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# Modes of Liability in International Criminal Law

ROTH, Robert

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# 4

## Improper Omission

ROBERT ROTH

### 4.1 Introduction

**1.** When major crimes are committed on a broad scale, most of the people who may be held criminally liable for these crimes have *actively* taken part in them.[1] Yet some of those morally and politically responsible for these crimes have not undertaken any action. Therefore, criminal prosecutors and judges must also analyse the conduct of people who did not act but whose conduct may nevertheless amount to international crimes. The basis for this operation is simple when a criminal provision specifically addresses the conduct of the person who omits to act; this situation is known as proper omission. By contrast, when *no specific criminal provision* regarding the omission to act is available, liability results from a legal construction the conditions of which will be discussed in the present chapter. This construction makes it possible to hold an individual responsible for a crime even when that individual has not performed any action entailing legal responsibility for the damage caused to victims or immaterial interests.

**2.** Literature and case law generally use the term 'commission by omission' to designate this construction;[2] yet since this legal framework is applied extensively in ICL in the contexts of aiding and abetting and JCE, it seems preferable to use the expression 'improper omission'. On the one hand, 'improper omission' contrasts directly with 'proper omission', and, on the other, reflects more properly the diversity of situations to which it may apply.[3]

**3.** In the criminal trials that took place in the aftermath of the Second World War, a series of convictions were based on the accused's failure to act. The majority of these

[1] This is why during the core Nuremberg Trial (September 1945–October 1946), the question of criminal liability for omissions was hardly even mentioned.

[2] For instance, the mode of liability of '*commission* by omission' as a distinct mode of liability was defined by the ICTY in *Stakić*, Trial Chamber Judgment, IT-97-24-T, 31 July 2003, para. 439: 'The Trial Chamber prefers to define "committing" as meaning that the accused participated, physically or otherwise directly or indirectly, in the material elements of the crime charged through *positive acts or, based on a duty to act, omissions*, whether individually or jointly with others' (emphasis added).

[3] Here, we follow the so-called formal approach to the distinction between proper (*echte Unterlassungsdelikte*) and improper (*unechte Unterlassungsdelikte*) omissions as made in the German-speaking literature; see P. Grubmiller, *Unterlassen im Strafrecht* (Zürich: Schulthess, 2011), at 213–216. In contrast, the so-called (minority) substantive approach assimilates proper omissions with conduct crimes (crimes incriminating a certain behaviour, without a requirement of any concrete result) and improper omissions with result crimes; see J. Ingle, 'Aiding and Abetting by Omission before the International Criminal Tribunals', 14 *Journal of International Criminal Justice* (2016) 747, at 751. Only the first approach makes sense in our view, especially for the discussion on the objections to omission liability based on the principle of legality (para. 28 ss).



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convictions were not supported by elaborate reasoning. The legal bases were broadly designed[4] and indictments and judgments often cast a wide net, blurring the line between action and omission.[5] Some decisions nevertheless based their verdict uniquely on violations of a duty to act.[6] Generally, these decisions relied on duties derived from laws of war applicable at the time.[7] Sometimes, however, the legal duty was (also) based on domestic law.[8] Whether this approach is still admissible under present international law will be discussed below.

**4.** From the outset, the ad hoc Tribunals accepted that crimes falling under their jurisdiction may be committed by omission. The Tribunals recognized this mode of liability even though their Statutes did not explicitly provide a legal basis for it.[9] In particular, the ICTY Appeals Chamber accepted this position in its *Tadić* Judgment.[10] Although the theoretical basis for this inclusion has never been extensively displayed,[11] two general principles underlie the initial choice of the *Tadić* Appeals Chamber. Firstly, this choice is in line with the development of IHL towards *positive obligations* for the belligerents.[12] Second, as discussed in the reasoning of the *Galić* Appeals Chamber, command responsibility is not sufficient to entirely capture the responsibility of a superior for his/her participation (in a broad sense) in a crime. Sometimes, the superior goes beyond his/her role as a commander and *supports* the crimes committed by his/her subordinates. However, this support is not always active. In the Appeals Chamber's view, there are situations where a commander's inaction must not solely be punished because of a violation of hierarchical obligations incumbent upon

[4] See the analysis of Control Council Law No. 10 by M.S. Grimminger, *Die allgemeine Unterlasssungshaftung im Völkerstrafrecht* (Frankfurt/M: Peter Lang, 2009), at 134–136. Article II(2)(c) of Control Council Law No. 10 presented a special form of omission liability: viz. the notion of 'taking a consenting part in' the commission of a crime. This term 'specifically includes persons who have taken a consenting part in war crimes, as, for example, a superior officer who has failed to take action to prevent a war crime when he had knowledge of its contemplated commission and was in a position to prevent it' (Draft Directive to the US (UK) (USSR) Commander in Chief, *Apprehension and Detention of War Criminals*, 21 October 1944, Art. 3(b)). Special thanks to L. D. Yanev for sharing this source.

[5] For two extensive accounts of the major international and national decisions during the 1940/50s, see Grimminger, supra n. 4, at 132–162, and M. Duttwiler, 'Liability for Omission in International Criminal Law', 6 *International Criminal Law Review* (2006) 1, at 17–25.

[6] Lessons from the post World War II case law *excluding* liability for omissions will be discussed below in para. 12.

[7] For instance, on the duties incumbent to the detaining power, see *Trial of Erich Heyer and Six Others* ('*The Essen Lynching Case*'), British Military Court (Essen), 22 December 1945, in United Nations War Crimes Commission (UNWCC), *Law Reports of Trials of War Criminals* (London: HMSO, 1947–1949), Vol. I, at 88, cited by Duttwiler, supra n. 5, at 21–22; or the laws on maritime warfare, see United Kingdom, Military Court in Hamburg, *Trial of Helmuth von Ruchteschell*, 1947, 13 Annual Digest and Reports of Public International Law Cases 247, cited by Duttwiler, supra n. 5, at 22 and Grimminger, supra n. 4, at 145 ss.

[8] See *Sch. et al.*, Supreme Court of the British Zone in Criminal Matters, 20 April 1949, in *Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Strafsachen*, Vol. II (Leipzig: Walter de Gruyter, 1949), at 11; cited by Duttwiler, supra n. 5, at 22.

[9] In particular Arts. 6(1) ICTY Statute and 7(1) ICTR Statute.

[10] ICTY, *Tadić*, Appeals Chamber Judgment, IT-94-1-A, 15 July 1999, para. 188.

[11] See ICTY, *Orić*, Appeals Chamber Judgment, IT-03-68-A, 3 July 2008, para. 43.

[12] This reasoning is eloquently displayed in A. Cassese, *International Criminal Law* (2nd edn, Oxford: Oxford University Press, 2008), at 234–235 (transformed into footnotes in the 3rd edn (Oxford: Oxford University Press, 2013), at 180; with convincing examples of what the author calls positive obligations (e.g. Arts. 16(4) and 17 of Geneva Convention I).

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him or her; on the top of this, the commander may have shown additional aspects of a criminal mind that call for a more consequential mode of liability. The conclusion is that 'a superior with a guilty mind may not avoid Article 7(1) responsibility [i.e. responsibility other than superior responsibility, here referring to responsibility for (improper) omissions] by relying on his or her silence or omissions or apparent omissions or understated participation or any mixture of overt and non-overt actions, where the effect of such conduct is to commission crimes by subordinates'.[13] This reasoning raises a number of questions, which will be addressed throughout the present chapter.[14]

**5.** Interpreting improper omission has become more complicated with the adoption of the ICC Statute. The complication stems not so much from the text of Article 25 on 'individual criminal responsibility', which is neither more nor less explicit on liability for omissions than the text of the Statutes of the ad hoc Tribunals. Rather, the complication arises when examining the history of the drafting of the Rome Statute. At the final Rome Conference in June 1998, the Preparatory Committee submitted a draft Article 28 dealing, according to its title, with the *actus reus* of criminal responsibility for omissions.[15] In reality, this draft Article laid the basis for criminal responsibility for omissions, providing quite elaborated answers to most of the questions that any legislator aspiring to codify the conditions of this type of liability has to address. This valuable provision was ultimately removed,[16] which legitimately raises the question as to whether this removal aimed at closing the door on liability for omissions. However, the discussion in Rome does not support this interpretation and the absence of any provision in the final Statute should be viewed as a 'missed opportunity'[17] rather than a 'prohibiting silence' (*silence qualifié*).

**6.** Commission by omission is recognized as a mode of liability in most domestic criminal laws.[18] The German doctrine to which this contribution will often refer has

[13] ICTY, *Galić*, Appeals Chamber Judgment, IT-98-29-A, 30 November 2006, para. 169.

[14] Often confronted with this topic, the SCSL has followed the same approach as the ad hoc Tribunals without further elaboration; see SCSL, *Brima et al.*, Trial Chamber Judgment, 04-16-T, 20 June 2007, para. 762.

