies Law Review* (2010) 575-593; M. Bergsmo, 'Introduction', in M.Bergsmo and S. Tianying (eds), *On the Proposed Crimes Against Humanity Convention*, FICHL Publication Series No. 18 (Torkel Opsahl Academic EPublisher 2014) 1-17, at 2.

[4] *Report of the International Law Commission, Sixty-ninth session (1 May-2 June and 3 July-4 August 2017)* ('2017 ILC Report'), UN Doc. A/72/10, § 45, Article 3.

[5] Crimes Against Humanity Initiative, *supra* note 1, Art. 4.

[6] 2017 ILC Report, § 45, Art. 6(2): 'Each State shall take the necessary measures to ensure that the following acts are offences under its criminal law: (a) committing a crime against humanity; (b) attempting to commit such a crime; and (c) ordering, soliciting, inducing, aiding, abetting or otherwise assisting in or contributing to the commission or attempted commission of such a crime.'

[7] 2017 ILC Report, § 45, Art. 6(4): 'Each State shall take the necessary measures to ensure that, under its criminal law, the fact that an offence referred to in this draft article was committed pursuant to an order of a Government or of a superior, whether military or civilian, is not a ground for excluding criminal responsibility of a subordinate.'

[8] 2017 ILC Report, § 45, Art. 6(5): 'Each State shall take the necessary measures to ensure that, under its criminal law, the fact that an offence referred to in this draft article was committed by a person holding an official position is not a ground for excluding criminal responsibility.'

[9] 2017 ILC Report, § 45, Art.6(6): 'Each State shall take the necessary measures to ensure that, under its criminal law, the offences referred to in this draft article shall not be subject to any statute of limitations.'

a system of punishment that reflects the grave nature of CAH.[10] Section (8) is the most ambitious and probably most controversial clause, providing for the liability of legal persons.[11]

A. The approach

The approach to individual criminal responsibility in draft Article 6 is praiseworthy, in that it uses neutral and generic terms to describe secondary liability. This is appropriate for a 'suppression treaty' like the convention which could result from the ILC articles, i.e. a treaty which would require enforcement via national justice systems.[12] It would be left to state parties to enact legislation on how to exactly criminalize conduct resulting or associated with CAH. In that sense, the CAH convention would take after conventions like the Torture Convention, the Genocide Convention and the 1949 Geneva Conventions.[13]

The modes of liability in Article 6(2) — ordering, soliciting, inducing, aiding and abetting and attempt liability — will often be captured in legal concepts and theories of liability that already exist in states' domestic criminal law, whether in unwritten common law or in the general part of a (written) criminal code. It is, therefore, highly likely that this section of Article 6 will not require much legislative change at the domestic level. In this respect, it is interesting to recall the UK position with regard to implementing Article III(e) of the Genocide Convention, which contains the concept of 'complicity to commit genocide'. The parliamentary secretary, when introducing the statute implementing the Genocide Convention to Parliament, observed that '[c]omplicity in genocide has not been included in Clause 2(1) because we take the view that the sub-heading in Article III (of the Genocide Convention) is subsumed in the act of genocide itself in exactly the same way as, under our domestic criminal law, aiding and abetting is a situation in which a person so charged could be charged as a principal in relation to the offence itself.'[14] In commenting on this draft provision, some delegations argued along similar lines: their domestic law already provides for the relevant modes of liability.[15] Other delegations, however, deplored the lack of specificity and would have preferred the provision to mirror the ICC's provision on individual criminal responsibility.[16] One delegation commented that 'indirect perpetration', one of the modes of perpetration in Article 25(3)(a) of the ICC Statute, should have been part of the provision.[17] The assumption seems to be that having specific modes of liability in a Convention on CAH would ensure alignment of domestic criminal law with international criminal law. The idea of harmonization of modes of liability, however, is in my view misguided — as I will explore in the next sub-section.

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[10] 2017 ILC Report, § 45, Art. 6(7): 'Each State shall take the necessary measures to ensure that, under its criminal law, the offences referred to in this draft article shall be punishable by appropriate penalties that take into account their grave nature.'

[11] 2017 ILC Report, § 45, Art. 6(8): 'Subject to the provisions of its national law, each State shall take measures, where appropriate, to establish the liability of legal persons for the offences referred to in this draft article. Subject to the legal principles of the State, such liability of legal persons may be criminal, civil or administrative.'

[12] The expression is used e.g. in K.J. Heller, 'What Is an International Crime? (A Revisionist History)', 58 *Harvard International Law Journal* (2017) 353-415, at 370 and elsewhere in the text.

[13] See Convention against Torture, Art. 4; Genocide Convention, Art. 5; Geneva Convention I (e.g.), Art. 49.

[14] *Official report, Fifth Series, Parliamentary Debates, Commons* 1968-1969, Vol. 777, 3-14 February 1969, 480-509, cited in W.A. Schabas, *Genocide in International Law* (Cambridge University Press, 2000), at 287.

[15] Croatia commented that some of the modes of liability listed in art. 6(2) were already covered in national law: Croatia, Statement at the UN GA, 6th Committee, UN Doc. A/C.6/71/SR.25, § 48. The Cuban delegation welcomed the fact that it was left to domestic legislatures to criminalize acts that constitute CAH: Cuba, Statement at the UN GA, 6th Committee, UN Doc. A/C.6/71/SR.24, § 65.

[16] Spain, Statement at the UN GA, 6th Committee, UN Doc. A/C.6/71/SR.26, § 5.

[17] El Salvador, Statement at the UN GA, 6th Committee, UN Doc. A/C.6/71/SR.25, § 51.

If at all, suppression treaties should only feature 'crime specific' theories of liability,[18] i.e. liability theories that either have an international pedigree or that have been specifically developed to apply to crimes under international law. Superior (or command) responsibility is such a 'crime specific' theory. It has a true international pedigree, as it developed in treaty and customary international law. The fact that it features in Article 6(3), as a copy of Article 28 of the ICC Statute, should be understood against that background. The problem, however, with Article 28 of the ICC Statute, and thus with Article 6(3) of the ILC draft, is that the provision's drafting is flawed and fraught with difficulties, as it will be discussed further below.