[15] *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, 14 April 1998, UN Doc. A/CONF.183/2/Add.1, Art. 28(2): 'Unless otherwise provided and for the purposes of paragraph 1, a person may be criminally responsible and liable for punishment for an omission where the person [could] [has the ability], [without unreasonable risk of danger to him/herself or others,] but intentionally [with the intention to facilitate a crime] or knowingly fails to avoid the result of an offence where: (a) The omission is specified in the definition of the crime under this Statute; or (b) In the circumstances, [the result of the omission corresponds to the result of a crime committed by means of an act] [the degree of unlawfulness realized by such omission corresponds to the degree of unlawfulness to be realized by the commission of such act], and the person is [either] under a pre-existing [legal] obligation under this Statute to avoid the result of such crime [or] creates a particular risk or danger that subsequently leads to the commission of such crime' (footnotes omitted).

[16] See W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2010), at 476–477, who comments on the deletion of Draft Article 28 and the discussions in the Working Group (for the latter, see UN Doc. A/CONF.183.C.1/WGGP/L.1 and UN Doc. A/CONF.183.C.1/WGGP/L.4/Add. 1/Rev.1). See also a good account of the drafting process in Duttwiler, supra n. 5, at 57.

[17] K. Ambos, 'Article 25', in O. Triffterer and K. Ambos, *Rome Statute of the International Criminal Court: A Commentary* (3rd edn, Munich: Beck, 2016), para. 55; see also K. Ambos, *Treatise on International Criminal Law – Volume I: Foundations and General Part* (Oxford: Oxford University Press, 2013), at 189 ss.

[18] For some comparative overviews, see Ambos, *Treatise*, supra n. 17, at 184–189; E. van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford: Oxford University Press, 2012), at 117–119 (on complicity/aiding and abetting by omission).

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elaborated to the broadest extent the conditions and limits of such form of liability. The German Code of Crimes against International Law (*Völkerstrafgesetzbuch*)[19] refers in its Section 2 to general criminal law; hence, Section 13 ('Omissions') of the German Criminal Code is applicable to international crimes.[20]

**7.** While the German doctrine is widely accepted, some states still do not recognize commission by omission as a mode of liability in their domestic legal system. The aforementioned removal of Article 28 from the final draft of the Rome Statute is largely due to opposition of the French delegation, which argued in Rome that this form of liability was unknown in the French legal tradition and would infringe the principle of legality.[21] Indeed, the official doctrine in French criminal law is that commission by omission does not exist. Although this is formally accurate, a comparative analysis[22] challenges this normative position in two ways. Firstly, offences of genuine or proper omission[23] have flourished in French law as a kind of compensation. Secondly, the extensive definition of negligence in French law has allowed for encompassing conducts, which other jurisdictions typically label as commission by omission. Therefore, the status of France as a 'persistent objector' to commission by omission liability can be challenged with good arguments.

## 4.2 Meaning and Application

### *4.2.1 Definition and Related Concepts*

**8.** This section will first define improper omission (Subsection (a)), after which it will try to identify points of confusion with command responsibility and JCE and address the uncertain delimitations vis-à-vis these concepts (Subsection (b).

#### (a) Definition

**9.** Omission in general may be defined as a form of criminal liability based on a failure to perform a *legal duty* (as opposed to a moral duty) when the perpetrator had the ability to act according to this legal duty.

**10.** A genuine or *proper omission* exists when a legal provision based in criminal law explicitly imposes a duty to act in a concrete situation.[24] Scholars agree that 'on the international level, proper crimes of omissions are rare',[25] but do not easily agree on a list of such crimes. Arguably, the first part of Article 8(2)(b)(xxv) of the ICC Statute

[19] Act to Introduce the Code of Crimes against International Law (translation to English, B. Duffett), 26 June 2002, available at www.mpicc.de/files/pdf1/vstgbleng2.pdf, last consulted 23 February 2017.

[20] German Criminal Code (translation to English, Prof. Dr M. Bohlander), as of 10 October 2013, available at www.gesetze-im-internet.de/englisch_stgb/, last consulted 23 February 2017; Section 13 ('Omissions'): '(1) Whosoever fails to avert a result which is an element of a criminal provision shall only be liable under this law if he is responsible under law to ensure that the result does not occur, and if the omission is equivalent to the realization of the statutory elements of the offence through a positive act. (2) The sentence may be mitigated pursuant to section 49(1).'

[21] On the latter argument, see below para. 27 ss.

[22] See the thorough research by A. Dan, *Le Délit de commission par omission: éléments de droit suisse et comparé* (Zürich: Schulthess, 2015), at 201–211. See also Ambos, *Treatise*, supra n. 17, at 188.

[23] See below para. 10.

[24] Duties that are too general conflict with the legality principle, see above para. 7.

[25] Duttwiler, supra n. 5, at 8.

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(starvation of civilians)[26] and Article 118(4)(b) of Geneva Convention III (unjustifiable delay in the repatriation of prisoners of war) are the most agreed-upon examples of proper omissions.

**11.** Improper omissions are failures to act that contravene duties imposed by bodies of law other than criminal law. This form of omission is sometimes qualified as 'indirect omission',[27]arguably a misleading expression as it seems to imply that there would be no direct link between the obligation to act and the failure to fulfil this obligation. In fact, the opposite is true.

**12.** The person bound by the obligation to act is called the '*guarantor*', a word that derives from the German '*Garant*'.[28] The guarantor holds responsibility either for the person, the good or the value protected by the provision entailing the duty to act or because he/she oversees certain sources of danger.[29] In this second case, i.e. that of overseeing certain sources of danger, the duty may arise from the *creation* of the danger rather than from the prior existence of the danger;[30] then, however, it is only when the creation of the danger cannot be deemed as having caused the damage that liability for omission can be considered.[31]

**13.** The duty incumbent on the guarantor has to be *specific*. Post Second-World War case law acquitted accused individuals for the reason that their specific obligations did not include the acts, benefits, etc. that had not been provided, or had been refused, to persons under their factual custody.[32] However, today, this jurisprudence would probably be considered as too formal today, since *circumstances alone* may also trigger an obligation to act.

**14.** In a nutshell, duties may arise from the *status* of the person or from the *situation* in which both the guarantor and the protected person find themselves.[33] Armed conflicts naturally provide for a variety of such situations.[34]

[26] The second part of the provision ('willfully impeding relief supplies') is conversely a crime of commission and is uneasily transformed into a crime of commission by omission.
[27] Cf. van Sliedregt, supra n. 18, at 54.
[28] The position of the holder of the obligation is called '*Garantenstellung*' in German law and in the laws that have taken over the German approach; cf. supra, para. 5.
[29] On this distinction, elaborated by German legal literature, see Ambos, 'Article 25', supra n. 17, para. 53.
[30] Cf. the *Koshiro Tanabe* case, Temporary Court Martial (Macassar, Netherlands East Indies), 5 February 1947, *ILR*, Vol. 14, at 210; cited and discussed by Duttwiler, supra n. 5, at 24.
[31] This supposes that omission is always *subsidiary* to commission; on this approach, see para. 38 ss.
[32] See the *Zuhlke* case, Special Court of Cassation (Holland), 6 December 1949, *ILR*, Vol. 15, at 415, 499, cited by Duttwiler, supra n. 5, at 23; and *United States of America* v. *Milch ('The Milch Case')*, Case No. 2, Military Tribunal II (Nuremberg), 16 April 1947, *TWC (Green Series)*, Vol. II, at 355 ss, quoted by Grimminger, supra n. 4, at 140. In both cases, members of the German Waffen-SS or of the Luftwaffe were considered under no specific obligation; in the former case to provide a clergyman to a prisoner condemned to death, in the latter case to allow prisoners to be submitted to experiments by their wardens. The second case is especially interesting since the accused was a high-ranking officer of the Luftwaffe (*Generalinspekto*r and *Feldmarschall*). Nevertheless, his duties were limited to the construction and delivery of aircraft. This is so even if the prisoners were within the control of the Luftwaffe and Milch had possessed the power to stop the experiments. Thus, the Court affirmed that power does not generate obligations.
[33] For the classical approach in criminal law, according to which obligations derive either from the status of a person or the circumstances, see R. Cryer, 'General Principles of Liability' in D. McGoldrick, P. Rowe and E. Donnelly (eds.), *The Permanent International Criminal Court: Legal and Policy Issues* (Oxford: Hart, 2004), at 237, elaborating on English and Welsh law.
[34] See below para. 16.


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(b) Related concepts

**15.** Whereas in ordinary criminal law improper omission is generally not linked in any way with a hierarchical position of the alleged perpetrator, this is not the case for the types of crimes international tribunals are dealing with. Therefore, the relationship between liability for omission and command responsibility are frequently at stake.[35] The two forms of liability are intertwined. On the one hand, a position of *authority* is one of the possible rationales for the very *existence* of a duty to act.[36] On the other hand, duties of 'guarantors' encompass more specific obligations which resound with superiors' duties as established within the framework of command responsibility: the duty to prevent and to punish[37] unlawful conduct and, less frequently, to submit the matter to the competent authorities. In some cases, the commander is even blamed for his/her 'failure to exercise ... authority'.[38]

**16.** Scholars have thus defined command responsibility as a form of omission *sui generis*[39] or 'a discrete and important form of omission liability'.[40] One extreme view even holds that 'command responsibility is ... the *only true form* of omission liability[41] in international criminal law'.[42] This extreme view is unfounded since, as will be shown below, aiding and abetting and participation in a JCE by omission have specific features that are certainly not mere reproductions or expansions of the conditions of command responsibility.[43] Nonetheless, the closeness of the two concepts raises two main questions. Firstly, what are the distinguishing criteria? Secondly, how does one approach cases of possible concurrent application of both forms of liability?

**17.** To date, the case law has not expanded much on the methodology allowing for the required distinction between liability for improper omission and command responsibility. Nevertheless, the ICTY Appeals Chamber held in *Blaškić* that 'the distinguishing factor between those modes of responsibility may be seen, *inter alia*, in the degree of concrete influence of the superior over the crime in which his subordinates participate: if the superior's intentional omission to prevent a crime takes place at a time when the crime has

[35] It may be noted that in the Statutes of the ad hoc Tribunals both modes of liability cohabit in a single provision (Arts. 7(1) and 7(3) ICTY Statute and 6(1) and 6(3) ICTR Statute).

[36] ICTY, *Karadžić* Trial Judgment, IT-95-5/18-T, 24 March 2016, para. 3494.

[37] E.g. ICTY, *Mrkšić et al.* Trial Judgment, IT-95-13/1-T, 27 September 2007, para. 553; *Karadžić* Trial Judgment, supra n. 36, paras. 3493 ss.

[38] *Karadžić,* Trial Judgment, supra n. 36, para. 3501.

[39] G. Mettraux, *The Law of Command Responsibility* (Oxford: Oxford University Press, 2009), at 37 ss; S. Zappalà, 'Les crimes d'omission', in H. Ascensio, E. Decaux and A. Pellet (eds.), *Droit international pénal* (2nd edn, Paris: Pedone, 2012), at 523.

[40] Cassese (3rd edn), supra n. 12, at 181. See also the comparative and substantial analysis by R. Cryer, *An Introduction to International Criminal Law and Procedure* (3rd edn, Cambridge: Cambridge University Press, 2014), at 393 ss.

[41] The question whether command responsibility is a form of improper or of proper omission will not be discussed here; see on this topic P. Gaeta, 'The Interplay between the Geneva Conventions and International Criminal Law', in A. Clapham, P. Gaeta and M. Sassòli, *The 1949 Geneva Conventions: A Commentary* (Oxford: Oxford University Press, 2015), at 749 (with references).

[42] G. Boas, 'Omission Liability at the International Criminal Tribunals – A Case for Reform', in S. Darcy and J. Powderly (eds.), *Judicial Creativity at the International Criminal Tribunals* (Oxford: Oxford University Press, 2010), at 207 (emphasis added).

[43] Cf. ICTY, *Blaškić* Appeals Chamber Judgment, IT-95-14-A, 29 July 2004, para. 91, which insists on the fact that these are 'distinct categories of criminal responsibility'.

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already become more concrete or currently occurs, his responsibility would also [i.e. in addition to under Article 7(3) (superior responsibility)] fall under Article 7(1) [i.e. omission liability] of the Statute'. (That is necessarily so because a 'superior who perpetrates a crime by omission pursuant to Article 7(1) of the Statute will, at the same time, fail to prevent this crime'.[44]) According to the Appeals Chamber in the same judgment, the 'degree of concrete influence' criterion then justifies why, in case both forms of liability apply, the adjudicating authority should 'convict only on the basis of 7(1) and consider the accused's superior position as an aggravating factor in sentencing'.[45] Since omission liability does not depend on a specific status or on formal authority, the blame is grounded not only on the duty to act but also on the material impact that non-compliance has exerted on the course of events. Put differently, commission by omission has a *direct* impact on the criminal action whereas the effect of a superior's dereliction of duty is felt, not directly on the underlying offence, but on the *environment* in which a crime is committed.[46] Therefore, improper omission offers a 'better characterization' of the responsibility of the offending superior.[47]

**18.** A few other points are worth clarifying before moving to the next section on the scope of application and delimitations of improper omission. First, concrete influence must not be conflated with physical presence or proximity:[48] since the judgment in the *Tadić* case, it has been admitted that participation (especially by omission) 'does not require an actual physical presence or physical assistance'.[49]

**19.** A second point worth noting is that the *mens rea* requirements also differ. The *mens rea* of the aider and abettor by omission is focused only on the actual offence,[50] whereas

[44] *Blaškić* Appeal Judgment, supra n. 43, para. 664; *Mrkšić et al.* Trial Judgment, supra n. 37, para. 555.

[45] *Blaškić* Appeal Judgment, supra n. 43, para. 91. Consequently, when both modes of liability apply, 7(1) 'will in general prevail' (*Blaškić* Appeal Judgment, supra n. 43, fn. 1386; ICTY, *Krnojelac*, Trial Chamber Judgment, 15 March 2002, IT-97-25-T, para. 173). However, other judgments have taken the opposite approach, namely a conviction based on 7(3) and aggravation based on 7(1): see ICTY, *Delalić et al.*, Appeals Chamber Judgment, IT-96-21-A, 20 February 2001, para. 745. The now dominant approach of the *Blaškić* Appeals Chamber seems much more logical.

[46] Mettraux, supra n. 39, at 41 (emphasis added). Idem for a JCE by omission, *Karadžić* Trial Judgment, supra n. 36, para. 3504. In ICTY, *Kordić and Čerkez*, Trial Chamber Judgment, IT-95-14/2-T, 26 February 2001, para. 369, the adjectives 'direct' and 'indirect' were used in this context, yet without much elaboration.

[47] *Krnojelac* Trial Judgment, supra n. 45, para. 173: 'The criminality of the [a]ccused is better characterised as that of an aider and abettor to the principal offenders who imposed and maintained the inhumane living conditions constituting inhumane acts and cruel treatment of the non-Serb detainees at the KP Dom.' In the same vein, ICTY, *Krstić*, Trial Chamber Judgment, IT-98-33-T, 2 August 2001, para. 605: 'The Trial Chamber adheres to the belief that where a commander participates in the commission of a crime *through his subordinates*, by "planning", "instigating" or "ordering" the commission of the crime, any responsibility under Article 7(3) is subsumed under Article 7(1).' Yet an ICTR judgment disregarded this possibility, holding the superior exclusively liable under Article 7(3), whereas it was 'pursuant to his *orders* that the atrocities were committed' (ICTR, *Kayishema and Ruzindana*, Trial Chamber Judgment, ICTR-95-1-T, 21 May 1999, para. 223 (emphasis added)).

[48] Cf. SCSL, *Taylor,* Appeals Chamber Judgment, SCSL-03-01-A, 26 September 2013, para. 480.

[49] ICTY, *Tadić*, Trial Chamber Judgment, IT-94-1-T, 7 May 1997, para. 679, referring to the Nuremberg war crimes trials case law. See also ICTY, *Furundžija*, Trial Chamber Judgment, IT-95-17-1/T, 10 December 1998, para. 232; ICTY, *Kunarac et al.*, Trial Chamber Judgment, 22 February 2001, para. 393. However, physical presence gives a 'probative indication' that that person encouraged or supported the perpetrators (ICTY, *Blaškić*, Trial Chamber Judgment, IT-95-14-T, 3 March 2000, para. 284; see also ICTY, *Aleksovski*, Trial Chamber Judgment, IT-95-14/1-T, 25 June 1999, para. 65.

[50] *Mrkšić et al.* Trial Judgment, supra n. 37, para. 556.

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the superior incurring command responsibility must also be aware of his/her statutory duties. Finally, command responsibility may apply more broadly in a given situation depending on which variation of *mens rea* best characterizes it (the commander allegedly responsible had reasons to know (Article 7(3) ICTY Statute) or should have known (Article 28(a)(i) ICC Statute) or consciously disregarded information (Article 28(b)(i) ICC Statute)).