Other concepts or theories of liability that could be termed 'crime specific' are joint enterprise liability and indirect perpetration.[19] While both of these theories, developed and applied by the ICTY and the ICC respectively, have been modelled on domestic law, they have been further shaped in their application to international crimes.[20] Neither of these two latter theories are mentioned in Article 6 of the ILC draft. This is not necessarily a bad choice, since they are contested concepts. In particular, the 'extended form' of Joint Criminal Enterprise (also known as JCE III), which is generally viewed as overly expansive giving rise to guilt by association[21] has provoked debate in scholarly circles as well as on the judicial bench. The same can be said about indirect co-perpetration, which has no clear basis in the ICC Statute and no grounding in international law.[22]

B. The Irrelevance of Harmonization

One of the aims of drawing up a CAH convention is to streamline inter-state legal cooperation. This is why the draft Convention mirrors the CAH definition of the ICC Statute. Different crime definitions would result in obligation-overload at the national level, creating an inextricable patchwork of differing obligations for states. Government delegations have, welcomed the CAH convention as an initiative that 'harmonizes'[23] and maybe even 'unifies'[24] domestic criminal law with regard to CAH. Harmonization of modes of liability is not necessary. Differentiation of standards or definitions of modes of liability will not pose an obstacle to mutual legal assistance. The test of 'dual

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[18] As I have argued earlier when commenting on the first draft of a proposed CAH convention. E. van Sliedregt, 'Modes of Participation' in L. N. Sadat (ed.), *Forging a Convention for Crimes Against Humanity* (Cambridge University Press, 2011) 279-304.
[19] *Ibid*., at 241-248.
[20] See E. van Sliedregt, 'The Curious Case of International Criminal Liability', 10 *Journal of International Criminal Justice (JICJ)* (2012) 1171–1188.
[21] J.S. Martinez and A.M. Danner, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law', 93 *California Law Review* (2005) 75-169; J.D. Ohlin, 'Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise', 5 *JICJ* (2007), 69-90; M. Badar, '"Just Convict Everyone!" – Joint Perpetration: From Tadić to Stakić and Back Again', 6 *International Criminal Law Review* (*ICLR*) (2006) 293-302. Notable is also ICTY Judge Lindholm's observation in his Separate Opinion to the *Simić* judgement 'I dissociate myself from the concept or doctrine of joint criminal enterprise in this case as well as generally … The concept or "doctrine" has caused confusion and a waste of time, and is in my opinion of no benefit to the work of the Tribunal or the development of international criminal law.' Separate and Partly Dissenting Opinion of Judge Per-Johan Lindholm, *Simić* (IT-95-9-T), Trial Chamber, 17 October 2003, §§ 2-5.
[22] L. Yanev and T. Kooijmans, 'Divided Minds in the Lubanga Trial Judgment: a Case against the Joint Control Theory', 13 *ICLR* (2013) 789; J.D. Ohlin, E. van Sliedregt and T. Weigend, 'Assessing the Control-Theory', 26 *Leiden Journal of International Law* (*LJIL*) (2013) 725-746; J. Stewart, 'The End of "Modes of Liability" for International Crimes', 25 *LJIL* (2012), 165-219; See also the vigorous dissents by Judges Van den Wyngaert and Fulford in the Chui and Lubanga cases, respecyively: Separate Opinion of Judge Adrian Fulford, Judgment, *Lubanga* (ICC-01/04-01/06), Trial Chamber I, 14 March 2012; Concurring Opinion of Judge Christine van den Wyngaert, Judgment, *Ngudjolo Chui* (ICC-01/04-02/12), Trial Chamber II, 18 December 2012.
[23] Brazil, Statement at the UN GA, 6th Committee, UN Doc. A/C.6/72/SR.21, § 11.
[24] Belarus, Statement at the UN GA, 6th Committee, http://statements.unmeetings.org/media2/16154382/belarus.pdf (last visited 28 April 2018).

criminality', central to mutual legal assistance, is generally limited to crime definitions. In the same vein, harmonization of modes of liability is not relevant for determining whether a state is 'unable' for purposes of complementarity pursuant to Article 17 of the ICC Statute.

At this point we need to briefly reflect on the interplay between national and international norms/standards of criminal responsibility when prosecuting international crimes domestically. In adjudicating international crimes, domestic courts may feel they need to apply international standards derived from international case or statutory law. After all, by prosecuting international crimes, they represent the interests of the international community; especially when exercising universal jurisdiction.

As argued earlier, with regard to crimes definitions and a liability concept such as superior responsibility, it makes sense to apply international standards and adopt an 'internationalist approach'.[25] They are proper international concepts that require implementation at the domestic level. An internationalist approach, however, is not appropriate with regard to modes of liability because, as van der Wilt writes, 'it is by no means self-evident that time-honoured general parts of criminal law should yield to their international equivalents, as this would probably cause unwarranted differences in the administration of criminal justice within one legal system'.[26] The ILC recognizes this in its Commentary. The draft Convention does 'not seek to require States to alter the preferred terminology or modalities that are well settled in national law'.[27]

This view is particularly compelling when we bear in mind that ICC law, and international criminal law more generally, is not yet fully crystallized in the area of individual criminal responsibility.[28] In fact, as mentioned earlier, concepts such as JCE and indirect co-perpetration have been contested. They do not necessarily constitute an obvious choice for a national legislator or judge when the alternative is represented by settled and familiar rules of domestic criminal law. This was also noted by the CAH Initiative. While the originally proposed draft text provided for a verbatim copy of Article 25 of the ICC Statute, in its 2014 Geneva meeting the Initiative conceded that 'a future convention might not prescribe specific modes of liability to be applied in national crimes against humanity prosecutions'. It was noted that 'international criminal law standards might seem unfamiliar and overly complex to national judges, who would likely be more comfortable applying the modes of liability already present in their national criminal law'.[29]

Article 6 of the ILC draft, referring to modes of liability that encapsulate concepts familiar to most national criminal justice systems and capturing them in neutral and broad terms, allows for *couleur locale* and hence facilitates implementation at the national level. This approach should be welcomed, even though it leads to pluralism rather than harmonization with regard to theories of liability.[30]

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[25] See H.G. van der Wilt, 'Equal Standards? On the Dialectics between National Jurisdictions and the International Criminal Court', 8 *ICLR* (2008) 229-272; H.G. van der Wilt, 'Genocide v. War Crimes in the Van Anraat Appeal', 6 *JICJ* (2008) 557-567; E. van Sliedregt, 'Complicity to Commit Genocide', in P. Gaeta (ed.), *The UN Genocide Convention: A Commentary* (Oxford University Press, 2009).
[26] Van der Wilt, *Equal Standards*, *supra* note 25, at 254.
[27] 2017 ILC Report, *supra* note 4, § 46, commentary to draft Article 6, § 15, p. 65.
[28] As one Dutch Court of Appeal justified its decision to ignore international standards in looking for guidance when interpreting aiding and abetting liability: Court of Appeal, The Hague, *Public Prosecutor v. Van Anraat*, 9 May 2007, Decision n. LJN: BA4676, ILDC 753 (NL 2007), § 7.
[29] Crimes Against Humanity Initiative, *Fulfilling the Dictates of Public Conscience: Moving Forward with a Convention on Crimes Against Humanity*, 17 July 2014, § 41, p. 16, at http://law.wustl.edu/harris/documents/Final-CAHGenevaReport-071714.pdf (last visited 28 April 2018).
[30] See A.K.A. Greenawalt, 'The Pluralism of International Criminal Law', 86 *Indiana Law Journal* (2011) 1063-1129.

C. An Underinclusive Provision?

Are there lacunae in Article 6? Probably yes. For instance, one government delegation deplored the absence of 'conspiracy',[31] an inchoate form of criminal responsibility (i.e. a crime on its own). Unlike modes of liability or accessorial/complicity liability, conspiracy liability does not require the crime to have actually been committed, since the mere agreement to commit a crime is sufficient. The draft article also neglects 'solicitation' or 'incitement' as an inchoate form of criminal responsibility, i.e. a conduct to be criminalized regardless of whether the crime solicited or incited actually takes place. [32] The absence is noteworthy, since conspiracy and incitement are instead considered punishable as inchoate offences in the Genocide Convention.[33]

The concept of criminal responsibility in Article 6 has to be viewed as a broad concept that includes both complicity and inchoate offences, i.e. conspiracy and incitement. The ILC explains that in the relevant international instruments soliciting, inducing, aiding and abetting 'are generally regarded as including planning, instigating, conspiring and, importantly, directly inciting another person to engage in the action that constitutes the offence'.[34] But this consideration blurs the line between modes of participation in the crime and inchoate offences, with conspiracy and incitement falling within the latter category.

As I have argued elsewhere, the inclusion of conspiracy as an inchoate offence in a CAH convention would be welcome, since it would solve problems of attribution of criminal responsibility to those in leadership positions.[35] Conspiracy is a useful concept in capturing the liability of 'intellectual perpetrators'. It does not require proof of a link to the perpetrators who directly committed the crimes. The latter are often not directly linked to the intellectual perpetrators in the higher echelons of government and/or the military. Trying to create such a link has generated contrived concepts such as JCE and indirect (co-) perpetration.

Conspiracy's inclusion in a CAH convention would not be obvious since conspiracy has a contentious history in international criminal law. In Nuremberg, the American delegation considered it a key concept of liability.[36] However, this notion, of common law origin, proved controversial amongst members of delegations from countries of civil law tradition. It was regarded as broad, vague and unfamiliar.[37] The German scholar Jescheck considered it a concept contrasting with continental traditions of criminal law.[38] Criminalizing the mere agreement was regarded a violation of individual autonomy and freedom. Despite the scepticism, the conspiracy concept survived, yet without

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[31] Iceland (Nordic countries), Statement at the UN GA, 6th Committee, UN Doc. A/C.6/71/SR.24, § 59.

[32] In English law, solicitation is a crime in the Offences against the person Act 1861, s. 4. 'To solicit or incite another to commit a crime is indictable at common law, even though the solicitation or incitement has no effect' (*DPP v. Armstrong* [2000] *Crim. L.R.* 379 D.C.). In American law 'solicitation' is an inchoate crime under the Model Penal Code, § 5.02: 'A person is guilty of solicitation to commit a crime if with the purpose of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct which would constitute such crime or an attempt to commit such crime or which would establish his complicity in its commission or attempted commission'. W. R. LaFave, *Modern Criminal Law: Cases, Comment and Questions* (2nd edn., West Publishing Corporation, 1988) at 696.

[33] Genocide Convention, Art. III(b) and (c).

[34] 2017 ILC Report, *supra* note 4, § 46, commentary to draft Article 6, § 13, at p. 64.

[35] Van Sliedregt, *Modes of Participation*, *supra* note 18, at 254.

[36] American colonel Murray C. Bernays designed the so-called collective criminality theory that would capture liability of Nazi war criminals. See E. van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford University Press, 2012) at 22-26. A definition valid at the time was that of C.S. Kenny, *Outlines of Criminal Law,* (Cambridge University Press, 1966), at 335: 'Conspiracy is the agreement of two or more persons to effect any unlawful purpose, whether as their ultimate aim or only as a means to it'.

[37] B.F. Smith, *Reaching Judgment at Nuremberg* (Basic Books Publishers, 1977) at 51.

[38] 'Es kommt hinzu, daß der Begriff der conspiracy in sich alle diejenigen Eigenarten des anglo-amerikanischen Strafrechts vereinigt, die wegen ihres grundsätzlichen Gegensatzes zur kontinentalen Strafrechtstradition nicht für das Völkerstrafrecht vorbildlich sein können', H.H, Jescheck, *Die Verantwortlichkeit der Staatsorgane nach Völkerstrafrecht* (Röhrscheid, 1952), at 276.

retaining the prominent position it originally had. Conspiracy was only applied with regard to crimes against peace.

Conspiracy is conspicuously absent from Article 25 of the ICC Statute. According to one commentator this was unintentional, and a lacuna glossed over by exhausted drafters.[39] Others said it was a conscious choice to move away from conspiracy's disputed Nuremberg legacy.[40] Over the years, conspiracy has gained support across a wide number of jurisdictions, especially after 9/11. With the fight against terrorism, continental European jurisdictions have been active in criminalizing the preparatory stages of a crime, in German referred to as *Vorfeldkriminalisierung.* Essentially, the earlier objections to conspiracy seem to have subsided.[41]

Against that background, we should rethink conspiracy's once controversial status in international criminal law and welcome its possible inclusion in Article 6 of the ILC draft, albeit at the moment there is just a reference in the ILC commentary. While I doubt conspiracy has a basis in existing international law — either custom or general principles — it has, over the years, gained a less controversial position in domestic law. A suppression treaty like the CAH convention should enable contracting parties to criminalize conspiracy to commit CAH. Still, those jurisdictions that do not traditionally treat conspiracy as an inchoate offence could refrain from applying it in this form and implement it instead as a form of complicity, which is what the Nuremberg tribunal and military courts in subsequent proceedings did with regard to war crimes and CAH.[42]

I would adopt a similar position with regard to 'incitement', a concept connoting an encouragement to commit a crime, as an inchoate offence.[43] While incitement is not a general liability concept under international law, it is adopted in domestic jurisdictions. It may be labelled in different ways, like the mentioned 'solicitation' or 'encouragement',[44] or present itself as 'failed instigation', describing the situation in which no crime actually occurs or is attempted after the instigation, but the instigator is still held liable.[45] The case for criminalizing incitement is a moral one: prompting an individual to commit a crime may be even more reprehensible than assisting someone who has already decided to commit a crime. In the law on genocide, incitement entails inchoate liability only if 'direct' and 'public'.[46] I would suggest these requirements to equally apply for incitement to commit CAH.