### 4.2.2 *Scope of Application*

**20.** In the case law, especially of the ad hoc Tribunals, most cases involving a responsibility for improper omission have concerned either aiding and abetting or participation in a JCE. To impute responsibility for omissions, both modes of liability first presuppose the existence of a personal and specific duty to protect the interest or goods that have been damaged by the action of the main perpetrator(s).[51] Second, the decisive factor then is whether the omission constituted a significant (for JCE) or substantial (for aiding and abetting)[52] contribution[53] of the alleged participant to the commission of the underlying offence.[54] A mixture of the two modes of participation has also been envisaged.[55] In both cases, liability presupposes the existence of a personal and specific duty to protect the interest or goods that have been damaged by the action of the main perpetrator(s).[56]

[51] A recent Appeals Chamber decision may raise doubts on this precise point. The Appeals Chamber first states that, in case of a JCE, 'the existence of a legal duty to act deriving from a rule of criminal law is not required' and then that 'the nature of the accused's duty and the extent of his ability to act are simply questions of evidence and not determinative of joint criminal enterprise liability' (ICTY, *Stanišić and Župljanin*, Appeals Chamber Judgment, IT-01-98-A, 30 June 2016, para. 110). The first assessment is surprising while the second is completely confusing: the existence of a duty to act and the qualifications of this duty are legal and not factual questions. Conversely, whether the duty has been violated is indeed a factual question. It is difficult for this author to envisage that a participant to an alleged JCE may be held liable for not doing anything without having an obligation to act/protect etc. The plain basis for liability would be missing. Some months earlier, the *Karadžić* Trial Judgment, supra n. 36, para. 3493, reaffirmed the classical approach.

[52] The controversial (for a multitude of reasons) appeal judgment in the *Gotovina and Marcač* case has posited that the 'threshold for finding a "significant contribution" to a JCE is lower than the "substantial contribution" required to enter a conviction for aiding and abetting' (ICTY, *Gotovina and Marcač*, Appeals Chamber Judgment, IT-06-90-A, 16 November 2012, para. 149). However, the only precedent cited by the Appeals Chamber is the *Kvočka et al.* Appeal Judgment, which is far from being clear on this (see ICTY, *Kvočka et al.*, Appeals Chamber Judgment, IT-98-30/1-A, 28 February 2005, para. 97).

[53] On the various approaches concerning the relation (causation?) between the contribution and the perpetration of the offence, see para. 40 ss.

[54] Compare *Mrkšić et al.* Trial Judgment, supra n. 37, paras. 545 (JCE) and 552 (aiding and. abetting). See recently *Karadžić* Trial Judgment, supra n. 36, para. 3495. For a development on the meaning and limits of a 'significant contribution' (without specific reference to liability for omissions), see ICTY, *Brđanin*, Appeals Chamber Judgment, IT-96-36-A, 3 April 2007, para. 430.

[55] ICY, *Kvočka et al.*, Trial Chamber Judgment, IT-98-30/1-A, 2 November 2001, para. 309 which mentions the 'aider or abettor or co-perpetrator' to a JCE approach; in this case, the contribution has to be substantial rather than significant, see *Kvočka et al.* Appeal Judgment, supra n. 52, paras. 97 and 187 ss. Implicitly confirmed in ICTY, *Milutinović et al.*, Trial Chamber Judgment, IT-05-87-T, 26 February 2009, Vol. 1, para. 103. Following a different approach, the conviction in the *Ndahimana* Appeal Judgment is based on aiding and abetting the commission of the crimes (genocide and extermination as a crime against humanity) evidenced by the participation of the accused in meetings with members of the JCE (to which he did not belong) (see ICTR, *Ndahimana*, Appeals Chamber Judgment, ICTR-01-68-A, 16 December 2013, paras. 150 ss).

[56] See generally C. Gosnell, 'Damned if You Don't: Liability of Omissions in International Criminal Law' in W. Schabas, Y. McDermott and N. Hayes (eds.), *The Ashgate Research Companion to International Criminal*

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**21.** Besides the situations already discussed, where aiding and abetting by omission amounts to a qualified form of command responsibility,[57] most of the cases have been regrouped under the label 'approving spectator'.[58] In principle, a person who is present during the commission of a crime – even the most atrocious one – may not be held liable for not having intervened. Thus, to incur liability, the 'approving spectator' must have 'a status . . . such that his presence had a significant *legitimising or encouraging* effect on the principals'.[59] This seminal definition from the *Furundžija* Trial Judgment calls for a series of remarks.

– By definition, and unlike what is the case for other forms of aiding and abetting, presence is required for omission.[60]
– Therefore, the line between commission and omission is especially thin: tacit encouragement may also qualify as commission, and it is close to impossible to draw from the case law a clear criteria allowing for a qualification of a commission rather than a omission.[61]
– Like any person accused of omission, the spectator must have a legal duty to act. This duty differentiates between the genuine spectator (approving, disapproving, or indifferent) and the *qualified* spectator (who has a legal duty to act, so that his/her approval is significant). *Formal authority* may be the source of the duty. In the case of such formal authority, command responsibility and aiding and abetting by omission are both applicable, unless the superior is not in a position to perform his/her duties as a commander. In the absence of formal authority, case law has based the (explicit or implicit) duty to act on influence[62] or even respect.[63] This reasoning amounts to a recognition of *factual authority* as a source of a duty to act.[64] This extension of 'authority' beyond formal duties corresponds to the approach generally accepted in

*Law: Critical Perspectives* (Farnham; Ashgate, 2013) 101, at 121–122, and more specifically Ingle, supra n. 3, at 757.

[57] See above paras. 3 and 15 ss.

[58] Boas, supra n. 42, at 212 ss who argues that there are in reality only two conceivable forms of aiding and abetting by omission: approving spectator and failure to act in a position of authority.

[59] *Furundžija* Trial Judgment, supra n. 49, para. 232 (emphasis added).

[60] See above para. 16.

[61] The discussion in the *Brđanin* Appeal Judgment, supra n. 54, paras. 273–276 perfectly illustrates the ambiguity of the taxonomy and the difficulty to delineate in such cases between aiding and abetting by commission and aiding and abetting by omission; see also ICTY, *Orić* Appeal Judgment, supra n. 11, paras. 42–43; ICTR, *Akayesu,* Trial Chamber Judgment, ICTR-96-4-T, 2 September 1998, paras. 694 and 706; *Kayishema and Ruzindana*, Trial Judgment, supra n. 47, para. 202. Stalled in ambiguity are for instance the Prosecutor's submissions in ICTY, *Furundžija*, Trial Judgment, supra n. 49, para. 42. Also disputable the reasoning of the ICTY Appeals Chamber (retaining aiding and abetting by omission) in *Mrkšić and Šljivančanin*, Appeals Chamber Judgment, IT-95-13/1-A, 5 May 2009, paras. 99 and 103 (reviewed, but not on this point which is a point of law, by ICTY, *Mrkšić and Šljivančanin*, Review Judgment, IT-95-13/1-R.1, 8 December 2010), or the quite confused approach in ICTR, *Mpambara,* Trial Chamber Judgment, ICTR-01-65-T, 11 September 2006, para. 22: 'criminal responsibility is derived not from the omission alone, but from the *omission combined with the choice to be present*' (emphasis added). See the very critical assessment of the case law by Ingle, supra n. 3, at 761 ss.

[62] Cf. e.g. *Ndahimana* Appeal Judgment, supra n. 56, para. 150.

[63] See e.g. this summary of a case decided by the German Supreme Court in the British Occupied Zone in 1948, endorsed in *Furundžija* Trial Judgment, supra n. 49, para. 207 (in 1998): 'an approving spectator who is held in such respect by the other perpetrators that his presence encourages them in their conduct, may be guilty of complicity in a crime against humanity'.

[64] See above paras. 11 and 14.


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domestic law where commission by omission has developed as a form of criminal liability.[65] It may nevertheless be questioned from a legal point of view, and the limits of application of this quite volatile reasoning raise some concerns.

**22.** Concerning the forms of participation other than aiding and abetting, the ad hoc Tribunals' case law is less explicit. However, the Appeals Chamber in the *Galić* case clearly excluded the possibility that *ordering* can be committed by omission, as it requires 'a positive act'.[66] The same reasoning should apply to planning.[67] Conversely, trial chambers have accepted that instigation can be committed by omission, for instance 'where a commander has created an environment permissive of criminal behaviour by subordinates'.[68] This determination may appear ambiguous or even clumsy since the 'creation of an environment' criterion is precisely the blame addressed to a superior under command responsibility.[69] The anyhow fluid distinction between the two modes of liability may then fade away.

**23.** If instigation by omission is accepted, the alleged instigator must be under a duty to act 'in the same way as for participation as a principal'.[70] This requirement, which is logical from a systematic point of view, must be carefully deconstructed. Indeed, the relevant duty to act is not any and every duty incumbent upon the principal perpetrator, as duties are always personal. Like for aiding and abetting by omission,[71] the alleged instigator must have a *personal duty to protect* interests or goods,[72] which have been infringed by the conduct of the perpetrator. However, his/her conduct must not have reached the threshold of having *directly* contributed to the infringement. Rather, the omission to act must have *substantially* contributed to the perpetrator's *decision* to commit a crime.[73] However, one may doubt whether it is possible to substantially influence conduct without words or deeds. This is why, in many domestic jurisdictions, instigation requires a positive act.[74]

[65] Cf. Duttwiler, supra n. 5 at 35 ss.

[66] *Galić* Appeal Judgment, supra n. 13, para. 176 and fn. 508; ICTY, *D. Milošević*, Appeals Chamber Judgment, IT-98-29-1-A, 12 November 2009, para. 267. For a critical comment on the *Galić* Decision, because it 'represents either confusion, or an oversimplified notion of action', see A. Zahar, 'Ordering' in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009), at 447.

[67] Cassese (3rd edn), supra n. 12, at 182.

[68] ICTY, *Galić*, Trial Chamber Judgment, IT-98-29, 5 December 2003, para. 168; *Blaškić* Trial Judgment, supra n. 49, para. 337, which adds that the discussion concerns 'the commission of *further* crimes' (original emphasis).

[69] See above para. 16.

[70] ICTY, *Orić*, Trial Chamber Judgment, IT-03-68-T, 30 June 2006, fn. 741; ICTR, *Rutaganda,* Trial Chamber Judgment, ICTR-96-3, 6 December 1999, para. 41.

[71] See above para. 18.

[72] Instigation by omission may also be construed on the responsibility that the guarantor holds with respect to specific *person*s (see para. 11). This responsibility may entail a duty to *deter* the person from committing a crime. However, this is one of the situations where aiding and abetting by omission more appropriately encapsulates the conduct (omission to intervene) of the alleged instigator (see para. 21).

[73] And must go beyond the duties of a commander, which are captured by command responsibility. On the relations between the two forms of participation, see above para. 14 ss.

[74] See the quite isolated decision in ICTY, *Prlić et al.*, Trial Chamber Judgment, IT-04-74-T, 29 May 2013, Vol. 1, paras. 226–230. The *Prlić* Trial Chamber is convinced that 'the very notion of instigation requires a positive act on the part of the instigator. The verb "to instigate" – to urge or to incite a person to do something – implicitly suggests a positive action' (at para. 229). In our view, the issue is a question of substance (the requirement of

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**24.** One may even have greater doubts regarding the possibility of 'chain instigation', where the (first) instigator would (by omission) instigate another person to in turn instigate the perpetrator. If this construction is possible for positive instigation,[75] it does not seem tenable for an initial instigation that occurred by omission.[76]

**25.** As regards specific crimes, there is no reason to exclude any of them from the possibility of being perpetrated by omission. This assertion holds even if *direct* perpetration by omission is hardy conceivable in relation to crimes such as extermination (as a crime against humanity) or genocide (including direct and public incitement to commit genocide as an inchoate offence).[77] On the other hand, more individual crimes, like murder, may be perpetrated directly by omission.[78] As for torture, its definition presupposes the 'consent or acquiescence' of a public official or other person acting in an official capacity.[79] These words imply a passive participation by the said agent, which will amount to aiding and abetting (or in extreme cases instigation) by omission if the conditions regarding the importance of the contribution to the crime are met. According to the Inter-American Convention on Torture,[80] the public agent who 'being able to prevent [acts of torture], fails to do so', may even be held liable as perpetrator.[81]

a significant influence is incompatible with simple abstention in the case of instigation) rather than a purely semantic issue, as submitted by the *Prlić* Trial Chamber. The Chamber seems to present aiding and abetting as a default option, which is probably accurate since, in the case of aiding and abetting, the contribution is aimed at facilitating the perpetration of the crime, not the decision-making process of the perpetrator(s) (as is the case for instigation). However, an ICC Pre-Trial Chamber has endorsed the approach adopted by the majority of the ad hoc Tribunal decisions, namely that 'inducement' (the terminology for instigation adopted by the ICC Statute; see Ch. 8 of the Study, para. 5 and 9) may be contained in an omission; see ICC, *Ntaganda*, Confirmation of Charges, ICC-01/04-02/06, 9 June 2014, fn. 629, a position which is also reiterated, without any discussion of the adverse approach taken by the *Prlic* Judgment, in *Karadžić* Trial Judgment, supra n. 36, para. 572. For a similar critical view, see H. Vest, *Völkerrechtsverbrecher verfolgen* (Bern: Stämpfli, 2011), at 195.

[75] See Ch. 8 of the Study, para. 25.

[76] See nonetheless Ambos, *Treatise*, supra n. 17, at 197.

[77] The *Kambanda* case of the ICTR is often quoted as illustrating the possibility of committing genocide through omission. However, the judgment itself (ICTR, *Kambanda*, Trial Chamber Judgment, ICTR-97-23-S, 4 September 1998) does not elaborate at all on the various ways of committing the crime of genocide and the crimes against humanity (because of the guilty plea by the accused); commissions and omissions are intertwined (see ibid., para. 40). In other cases, aiding and abetting by omission has clearly been accepted (see e.g. *Ndahimana* Appeal Judgment, supra n. 56, para. 149).

[78] *Orić* Trial Judgment supra n. 70, para. 302. In the *Krnojelac* case, which is often cited as a case of commission by omission (see S. Knuckey, 'Murder in Common Article 3' in Clapham *et al.*, supra n. 41, at 462), but is in reality a pure act by commission, the accused was prosecuted for murder for having (among other misdeeds) caused the suicide of a detainee by beating him seriously. The Trial Chamber considered that the cause–effect relation between the beating and the suicide had not been brought about (*Krnojelac* Trial Judgment, supra n. 45, paras. 328–329 and 342). Can a suicide perpetrated when the victim is under the custody of the alleged perpetrator lead to the latter's liability if he/she does not *prevent* the suicide? The answer to this question is debatable, illustrating the difficulties with the causation requirement. This requirement will be discussed below (para. 40 ss).

[79] Art. 1 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984; a condition confirmed in the context of an armed conflict, see ICTY, *Delalić et al.*, Trial Chamber Judgment, IT-96-21-T, 16 November 1998, para. 495; *Akayesu* Trial Judgment, supra n. 61, para. 597.

[80] Art. 3(a) Inter-American Convention to Prevent and Punish Torture of 9 December 1985.

[81] Cf. Duttwiler, supra n. 5, at 12–13, with additional references to the Inter-American Convention on Torture.

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## 4.3 Constitutive Elements

### *4.3.1 Uncontested Elements*

**26.** There are several conditions for liability related to improper omission (in general) and commission by omission (in particular). These conditions, as identified by international case law and the most authoritative literature, are generally:

– The accused must have a *legal duty* to act.
– The accused must have had the *ability* to act.
– The accused *failed to* act.
– The failure to act may be *assimilated to the commission* of a crime.[82]
– The requisites concerning the *mens rea* of the specific offence and mode of participation are fulfilled.

**27.** As such, these conditions are uncontested. Yet their application raises a series of problems and questions. Therefore, the following paragraphs will address these contentious topics. As regards the requirements concerning the *mens rea*, omission presents no specificities as compared to commission. Consequently, these requirements solely depend on the offence and the mode of participation. However, the extreme case of French law may be recalled: '*negligence*' under Article 121-3(3)-(4) of the French Penal Code[83] encompasses an absence of action that contributes to a crime. In such a setting, the dividing line between objective and subjective elements may become blurred.

### *4.3.2 Open Questions*

#### (a) Compatibility with the principle of legality

**28.** The compatibility of liability for improper omissions with Article 22 of the ICC Statute has been questioned from the viewpoint of the principle of legality (*nullum crimen sine lege*).[84] The Statute does not explicitly mention that the absence of any action (what we will call a legislative *descriptive* approach) or the violation of a duty to act (what may be called a legislative *normative* approach) may trigger such liability. Therefore, one can ask whether the judge is allowed to 'fill the gap' or to interpret the silence of the statute as a permission to 'construct' liability in a way not formally prescribed by the written law.[85]

[82] We have adopted this formula instead of the classical formula, namely that 'the failure to act resulted in the commission of the crime' (see e.g. ICTR, *Ntagerura et al.*, Trial Chamber Judgment, ICTR-99-46, 25 February 2004, para. 659; Cassese (3rd edn), supra n. 12, at 181). It is logically unconvincing to argue that an omission *results in the commission* of the crime. Moreover, omissions can be conduct crimes (see above n. 3). Furthermore, the proposed formula emphasizes the equivalence between commissions and omissions, an issue that will be addressed below (para. 38 ss).

[83] French Penal Code, as of 25 February 2017, available at www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070719, last consulted 25 February 2017 (translation to English, Prof. Dr J. R. Spencer), as of 1 July 2006, available at www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations, last consulted 25 February 2017.

[84] See for instance Grimminger, supra n. 4, at 283 ss.

[85] A more focused criticism points to the difficulty of assessing the application of the ICC Statute *ratione temporis* in this regard, since it is highly difficult to determine when the 'conduct' (Art. 24(1) ICC Statute) of omitting to act actually occurred; see O. Pangalangan 'Non-retroactivity *Ratione Personae*' in Triffterer and Ambos, supra n. 17, at 467.