3. Commission and Omission

There is no separate mention in Article 6 of omission liability. In general, omission liability is implied in provisions penalising positive criminal conduct unless verbs suggesting action are part of the crime's definition.[47] This so-called 'commission by omission'[48] can be distinguished from

[39] W.A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2010), at 438.
[40] See J.D. Ohlin, 'Incitement and Conspiracy to Commit Genocide', in P. Gaeta (ed.), *The UN Genocide Convention: A Commentary* (Oxford University Press, 2009) at 222-223.
[41] See report of the debate in St Louis on the first draft text of the Convention, in Sadat, *Forging a Convention, supra* note 18, at 470, § 45.
[42] Van Sliedregt, *Individual Criminal Responsibility*, *supra* note 36, at 24.
[43] J. Horder, *Ashworth's Principles of Criminal Law*, (8th edn, Oxford University Press, 2016) at 494.
[44] In English law, the common law crime of incitement has been abolished and replaced by 'encouragement'. Still, there are a number of statutory offences of incitement, for instance incitement to commit terrorism. See Horder, *supra* note 43, at 494-495.
[45] See § 30 German Criminal Code (*versuchte Anstiftung*); Article 46a Dutch Criminal Code.
[46] See Ohlin, *Incitement and Conspiracy*, *supra* note 40, at 214-218.
[47] J. Pradel, *Droit Pénal Comparé* (Dalloz 1995) at 235-236; H.H. Jescheck and T. Weigend, *Lehrbuch des Strafrechts. Allgemeiner Teil,* (5th edn., Duncker & Humblot, 1996), at 612-613.
[48] In German terminology, '*unechte Unterlassungsdelikte*' and, in Anglo-American terms, 'indirect' omissions.

'genuine' or 'direct' omission liability, which penalizes criminal inaction explicitly, e.g. intentional starvation, which is a war crime in Article 8(2)(b)(xxv) of the ICC Statute. 'Genuine' crimes of omission are usually conduct crimes (penalising conduct), while crimes that qualify as commission by omission are often result crimes (penalising consequence). A classic example of 'commission by omission' in national law is the case of the parent who neglects to feed her or his child. Not feeding the child causes it to die, which amounts to murder.

The drafters of the ICC Statute attempted to draw up a general definition on omission contained in a provision on *actus reus*.[49] However, the Working Group that was charged with the task could not agree on a definition.[50] Some delegations argued that only Article 28 creates, and should create, liability by omission.[51] The formulation of the *nullum crimen sine lege* principle in Article 22 was understood as requiring the ICC provisions to state exhaustively the subject-matter of an offence and prohibit application by analogy.[52] The French delegation had insisted on limiting omission liability to specific crimes, spelt out in the Rome Statute and the Elements of Crimes.

Commission by omission is a construction of doctrine and has its basis in jurisprudence. Some jurisdictions reject the concept, hereby endorsing a very strict legality principle. French courts, in particular, have rejected the construction of liability through commission by omission.[53] But such a strict approach is in my view inappropriate, especially for a treaty like a CAH convention, which aims to domestic enforcement. After all, most national jurisdictions accept 'commission by omission' which arises from a duty of care. Such duties stem from relationships established by law, contract, balance of power, agency, or previous conduct.[54] Moreover, international courts have accepted a commission by omission-interpretation of crime definitions.[55] Crimes would lose much of their scope if they were limited to active conduct. This is certainly true, for instance, for the crime against humanity of murder.

But can there be criminal liability even for complicity or aiding and abetting by omission? And can non-intervention qualify as instigation? Again, I would answer in the positive. An analysis of domestic law suggests that courts have accepted the possibility of aiding and abetting by omission. Moral support or intangible assistance by being an approving spectator can, under certain circumstances, be regarded as encouraging or aiding and abetting a crime committed by the principal perpetrator, even though the line between an (intangible) activity and an omission may be a fine one

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[49] *Report of the Preparatory Committee on the Establishment of an International Criminal Court,* 14 April 1998, UN Doc. A/CONF.183/2/Add.1.

[50] ILC, *Report of the Working Group on General Principles of Criminal Law,* 29 June 1998, UN Doc. A/CONF.183/C.1/WGGP/L.4/Add.1, at 4 contained a (later deleted) provision entitled '*Actus reus* (act and/or omission); See also *Ad Hoc Committee Report, Annex II,* 6 September 1995, UN Doc. A/50/22, at 58; ILC, *Preparatory Committee 1996 Report,* UN Doc. A/51/22, Vol. I., at 45 and Vol. II, at 90-91; *Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The* Netherlands, UN Doc. A/AC.249/1998/L.13, at 58-59; *Preparatory Committee Final Draft*, A/CONF.183/2, at 54-55. See Schabas, *Commentary*, *supra* note 39, at 476-477.

[51] E. Wise, 'General Principles of Criminal Law', in L. S. Wexler (ed.), *Model Draft Statute for the International Criminal Court based on the Preparatory Committee's Text to the Diplomatic Conference, Rome, June 15-July 17 1998* (Nouvelles Etudes Penales, 1998), at 48-50.

[52] M. Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Intersentia, 2002) at 396, § 370.

[53] Pradel, *supra* note 47, at 236.

[54] L. Alexander, 'Duties to Act Triggered by Creation of the Peril: Easy Cases, Puzzling Cases, and Complex Culpability', in D.K. Nelkin and S.C. Rickless (eds.), *The Ethics and Law of Omissions* (Oxford University Press, 2017) 180-196.

[55] In *Blaškić* the ICTY Trial Chamber ruled that the offence of 'inhuman treatment' (Art. 2(b) ICTYSt., qualifying as 'grave breach of the Geneva Conventions') and 'cruel treatment' (Art. 3 ICTYSt., qualifying as a war crime) could consist of both, acts and omissions. Judgment, *Blaškiç* (IT-95-14-T), Trial Chamber, 3 March 2000, §§ 154 and 186. The ICTR Trial Chamber in *Kambanda* ruled that all the acts of genocide could be committed by omission. Judgement, *Kambanda* (ICTR 97-23-S), Trial Chamber, 23 September 1998, § 40. See further Schabas, *Genocide, supra* note 14*,* at 156.

to draw in this context. [56] International courts have equally allowed for a 'commission by omission' interpretation of modes of liability.[57] Mere presence is not sufficient; it must have a 'significant encouraging effect'.[58] In *Mpambara*, the ICTR held that this means that there is a conscious choice to be present.[59]

In sum, the fact that the CAH convention does not contain a separate provision on omission liability should in my view not be taken as an indication that CAH cannot be 'committed' or 'instigated' by way of an omission and through intangible support.

4. Superior responsibility[60]

Article 6(3) of the ILC draft comprises the theory of superior responsibility. It mirrors Article 28 of the ICC Statute. It is appropriate that a 'suppression treaty' on CAH contains a provision on superior responsibility, a 'crime-specific' theory of liability with an international pedigree. Superior responsibility requires implementation at the national level and a number of states, as part of their ratification process of the ICC, have indeed already implemented it as a *sui generis* liability theory in their national criminal law.

Superior responsibility, as codified in the statutes of international criminal tribunals, is a multi-layered concept.[61] It comprises two 'liability models': (i) superior responsibility as a separate crime and (ii) superior responsibility as a mode of liability. Moreover, in temporal terms superior responsibility criminalizes two types of *actus reus*: a pre-crime variant (failure to prevent) and a post-crime variant (failure to punish or report to authorities). Lastly, it varies as to *mens rea.* In its ICC version, it comprises two different knowledge standards: 'should have known' for military superiors and 'consciously disregarded' for non-military superiors.

The implementation of superior responsibility in national law illustrates this multi-layered structure. The German Code of Crimes against International Law,[62] for example, contains three provisions relating to superior criminal responsibility. A superior who intentionally omits to prevent the commission of crimes deserves the same punishment as the subordinate (Article 1 § 4(1)) and can

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[56] There must be an act of encouragement coupled with the requisite *mens rea*. Some courts have added to that, that the encouragement must have had some effect on the principal but this is not generally accepted (*Wilcox v. Jeffrey* [1951] 1 All ER 464). Interesting in this respect is also the 'Big Dan's rape case' about witnessing a crime without intervening (*Canbaña*, CNCP, JA 2004-II:822). The French position is, again much more circumscribed. In the case of *Coutant* it was determined that complicity by omission requires a deliberate failure to act before a person in a specific position can be held accountable by way of passive acquiescence in an illegal lottery. See *Coutant*, Crim. 29 Jan. 1936, DH 1936.134, cited in Bell *et al*., *Principles of French Law* (Oxford University Press, 2008), at 218 and 236.

[57] In *Akayesu*, the Trial Chamber held that the defendant, a *bourgmestre*, aided and abetted by being present at the scene of the crime because his inaction coupled with his status had an encouraging effect on the actual perpetrators. Judgment, *Akayesu* (ICTR-96-4-T), Trial Chamber, 2 September 1998*,* § 705. In *Furundžjia,* the Trial Chamber convicted the accused of rape as a war crime for continuing his interrogation while the person who was interrogated was subjected to sexual violence. The accused's presence coupled with his position of authority, and the non-intervention amounted to 'intangible assistance' with an encouraging effect. Judgment, *Furundzija* (IT-95-17/1-T), Trial Chamber, 10 December 1998, § 691.

[58] See analysis of case law by G. Boas *et al., International Criminal Law Practitioner Library, Elements of Crimes under International Law* (Cambridge University Press, 2008), at 313-315.

[59] Judgment, *Mpambara* (ICTR-01-65-T), Trial Chamber, 11 September 2006, § 22.

[60] This section draws on my contribution Van Sliedregt, *Modes of Participation*, *supra* note 18, at 257-261.

[61] E. van Sliedregt, 'Article 28 of the ICC Statute: Mode of Liability and/or separate offense?', 20 *New Criminal Law Review* (2009) 420, at 425-427; van Sliedregt, *Individual Criminal Responsibility*, *supra* note 36, 204-206.

[62] 'Gesetz zur Einführung des Völkerstrafgesetzbuches', 26 June 2002, *Bundesgesetzblatt Jahrgang 2002* Teil II, Nr. 42, 2254. Available in English https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=8789D6CFA5AFE9C941256C77003319DA&action=openDocument&xp_countrySelected=DE&xp_topicSelected=GVAL-992BU7&from=state&SessionID=DZEFZ3ANPT.

be qualified as an accomplice, whereas the failure to properly supervise the subordinate (Article 1 § 13) and/or report crimes (Article 1 § 14) are separate crimes of omission and as such punished more leniently. The Dutch International Crimes Act[63] provides for a 'splitting solution' as well. Section 9(1) criminalizes a superior who '(a) intentionally permits the commission of such an offence by a subordinate; or (b) intentionally fails to take measures, in so far as these are necessary and can be expected of him, if one of his subordinates has committed or intends to commit such an offence.' The cognitive aspect in these provisions requires actual knowledge for 1(a) and constructive knowledge ('must have known') for 1(b). Section 9(2), on the other hand, provides for superior responsibility as a separate offence, a negligent dereliction of duty, which carries a lower sentence than the underlying (subordinate) offence. Other national legislators have opted for one particular interpretation of superior responsibility. The UK International Criminal Court Act 2001 regards superior responsibility as a mode of liability. Section 65 of the ICC Act 2001 incorporates almost *verbatim* Article 28 of the ICC Statute, adding in paragraph 4: 'A person responsible under this section for an offence is regarded as aiding, abetting, counselling or procuring the commission of the offence.'[64] The Canadian legislator, on the other hand, interpreted superior responsibility as a distinct offence rather than a way of committing one of the three core crimes.[65]

When commenting on the first draft-discussion paper of the proposed CAH convention, I had argued that superior responsibility should be 'remodelled'.[66] With the new ILC draft there was finally an opportunity to recognise the different concepts of superior responsibility. The only substantive distinction that *is* codified in Article 28 of the ICC Statute - apart from the temporal pre-crime/post-crime which is part of all international superior responsibility definitions - and repeated in the ILC draft, is that between military and non-military superiors. This differentiation, however, is unnecessary.[67] An analysis of customary and conventional international law demonstrates that the three elements that make up superior responsibility — (i) position of control; (ii) knowledge; (iii) failure to prevent or punish/report — give sufficient room to vary according to the type of superior.[68] Unfortunately, the current ILC draft mirrors the ICC provision, leaving its multi-layered structure intact and its complexities and ambiguity unexplained. Unsurprisingly, some delegations criticized Article 6(3) for being vague and requiring further explanation.[69]

Adopting the text of Article 28 of the ICC Statute is unwelcome also for other reasons. In its 'should have known format', superior responsibility is a mode of liability for intentional crimes in the form of negligence. As such it gives rise to 'a stunning contradiction between the negligent conduct of the superior and the underlying intent crimes committed by the subordinates'.[70] Also the causal link is unclear with regard to the post-crime scenario since it stipulates that crimes are committed by subordinates 'as a result' of a failure on the part of the superior.[71] There are good

[63] For a more elaborate analysis of the Act, see H. Bevers et al., 'The Dutch International Crimes Act', in M. Neuner (ed.), *National legislation incorporating international crimes* (BWV-Berliner Wissenschafts-Verlag/Wolf Legal Publishers, 2003), 179-197.
[64] UK International Criminal Court Act 2001, c. 17, s. 65, at http://www.legislation.gov.uk/ukpga/2001/17/contents (visited 28 April 2018)
[65] See Section 5, Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24, 29 June 2000, at http://laws-lois.justice.gc.ca/eng/acts/C-45.9/ (visited 28 April 2018)
[66] Van Sliedregt, *Modes of Participation*, *supra* note 18, 259-260.
[67] van Sliedregt, *Individual Criminal Responsibility*, *supra* note 36, at 200-202.
[68] *Ibid.,* at 185-186.
[69] Hungary, Statement at the UN GA, 6th Committee, UN Doc. A/C.6/71/SR.24, § 80; Turkey, Statement at the UN GA, 6th Committee, UN Doc. A/C.6/72/SR.20, § 76.
[70] K. Ambos, 'Superior Responsibility', in A. Cassese et al. (eds*.), The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002) 823-872, at 852.
[71] In *Bemba*, the Trial Chamber agreed with what the Pre-Trial Chamber had already determined when confirming the indictment: proof of such a causal relationship is only required for the pre-crime duty to 'prevent' (future crimes). Indeed, it would be illogical to interpret Article 28 otherwise. Judgment, *Bemba* (ICC-01/05-01/08), Trial Chamber, 21 March

arguments to support a negligent type of superior responsibility for military superiors but then it should be construed as a separate offence of negligence, as some jurisidctions have done in their implementing legislation.