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**29.** It must first of all be observed that the same question could have arisen when the post-World War II jurisdictions and then the ad hoc Tribunals convicted accused for improper omission.[86] The fact that the Statutes of these tribunals did not include any provision on *nullum crimen* similar to Article 22 of the ICC Statute does not make any difference, since the principle of legality (*nullum crimen* and *nulla poena sine lege*) is a 'fundamental principle of criminal justice'[87] and must be recognized as part of customary international law.

**30.** Besides its recognition in most national criminal law systems, two main arguments have confirmed the conformity of liability for omission for international crimes with the legality principle, specifically within the framework of the ICC Statute. First, Article 22(1) of the ICC Statute and the Elements of Crime[88] refer to a '*conduct*', a word that may be interpreted as including the absence of any action.[89] Second, a hierarchy may be read in Article 22 of the ICC Statute. The general provision of Section (1) on the conduct being a crime at the time it takes place is complemented by the more elaborate provision of Section (2), which specifically addresses the *definition* of crimes, which must be 'strictly construed'. This means that the definition of crimes is submitted to a higher standard regarding *nullum crimen* than the general principles of criminal law and the rules governing attribution of criminal responsibility.[90]

(b) Source of the duty to act

**31.** The justification for the existence of liability for not taking action lies in the (pre-)existence of a *legal duty* (as opposed to a moral duty) to act. What is the *sedes materiae* of these duties?

**32.** Regarding crimes allegedly committed in the context of an armed conflict, one may naturally think first of IHL. In line with the obligations to protect already mentioned,[91] Articles 86 and 87 of Additional Protocol I (concerning respectively failures to act and the duties of commanders) impose broad duties to prevent and then obligations to act, which complement the more specific obligations derived, for instance, from the provisions of Geneva Convention III, serving to protect prisoners of war, or of Geneva Convention IV, benefiting the civilian population in occupied territory. However, these obligations lie with the contracting parties who by definition are states. A state's compliance with these

[86] However, for the latter jurisdictions, see above n. 4. With regard to the ad hoc Tribunals, the issue of legality has been discussed and answered in a fairly benevolent way by Judge Shahabuddeen in his separate opinion joined to ICTY, *Krajišnik*, Appeals Chamber Judgment, IT-00-39-A, 17 March 2009, paras. 10–15 (advocating the permissibility of JCE as a mode of liability, although it was not explicitly provided for in Art. 7(1) of the ICTY Statute.

[87] S. Lamb, '*Nullum Crimen, Nulla Poena Sine Lege* in International Criminal Law' in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), Vol. I, 733, at 733–756; for a comprehensive study, see M. C. Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (Cambridge: Cambridge University Press, 2011), at 296–358.

[88] *Elements of Crimes* (International Criminal Court, 2011), General Introduction, paras. 2, 7(a)–(b) and 9.

[89] van Sliedregt, supra n. 18, at 56; Ambos, *Treatise*, supra n. 17, at 190.

[90] L. Berster, '"Duty to Act" and "Commission by Omission" in International Criminal Law', 10 *International Criminal Law Review* (2010) 609, at 644; G. Werle and F. Jeßberger, *Principles of International Criminal Law* (3rd edn, Oxford: Oxford University Press) 269.

[91] Para. 3 and n. 12.

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obligations is dependent upon the actions of individuals, '*individus-institutions*' as aptly pictured by Zappalà.[92] Does liability and in particular criminal liability follow for these individuals in cases of non-compliance? International tribunals have answered this question in the affirmative, both explicitly[93] and (more often) implicitly, but many scholars have expressed serious doubts as to the validity of this reasoning. First, strictly speaking, none of these rules imposes obligations upon individuals.[94] Second, from a legal point of view, these rules are too loosely drafted to serve as a basis for (criminal) liability.[95] The 'structural differences' between criminal law and IHL must not be underestimated.[96] This means that holding individuals responsible is at best a stopgap, while the real stakes lie with state responsibility (or other forms of collective responsibility within the state structure, or by other actors submitted to the same obligations).[97]

**33.** Transforming treaty obligations incumbent upon states into legal bases for individual responsibility may be considered a part of the Nuremberg Trials' legacy.[98] The case against such transformation entails two dimensions. First, the obligation may not be specific enough, an argument that is part of the discussion on legality.[99] Second, many situations may arise where an individual, even if he/she was in a position to fulfil the state's obligation, may not be considered an obliged party because he/she had no specific protective duty.[100]

**34.** From a legalistic point of view, *criminal law* provisions certainly afford the best guarantees. This is perhaps the reason why, from the outset, the ad hoc Tribunals have sometimes adopted the strange position that the duty to act had to be prescribed by a criminal law provision. However, the case law has been fairly inconsistent on this issue and no definitive position has been taken.[101] The requirement of a duty based on criminal law makes no sense and derives from the confusion between proper and improper

92 Zappalà, supra n. 39, at 527.
93 See e.g. ICTR, *Rutaganira*, Trial Chamber Judgment, ICTR-95-1C, 14 March 2005, paras. 78 ss; *Orić* Trial Judgment, supra n. 70, para. 304.
94 E.g. Berster, supra n. 90, at 626, with references to the *travaux préparatoires* of the Geneva Conventions. Berster, at 624 ss also develops the classical argument made by 'IHL purists' that the transposition of IHL norms into legal bases for criminal responsibility may have a 'dis-incentivizing' rather than an incentivizing effect.
95 This point is aptly made by Boas, supra n. 42, at 221.
96 Gaeta supra n. 41, at 750.
97 Cf. on a related topic, but the reasoning may be transposed, S. Sivakumaran, 'Command Responsibility in Irregular Troops', 10 *Journal of International Criminal Justice* (2012) 1129.
98 'Treaties that were binding on states only and which did not provide for any criminal sanctions were relied upon at Nuremberg to demonstrate the criminal character of aggressive war and to justify individuals being held accountable for it.' See G. Mettraux, 'Judicial Inheritance: The Value and Significance of the Nuremberg Trial to Contemporary War Crime Tribunals', in G. Mettraux (ed.), *Perspectives on the Nuremberg Trial* (Oxford: Oxford University Press, 2008), at 611.
99 For a very strict approach, which does not recognize any specificity to international criminal law in this regard and recommends that only duties 'as they are understood in domestic law' be accepted as a source of the duty to act, see Ingle, supra n. 3, at 757 and Gosnell, supra n. 55, at 131.
100 See above para. 12.
101 Seminal: *Tadić* Appeal Judgment, supra n. 9, para. 188: criminal law provision; idem *Ntagerura et al.* Trial Judgment, supra n. 82, para. 660; *Mrkšić and Šljivančanin* Appeal Judgment, supra n. 61, para. 151; left open in ICTR, *Ntagerura et al.*, Appeals Chamber Judgment, ICTR-99-46-A, 7 July 2006, paras. 334–335; for a broader approach: *Mrkšić et al.* Trial Judgment, supra n. 37, para. 668; *Milutinović et al.* Trial Judgment, supra n. 56, para. 90, fn. 113.

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omission, as illustrated by this excerpt of a trial chamber's judgment: 'The Chamber recalls that omission proper may lead to individual criminal responsibility under Article 6(1) of the ICTR Statute/Article 7(1) of the ICTY Statute where there is a legal duty to act mandated by a rule of criminal law.'[102] A specific duty to act enshrined in a criminal law provision precisely corresponds to a proper omission provision. A perpetrator by improper omission infringes norms of public international law[103] or domestic administrative, disciplinary, or statutory provisions, or even obligations under private law as in the classical example of the *Roechling* case.[104] The question then arises as to what extent international criminal liability may rely on *domestic* law when it comes to the duties that represent the source of the accused's responsibility.[105]

**35.** There are a series of good arguments against the admission of domestic law obligations to act as sources of liability for improper omission. Some are historical: in its 1991 Draft Code of Crimes against the Peace and Security of Mankind and in subsequent documents, the ILC took a firm position against contamination of international law by domestic law and affirmed the necessity of the 'independence' of international law.[106] The *travaux préparatoires* of the ICC Statute take a similar position.[107] But the reality of law application cannot do without some interaction between international and domestic law: there is, for instance, no international standard regarding the organization of military and civil forces; thus, domestic law is in some instances indispensable in order to determine, beyond general obligations enshrined in IHL, what the specific obligations of civil or military agents are.[108] Case law has even invoked domestic regulations in support of IHL obligations in this context.[109]

**36.** However, a difficulty may arise in such cases regarding the *foreseeability* of the obligation to act. If one may admit, although maybe fictionally, that international obligations are universally known, or at least are not bound to any specific jurisdiction, the same does not hold true for obligations deriving from domestic law.[110] Military personnel and civilians are only supposed to know their own domestic law (and international law). Thus, if they infringe obligations based on foreign law, the element of awareness cannot be retained. This line of reasoning fits within Article 21(1)(c) of the ICC Statute, which gives

[102] ICTR, *Zigiranyirazo*, Trial Chamber Judgment, ICTR-01-73-T, 18 December 2008, para. 386, fn. 740. See also a confusion in the language itself: *Brđanin* Appeal Judgment, supra n. 54, para. 275: 'commission by omission proper'.