To properly reflect the said distinctions in terms of culpability, ideally, a CAH convention should provide for three concepts of superior responsibility: (i) intentionally permitting the commission of crimes by subordinates (ii) intentionally failing to report crimes, and (iii) negligently failing to supervise subordinates.

5. Superior Orders

Article 6(4) of the ILC draft provides that 'each State shall take the necessary measures to ensure that the fact that an offence referred to in the article was committed pursuant to an order of a Government or of a superior, whether military or civilian, is not a ground for excluding the criminal responsibility of a subordinate'. The ILC recognizes that most national jurisdictions will provide for defences in the general part of their criminal law.[72] With regard to superior orders there should, however, be an exception; it cannot be a defence for CAH. The ILC points to the position in international law and the fact that the defence of superior orders has been excluded in almost all statutes of international and hybrid courts, for all crimes, starting with the Charter of the Nuremberg Tribunal. Moreover, it has been excluded as a defence in a range of treaties, including those banning torture and enforced disappearances.[73]

The ICC Statute is the first treaty to allow superior orders to be a complete defence, albeit under certain strict conditions and only for war crimes. This can be referred to as the 'conditional liability approach' to superior orders. This approach can be traced back to 19th century Austro-Hungarian and German military (penal) law.[74] It was relied upon before the Leipzig Court in the *Llandovery Castle*[75] and *Dover Castle*[76] cases, where defendants were charged with the unlawful sinking of hospital ships during WWI. In the words of the court in Llandovery Castle:

> However the subordinate obeying an order is liable to punishment if it was known to him that the order of the superior involved the infringement of civil or military law (…). It is certainly to be urged, in favour of the military subordinates, that they are under no obligation to question the order of their superior officer and they can count upon its legality. But no such confidence can be held to exist if such an order is universally known to everybody including the accused, to be without any doubt whatever against the law.[77]

Article 33(1) of the ICC Statute reflects the *Llandovery castle* reasoning. Three conditions need to be met: (i) there must be an obligation to obey orders, (ii) there can be no knowledge of the

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2016, § 211. See, however, the somewhat confusing alternative interpretation provided by Judge Steiner in a separate opinion to the judgment.

[72] 2017 ILC Report, *supra* note 4, § 46, commentary to draft Article 6, § 24, at p. 67.

[73] *Ibid*., §§ 26-27, at pp. 67-68.

[74] See N. Keijzer, *Military Obedience* (Sijthoff & Noordhoff, 1978), at 190-191; P. Gaeta, 'The Defence of Superior Orders; The Statute of the International Criminal Court versus customary international law', 10 *European Journal of International Law* (1999), 172-191, at 175.

[75] German Supreme Court (Reichsgericht) at Leipzig, 16 July 1921. Verhandlungen, Vol. 368, at 2579–2586; Engl. transl. in 16 *American Journal of International Law* (*AJIL*) (1922) 708-724, at 721-723.

[76] German Supreme Court (Reichsgericht) at Leipzig, 4 June 1921. Verhandlungen, Vol. 368, 2556–2557; Engl. transl. in 16 *AJIL* (1922), 704-708, at 706-708.

[77] *Ibid*., at 721-722.

unlawful nature of the order, and (iii) the order was not manifestly unlawful. Section 33(2) of the ICC Statute stipulates that orders to commit CAH or genocide are regarded 'manifestly unlawful'.[78]

Article 33 of the ICC Statute has been hotly debated. Gaeta considers it contrary to customary international law, which in her view embraces the 'absolute liability approach': the defence of superior orders is never a (complete) defence.[79] At best, she says, it can mitigate the sentence. There is, however, quite some evidence to refute the absolute liability approach as the only valid approach to superior orders in international law. The negotiating history of the Nuremberg Statute demonstrates that its 'founding fathers' were neither unanimous nor definite in rejecting the possibility to rely on superior orders as a defence albeit under certain conditions.[80] They eventually chose for an outright exclusion of superior orders because of the magnitude of the crimes and the type of perpetrators. It was thought that such a plea could not avail the leaders of the Nazi regime. Garraway regards the absolute liability approach in Nuremberg as 'situation specific rather than a general reflection of the views for all war crimes at that particular time'.[81]. Dinstein notes that the Tokyo tribunal took a different approach, and it 'prescribed a more flexible, and a more logical, rule than that enunciated in London. It is not the doctrine of absolute liability, but rather the principle which permits all the circumstances of the case to play their parts, that prevails here'.[82]

The attempts in the post-war period to formulate a generally accepted rule on superior orders, for the purpose of codification in an international treaty, were in vain. Neither at the drafting sessions for the Genocide Convention, nor at the diplomatic conferences drawing up the 1949 Geneva Conventions and the 1977 Additional Protocols, could a satisfactory text be adopted.[83] After considerable debate, with proposals ranging from a draft proposal eliminating the defence, to a provision allowing the superior orders plea in case of mistake, the delegates decided to drop the issue. The 1954 Draft Code of Crimes did not contain an outright exclusion of superior orders but added the qualification that 'in the circumstances at the time it was possible for him not to comply with that order'.[84] The latter formula returned in the 1991 ILC Draft Code where superior orders was not accepted as a defence *per se*. It could be pleaded in connection with duress or choice of evils/necessity. The initiatives of the *Association Internationale de Droit Pénal* (AIDP) and the International Law Association (ILA) in drafting an ICC Statute adopted a similar stance.[85]

When the Statutes of the *ad hoc* Tribunals were drawn up there was no generally accepted international rule on superior orders and no example other than the Statute of the Nuremberg Tribunal to draw on. It was therefore no surprise that the Statutes follow the Nuremberg-example and provided

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[78] Art. 33 ICCSt.: '1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless: (a) The person was under a legal obligation to obey orders of the Government or the superior in question; (b) The person did not know that the order was unlawful; and (c) The order was not manifestly unlawful. 2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.'

[79] Gaeta, *Superior Orders*, *supra* note 74, at 175.

[80] United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the development of the Laws of War* (H.M.S.O. 1948), at 98, 279. See also van Sliedregt, *Individual Criminal Responsibility*, *supra* note 36, 288-290.

[81] P. Duyx *et al*., 'War Crimes Law and the Statute of Rome: Some Afterthoughts? Report on the Seminar of Rijswijk', 39 *Revue de Droit Militaire et de Droit de la Guerre* (2000) 67-124, at 97.

[82] Y. Dinstein, *The Defence of 'Obedience to Superior Orders' in International Law* (Sijthoff, 1965), at 157.

[83] *Ibid*., at 217-225; See also Schabas, *Genocide, supra* note 14, at 326-329.

[84] *Report of the International Law Commission Covering the Work of its Sixth Session*, 3-28 July 1954, UN Doc. A/2693, Art. 4, at p. 150.

[85] See Article 33-16 of the Siracusa Draft II in C. Nill-Theobald, *'Defences' bei Kriegsverbrechen am Beispiel Deutschlands under der USA* (Edition Iuscrim, 1998), Annex B, at 459. The ILA Draft Statute did not allow 'obedience to superior orders as a justification per se, but it can be taken into consideration in conjunction with other facts of the case in the context of Excuses (…), Mistake of Fact, Mistake of Law, Duress'. See International Law Association, 'Report of 64th Conference', 64 *International Law Association Report of Conference* (1990), at 187.

for the absolute liability approach: superior orders is excluded as a defence.[86] The Secretary General, in his explanatory report to the ICTY Statute, however, writes that superior orders can be a defence 'in connection with other defences such as coercion or lack of moral choice'.[87] The *Erdemović* case at the ICTY, where superior orders was pleaded in combination with the defence of duress, demonstrated that especially when it concerns lower level defendants a defence of superior orders may be appropriate, even when it concerns crimes against humanity. A highly divided Appeals Chamber decided to convict nevertheless, relying on policy arguments to justify its decision but imposing the most lenient sentence in the history of international criminal law.

The case of *Erdemović* left its traces when it came to drafting the ICC Statute. After many long and difficult debates, those in favour and those against the conditional liability approach found a compromise in one rule. Article 33 comprises both the conditional and absolute liability approach. Under certain conditions, phrased as exceptions to the rule that superior orders is not a defence, the superior orders-plea can fully exonerate a defendant but not for crimes against humanity and genocide.

Article 33 of the ICC Statute, for the first time, linked the availability of the defence of superior orders to specific crimes. Until then debates on superior orders had assumed the defence was available (or not) with regard to all core crimes. The assumption underlying the differentiation in Article 33 is that war crimes, as a category of crimes, is a less apparent and less serious breach of international law than crimes against humanity and genocide. This structure of Article 33 is, in my view, unwelcome. Not only because such a crime-hierarchy has never been officially accepted and endorsed but also because the distinction between war crimes and crimes against humanity is a fluid one. As Zimmermann comments, even in situations in which the defendant can rely on a defence of superior orders with regard to war crimes, he can still be punished for the same acts as crimes against humanity.[88] This is unacceptable and would violate the principles of equity and fairness.

A successful plea of superior orders *implies* that an order is not manifestly unlawful. This will indeed often mean that no defence is available for crimes against humanity and genocide. It should, however, be left to courts, on a case-by-case basis, to determine whether an order was manifestly unlawful or not. To exclude this *a priori* is unnecessary. Section (2) of Article 33 is, in my view, superfluous and only there to please those pushing for the absolute liability approach.

Against that background, I would argue that Article 6(4) should qualify the term 'order'. States should ensure that the defence is not available when a crime has been committed by obeying a 'manifestly unlawful' order. In this way, the CAH convention would align with the current position in international law. This would be the appropriate approach to be incorporated at the domestic level, especially in light of the fact that defendants of middle and low rank are likely to be tried at the domestic level.[89] As *Erdemović* has shown, adhering to the Nuremberg-specific absolute liability rule could not be appropriate when the plea is raised by lower level defendants.

6. Liability of Legal Persons

[86] Cf. Art. 6(3) ICTYSt. and Art. 7(3) ICTRSt.: '[t]he fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires'.
[87] *Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, UN Doc. S/25704 (1993), reprinted in 32 *ILM* 1163 (1993), § 57.
[88] A. Zimmermann, 'Superior Orders', in A. Cassese *et al*. (eds)*, The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press 2002) 957-973*,* at 972.
[89] See Crimes Against Humanity Initiative, *Fulfilling the Dictates*, *supra* note 29, at 4, § 10.

Liability of legal persons in draft Article 6(8) is a welcome addition to the legal framework ensuring liability for crimes against humanity. Quite a number of government delegations, however, deem it controversial and a concept that requires further consideration.[90] In their reluctance to embrace it, they point to the diversity of State practice. This had earlier been the reason for those drafting the ICC Statute to abandon an attempt to include liability of legal persons in the Statute.[91] There are, in my view, at least four reasons why this opposition to inclusion of legal person-liability should be nuanced and even dismissed.

First of all, as the ILC points out in its Commentary to the draft, the provision is modelled on Article 3(1) of the 2000 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, which like the draft CAH convention is a 'suppression treaty'. It entered into force in 2002 and as of July 2017 has been ratified by 173 states and a further 9 who signed it yet need to ratify it. The Optional Protocol has no reservations or declarations with regard to the liability of legal persons, not even by those states that say they cannot accommodate legal person liability since their law does not allow for it.[92] Surely, ending impunity for crimes against humanity via establishing liability of legal persons is as worthy a cause as it is the banning of child prostitution and child pornography.

Secondly, the world, and with it state practice, has moved on since the drafting of the ICC Statute. Increasingly, domestic jurisdictions have accepted that legal entities can commit offences and be held accountable, either under civil law or criminal law.[93] Moreover, at the international level, we have a normative system in place that provides for monitoring and supervision of corporations to ensure they respect human rights. Corporations can be taken to court for violating international law, in particular human rights. The *Talisman Energy*[94] and *Kiobel*[95] cases are notable examples.[96] In 2014, the Special Tribunal for Lebanon (STL) held that legal persons can be the subject of contempt proceedings. Three TV stations were held in contempt because of revealing names of witnesses that should have been kept concealed.[97] Corporate liability was read into the Statute. The term 'person' was thought to extend to natural and legal persons. In justifying this reading the Tribunal referred to Lebanese law and '[a] general trend in most countries towards bringing corporate entities to book for their criminal acts or the criminal acts of their officers'.[98] The latest development that can be