[103] See above para. 29 as regards IHL norms.

[104] In this case, the Tribunal relied on a contractual obligation to protect the well-being of workers employed in the accused's plants; *Case* v. *Hermann Roechling and others*, General Tribunal of the Military Government of the French Occupation Zone in Germany, 30 June 1948, in *TWC (Blue Series)*, Vol. XIV, at 1075–1143. See F. Noto, *Secondary Liability in International Criminal Law* (Zurich/St Gallen: Dike, 2013), at 196 and fn. 1095.

[105] For a thorough discussion on this point, see Berster, supra n. 90, at 624 ss.

[106] *Yearbook of the International Law Commission* (1991), Vol. II, Part 2, UN Doc. A/CN.4/SER.A/1991/Add.1, at 94.

[107] *Report of the Preparatory Committee*, supra n. 15, at 54 ss. (Article 28 of the Draft ICC Statute was reproduced above in the same note.)

[108] Cf. *Ntagerura et al.* Appeal Judgment, supra n. 101, para. 334.

[109] See e.g. *Mrkšić et al.* Trial Judgment, supra n. 37, fn. 2157; referring to the Regulations on the Application of International Laws of War in the Armed Forces of the SFRY of 1988. See also *Blaškić* Appeal Judgment, supra n. 43, para. 338.

[110] This 'Beccarian' argument is accurately put forward in K. Weltz, *Die Unterlassungshaftung im Völkerstrafrecht* (Freiburg im Breisgau: edition iuscrim, 2004) 301–303; cited by Berster, supra n. 90, at 625.

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precedence to the 'the national laws of States that would normally exercise jurisdiction over the crime', i.e. the state(s) where the alleged offences have been perpetrated.[111]

**37.** The ultimate argument against consideration of domestic regulations is the risk of *fragmentation* of international law.[112] A *uniform approach* regarding the link between the regulations in which the duty to act is enshrined and its application as an incriminating factor in cases of non-compliance addresses the legitimate concern of the coherence of the international law of criminal liability.

### (c) Equivalence of omission and commission

**38.** Liability for commission by omission rests on the assumption that its effects[113] may be assimilated with the effects of the commission of a crime. However, is liability for omission really *equivalent* to liability for commission? This question was tentatively answered in the affirmative by Article 28 of the Draft ICC Statute of April 1998.[114] The question is a theoretical, if not a philosophical one. But it also has practical consequences: is it wrong – or immaterial – to convict someone for omission when the label of commission better captures the essence of the conduct? Laws influenced by the German doctrine distinguish between two approaches that provide different answers to this question. According to the first approach, omission is always subsidiary to commission. According to the second approach, the judge has to select the label that 'better suits the role that the accused has played'.[115] Practically speaking, the judge may be tempted to choose the qualification of commission since liability for omission entails some additional elements that may be hard to establish. Nevertheless, the case law has sometimes indicated that the qualification of omission is the proper standard. This is particularly true in instances where both approaches would have led to consider the active conduct as predominant (or sufficient).[116] Unfortunately, the ad hoc Tribunals have not been strict in their approach, instead relying on an 'all-embracing' reasoning. On the one hand, they tried to capture encouragement and approval, correctly labelled

[111] See for this argument Berster, supra n. 90, at 632.

[112] Cassese (3rd edn), supra n. 12, at 181 who argues that '[t]o hold otherwise would allow for an unacceptable variation of the rules of ICL in different places'. This form of fragmentation has not been identified in C. Stahn and L. van den Herik's essay '"Fragmentation": Diversification and "3D" Legal Pluralism: International Criminal Law as the Jack-in-the-Box?', in L. van den Herik and C. Stahn (eds.), *The Diversification and Fragmentation of International Criminal Law* (Leiden: Nijhoff, 2012) 21–89.

[113] We use the term 'effects' to avoid the use of the term 'result', which is a technical term distinguishing a special class of crimes (i.e. result crimes; see below para. 40).

[114] *Report of the Preparatory Committee*, supra n. 15, at 54: 'A person may be criminally responsible and liable for punishment for an omission . . . where: [variant A] the result of the omission corresponds to the result of a crime committed by means of an act [or] [variant B] the degree of unlawfulness realized by such omission corresponds to the degree of unlawfulness to be realized by the commission of such act'. See also above para. 4 and n. 15, where Draft Article 28(2) of the ICC Statute was already reproduced in full.

[115] This theory is designated as the *Schwerpunkttheorie* in the German legal literature; cf. Noto, supra n. 104, at 194–195.

[116] A good example of a disputable labelling as omission where a commission was really at stake, often mentioned in the literature (cf. van Sliedregt, supra n. 18, at 56 and Noto, supra n. 104, at 193) is the *Akayesu* Trial Judgment, supra n. 61, para. 693, which will be discussed below (n. 134). See also the argument made by the Defence in its Preliminary Motion on Lack of Jurisdiction concerning Omission Liability of 25 March 2009 in the *Karadžić* case as dealt with in ICTY, *Karadžić*, Trial Chamber – Decision on Six Preliminary Motions Challenging Jurisdiction, IT-95-5/18-PT, 28 April 2009, paras. 16–17, and the corresponding decision, *Karadžić* Trial Judgment, supra n. 36, paras. 3501–3504.

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as commissions.[117] On the other hand, they insisted on authority as a source of a duty to act, being a characteristic of commission by omission.[118]

**39.** The equivalence between an act and an omission can be approached from a *legal* or from a *moral* point of view.[119] Under the first approach, equivalence is based on the existence of a legal norm: since no omission may lead to criminal responsibility without the existence of a legal duty to act, the norm establishing this duty is equivalent to the specific incriminating norm in cases of action or proper omission.[120] Under the 'moral approach', omissions are considered to be as 'blameworthy' as actions.[121] Still, the blame may be directed either at the *conduct* of the alleged perpetrator or the *result* of his/her abstention to act. In reality, both approaches supplement each other. From its origin, ICL aimed to ensure 'that a conduct which constitutes a grave violation of moral standards could not be regarded as "innocent in law"'.[122] At the same time, the principle of legality imposes a strict scrutiny of the source of the legal duty whose violation triggers responsibility for omissions.

### (d) 'Causation'

**40.** Before international criminal tribunals, parties have sometimes argued that without *proof of causation* between the violation of the duty to act and the realization of the constitutive elements of the offence, liability for omissions would amount to imposing 'strict liability'.[123] It is therefore important to determine whether such a link must, in fact, be established. However, two major conceptual difficulties arise. First, what would be the *cause*? The alleged perpetrator has not done anything: *ex nihilo nihil fit*.[124] Causation may thus only be discussed in hypothetical terms: would the conduct of a perpetrator abiding

[117] Cf. *Orić* Appeal Judgment, supra n. 11, paras. 40–42; *Furundžija* Trial Judgment, supra n. 49, para. 12.

[118] The best – or worst – example are the developments in the *Brđanin* Appeal Judgment, supra n. 54, paras. 272–275, where the reader is buffeted between parts of reasoning on pure commission and parts of reasoning on the conditions of liability of commission by omission, even conflated in para. 275 with omission proper.

[119] The German and Swiss criminal codes contain an explicit 'equivalence clause' (in respectively Section 13(1) and Art. 11(3); infra n. 120).

[120] Ambos, *Treatise*, supra n. 17, at 196.

[121] Duttwiler, supra n. 5, at 4–5; citing Fletcher, *Rethinking Criminal Law* (Boston: Little Brown, 1978) at 611. The moral dimension is underlined by the imprecise English version of the 'equivalence clause' of Article 11(3) of the Swiss Penal Code (translation to English), as of 1 January 2017, available at www.admin.ch/opc/en/classified-compilation/19370083/201701010000/311.0.pdf, last consulted 1 March 2017: 'Any person who fails to comply with a duty to act is liable to prosecution only if, on the basis of the elements of the offence concerned, his conduct is, in the circumstances, as *culpable* as it would have been had he actively committed the offence' (emphasis added). Section 13(1) of the German Criminal Code (supra n. 20) sounds more 'morally neutral' and legalistic: 'Whosoever fails to avert a result which is an element of a criminal provision shall only be liable under this law if he is responsible under law to ensure that the result does not occur, and if the omission is equivalent to the realization of the *statutory elements* of the offence through a positive act' (emphasis added).

[122] Mettraux, supra n. 98, at 610, partially quoting the Opening Speech of Justice Robert H. Jackson, Chief Prosecutor for the United States of America, as reproduced in *The Trial of German Major War Criminals* (London: His Majesty's Stationery Office, 1946), at 46.