[90] See debates in the 6th Committee, A/C.6/71/SR.26.
[91] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Working Paper on Article 23*, paragraphs 5 and 6, A/Conf.183/C.1/WGGP/L.5/Rev.2, 3 July 1998. See A. Clapham, 'The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court', in: M. Kamminga and S. Zia-Zarifi (eds.), *Liability of Multinational Corporations Under International Law* (Brill, 2000), at 139.
[92] Hungary, Statement at the UN GA, 6th Committee, UN Doc. A/C.6/71/SR.24, § 81
[93] C. Wells, C*orporations and Criminal Responsibility,* (2nd edn. Oxford University Press, 2001); D.E. Stoichkova, *Towards Corporate Liability in International Criminal Law* (Intersentia, 2010); J. Kyriakakis, 'Corporations before International Criminal Courts: Implications for the International Criminal Justice Project', 30 *LJIL* (2017) 221-240.
[94] *Presbyterian Church of Sudan v. Talisman Energy Inc* (582 5F.3 244, 259), 2 October 2009. See also US Supreme Court, *Presbyterian Church of Sudan et al. v. Talisman Energy Inc* (No. 09-1262), Amicus Curiae of international law scholars, 30 April 2010, *Presbyterian Church of Sudan et al. v. Talisman Energy Inc* (No. 09-1262), Amicus Curiae of international law scholars: http://hrp.law.harvard.edu/wp-content/uploads/2013/07/talisman-amicus-final-filed-4-30-10.pdf (visited on 29 April 2018).
[95] *Kiobel v. Royal Dutch Petroleum*, 133 S.Ct. 1659 (2013).
[96] The *Kiobel* case, however, limits extra-territorial jurisdiction of American courts under the Alien Tort Statute. Recently, the US Supreme Court has clarified, and thereby limited, this possibility even more in *Jesner et al v Arab Bank PLC* (No. 16-499), 24 April 2018.
[97] Judgment, *New TVS A.L. Karma Mohamed Thasin Al Khayat* (STL-14-05), 18 September 2015.
[98] Orders in Lieu of an Indictment, *New TVS A.L. Karma Mohamed Thasin Al Khayat* (STL-14-05), 31 January 2014, at § 26, citing Clifford Chance 'Corporate Liability in Europe', January 2012, at https://www.cliffordchance.com/content/dam/cliffordchance/PDF/European_Technical_Bulletin.pdf (visited 28 April 2018).

mentioned in this respect is the provision on corporate liability in the Malabo Protocol. This Protocol proposes to add international criminal jurisdiction to the future African Court of Justice and Human Rights (ACJHR) and was adopted by the African Union in June 2014. Article 46C(1) of the Malabo Protocol provides for jurisdiction over legal persons alongside natural persons: '[f]or the purpose of this Statute, the Court shall have jurisdiction over legal persons, with the exception of States.'[99]

Thirdly, Article 6(8) of the ILC draft is broad enough to provide for liability of legal persons even for those jurisdictions that traditionally have rejected liability for legal persons. Its wording is sufficiently broad to allow for attribution via individual liability. One of the reasons why some jurisdictions — most notably Germany — do not accept criminal liability of legal persons is the idea that abstract legal entities have 'no body to kick and no soul to damn'. Yet, liability can be attributed to the entity by way of vicarious liability of a company's agent. Vicarious liability is based on the legal fiction that whatever a person does through an agent, he/she is deemed to have done him/herself. In attributing liability to an entity it needs to be determined: (i) whether the elements of the offence were met in the conduct of the agent and (ii) whether the conduct can be ascribed to the entity on the basis of the relationship of agency (e.g. employment). Moreover, Article 6(8) allows for establishing non-criminal liability. This aligns with the reality of domestic jurisdictions that do not accept criminal liability of legal entities but *do* provide for administrative liability of legal persons, e.g. Germany where companies can be liable under the Act on Regulatory Offences (*Ordnungswidrigkeitengesetz*).

Fourthly, the prevalence of corporate misconduct condoning or benefiting from human rights abuse in war-torn and instable countries calls for legal person-liability in a CAH convention. Research into business activity, especially on the African continent, has shown that corporations involved in the private security industry, oil industry, mining business, diamond and timber trade commit or are complicit in war crimes and crimes against humanity. Corporations can be direct perpetrators[100] but more often will be complicit by benefiting from, or silently approving human rights violations.[101] Corporate complicity may be even more indirect than that. By continuing to do business with dictatorial regimes, business entities have contributed to the political legitimization and economic viability of regimes engaged in CAH. The Truth and Reconciliation Commission in South Africa, for instance, concluded that the Apartheid regime could not have survived without the business support of certain companies, such as IBM and Ford.[102]

Of course, individual businessmen can be prosecuted and punished for aiding and abetting CAH. Experience in the Netherlands has shown that this requires states to provide for a broader concept of aiding and abetting than currently encapsulated in Article 25(3)(c) of the ICC Statute.[103] The latter provision requires that he who aids or abets or otherwise assists does so with 'the purpose of facilitating the commission of a crime'. The CAH Initiative at their Geneva meeting in 2014 noted that this mental requirement is too restrictive. The example was used of an arms manufacturer who

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[99] African Union, *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, 27 June 2014, Art. 46(C).

[100] L.J. van den Herik and J.L. Cernic, 'Regulating Corporations Under International Law: From Human Rights to International Criminal Law and Back Again', 8 *JICJ* (2010), 725-743. E. van Sliedregt and W. Huisman, 'Rogue Traders: Dutch Businessmen, International Crimes and Corporate Complicity', 8 *JICJ* (2010), at 816.

[101] A. Clapham and S. Jerbi, 'Categories of Corporate Complicity in Human Rights Abuses', 24 *Hastings International and Comparative Law Review* (2001) 339-349. W. Huisman, *Business as Usual? The Involvement of Corporations with International Crimes* (Boom Legal Publishers, 2010); M. Punch, *Dirty Business: Exploring Corporate Misconduct, Analysis and Cases* (Sage Publications, 1996); J.G. Stewart, 'The Turn to Corporate Criminal Liability for International Crimes: Transcending the Alien Tort Statute', *NYUJ Int'l L. & Pol.*

[102] A. Akinwumi, 'Powers of Reach: Legal Mobilization in a Post-apartheid Redress Campaign', 22 *Social & Legal Studies* (2013), 25-41.

[103] See van der Wilt, *Genocide v. War Crimes*, *supra* note 25.

sells weapons to persons it knows are committing CAH but whose purpose is to make a profit. Hence adhering to the ICC standard would exclude the manufacturer's liability.[104]

7. **Conclusion**

The way in which the ILC draft ensures criminalization of crimes against humanity in national law is certainly commendable. The ILC approach, which does not set out to achieve harmonization, is in line with the proposed convention's nature as a 'suppression treaty', thus enabling efficient implementation at the domestic level. My suggestions for modification concern the insertion and explicit recognition of conspiracy and incitement as inchoate offences, and a qualification of the superior orders defence, allowing reliance on the defence for non-manifestly unlawful orders. The provision on superior responsibility is probably the one requiring the most work by drafters. This clause, which in its current version mirrors Article 28 of the ICC Statute, is vague and unclear. I would recommend drafters to adopt a 'splitting solution', recognizing a number of separate superior responsibility concepts.

Conversely, I welcome wholeheartedly the clause on legal person-liability. While I recognize that liability of legal persons — like the inchoate concept of conspiracy — is not yet crystallized into a (general) concept of criminal responsibility under international law, I would argue that this is not a problem. Being part of a 'suppression-treaty to-be', leaving a 'margin of implementation' and room for *couleur locale,* Article 6 of the ILC draft can have the role of 'nudging' the law. It may move it forward into a desirable direction whilst aligning to existing developments in domestic law, provided of course that the resulting convention does not force domestic jurisdictions to adopt principles or concepts that go against their constitution or foundational principles.

[104] Crimes Against Humanity Initiative, *Fulfilling the Dictates*, *supra* note 29, at 16, § 40.