[123] See in particular *Blaškić* Appeal Judgment, supra n. 43, paras. 43 and 86, and the concise answer of the Appeals Chamber at para. 57. Strict liability is probably not the proper word here: what the ICTY is discussing in *Blaškić* is the very existence of pure *conduct crimes*. See the end of this para. and n. 113. Strict liability comes close to purely objective liability where the *mens rea* of the alleged perpetrator is not considered. However, to our knowledge, nothing in the case law of the international criminal tribunals approximates this notion.

[124] Meaning 'nothing comes from nothing'. Duttwiler, supra n. 5, at 6, who is quite sharp on this issue.

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by his/her duties to act have prevented the undesirable events from happening? This question becomes even more difficult when there are multiple duties. In this case, one would have to consider the hypothetical effects of each action available to the perpetrator as part of a wide range of rule-abiding acts, which may simply be impossible. Second, the very notion of *effect(s)* is meaningless in the case of conduct crimes, as opposed to result crimes:[125] conduct crimes are defined as crimes incriminating a certain behaviour, without the requirement of any concrete result.[126]

**41.** Without addressing these delicate issues,[127] the case law has nonetheless refrained from adopting a too strict causation requirement. Omissions must have a 'substantial effect upon the perpetration of the crime'[128] or have 'significantly contributed to the commission of the crimes involved in the joint criminal enterprise'.[129] However, 'proof of a causal relationship, in the sense of a *conditio sine qua non*, between the conduct of the aider and abettor and the commission of the crime, or proof that such conduct served as a condition precedent to the commission of the crime, is not required'.[130] This facilitates considering as punishable aiding and abetting by omission *after* the perpetration by a principal (by not punishing the principal or not submitting his/her case to a competent authority),[131] even though in such a case the substantial effect (or significant contribution) must be found in the encouragement by the *expectation* or even assurance that no action will be taken afterwards.[132] As the chance of such effect decreases with the passage of time, the *Strugar* Trial Chamber was not satisfied that an omission 'well after the offences were committed, could have a direct and substantial effect on the commission of the crime'.[133]

**42.** A cause–effect relation is considered *ex post facto*: the external observer determines whether the specific act or omission has induced a consequence. The case law of the ICTY

[125] See van Sliedregt, supra n. 18, at 54–56.

[126] See for instance 'offences of possession' according to English terminology (see A. Ashworth and J. Horder, *Principles of Criminal Law* (7th edn, Oxford: Oxford University Press, 2013), at 98), such as possession of weapons or devices that *may* be used to perpetrate an offence but whose possession already infringes criminal law. In German terminology, conduct crimes are called *schlichte Tätigkeitsdelikte*; French terminology varies (e.g. '*délits formels*' in Swiss law).

[127] For an in-depth discussion on these issues, see Ingle, supra n. 3, at 765 ss.

[128] 'The Appeals Chamber recalls that the *actus reus* of aiding and abetting consists of *acts* directed to assist . . . which have a *substantial effect* upon the perpetration of the crime' (our italics), ICTY, *The Prosecutor* v. *Blagoje Simic* Appeals Chamber Judgment, IT-95-9-A, 28 November 2006 para. 85. Already ICTY, *The Prosecutor* v. *Tihomir Blaskic,* Appeals Chamber Judgment, supra n. 43, para. 48.

[129] ICTY, *Krajišnik*, Appeals Chamber Judgment, IT-00-39-A, 17 March 2009, para. 696; *Brđanin* Appeal Judgment, supra n. 54, para. 430.

[130] *Brđanin* Appeal Judgment, supra n. 54, para. 348. See also *Furundžija* Trial Judgment, supra n. 49, para. 233; *Blaškić* Appeal Judgment, supra n. 43, para. 48; *Ndahimana* Appeal Judgment supra n. 56, para. 149; *Aleksovski* Trial Judgment, supra n. 49, para. 61. But the case law is far from consistent: see e.g. *Blaškić* Trial Judgment, supra n. 49, para. 339.

[131] *Mrkšić et al.* Appeal Judgment, supra n. 61, para. 81.; *Aleksovski* Trial Judgment, supra n. 49, para. 62.

[132] R. O'Keefe, *International Criminal Law* (Oxford: Oxford University Press, 2015), at 190 and fn. 144. Another situation is considered in the *Akayesu* Trial Judgment, supra n. 61, at para. 693; as paraphrased in the *Aleksovski* Trial Judgment, supra n. 49, at para. 64: 'the fact that the accused had *previously* provided verbal encouragement for the commission of similar acts and that his position as mayor conferred on him such authority that his *silence* in the face of crimes being committed nearby could be interpreted by the perpetrators of the rapes only as a signal of official tolerance for sexual violence' (emphasis added).

[133] ICTY, *Strugar*, Trial Chamber Judgment, IT-01-42-T, 31 January 2005, para. 355. However, as correctly noted by the Trial Chamber, this reasoning does not apply to command responsibility, as that mode of liability does not require a substantial effect on/significant contribution to the principal crime.

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Appeals Chamber has considered and vividly discussed another approach. In cases where he/she is remote from the crimes of the main perpetrator,[134] the alleged aider and abettor would only be liable when his/her assistance was directed specifically and unequivocally towards the crimes committed by the main perpetrator.[135] This so-called '*specific direction*' requirement, which has since been rejected,[136] must not be conflated with a cause–effect relation; for the latter, the observer has to analyse the sequence of events from the viewpoint of the alleged aider and abettor, thus forming an *ex ante* perspective.[137] Does the general recognition of aiding and abetting through omission help to build the case against the 'specific direction' requirement?[138] Arguably, an omission may in the same manner as a positive act be aimed at a certain objective, i.e. the commission of a crime. This additional requirement definitely makes the case harder for the prosecution;[139] but this argument as such should not be determinative in and of itself.[140]

[134] In passing, the *Perišić* Appeals Chamber adds a temporal condition to the consideration of the 'specific direction' requirement: 'significant temporal distance between the actions of an accused individual and the crime he or she allegedly assisted decreases the likelihood of a connection between that crime and the accused individual's actions' (ICTY, *Perišić*, Appeals Chamber Judgment, 28 February 2013, IT-04–81-A, para. 40, with a reference to ICTY, *Kupreškić et al.*, Appeals Chamber Judgment, IT-95-16-A, 23 October 2001, paras. 275–277).

[135] *Perišić* Appeal Judgment, supra n. 134, paras. 25–40.

[136] See ICTY, *Šainović et al.*, Appeals Chamber Judgment, IT-05-87-A, 23 January 2014, paras. 1649–1650, confirming previous judgments also rejecting the specific direction requirement: see *Mrkšić and Šljivančanin* Appeal Judgment, supra n. 61, para. 159; ICTY, *Lukić and Lukić*, Appeals Chamber Judgment, IT-98-3271-A, 4 December 2012, para. 424. This was confirmed in ICTY, *Stanišić & Simatović,* Appeals Chamber Judgment, IT-03-69-A, 9 December 2015, paras. 104–106, overturning (by a 3–2 majority) the Trial Chamber decision (i.e. ICTY, *Stanišić & Simatović,* Trial Chamber Judgment, IT-03-69-T, 30 May 2013, para. 1264). See also *Taylor* Appeal Judgment, supra n. 48, paras. 476–481.

[137] As thoroughly discussed in K. Ambos and O. Nijkam, 'Charles Taylor's Criminal Responsibility', 11 *Journal of International Criminal Justice* (2013) 789, at 805–807, neither the case law nor the individual opinion of judges has been crystal-clear on the question whether the 'specific direction' requirement, which the authors consider to be implicitly (and sometimes explicitly) present in many decisions concerning aiding and abetting, must be considered as part of the *actus reus* or *mens rea* (see also the contention of the Defence in the *Taylor* Appeal Judgment, supra n. 48, at para. 468). We consider it to be part of the *actus reus* since the determinative element is not the state of mind of the accused, but whether the external observer could have interpreted the conduct (here the absence of action) only as aiming at favouring the commission of the crime. It is especially appropriate not to rely on the state of mind of the accused when analysing an omission rather than an action. On the *travaux préparatoires* of the ICC Statute on the topic, see *Šainović et al.* Appeal Judgment, supra n. 136, paras. 1647–1648.

[138] For a positive answer, see A. Coco and T. Gal, 'Losing Direction: The ICTY Appeals Chamber's Controversial Approach to Aiding and Abetting in *Perišić*', 12 *Journal of International Criminal Justice* (2014) 345, at 362: 'the stand taken by the Appeals Chamber in *Perišić* does not fit well with aiding and abetting through omission. Omission may result in encouraging or facilitating a specific crime when there is a legal duty to act. But it is hard to construe omission – inaction – as 'specifically directed' to something. It would require the prosecutor to show that the omission *could not have resulted in anything else but the final crim*e. But failing to act, when there is a duty to do so, does not always result in the perpetration of a crime' (emphasis added).

[139] This is the main argument made by Coco and Gal, supra n. 140, at 362.

[140] In *Šainović et al.*, the ICTY Appeals Chamber, departing from the *Perišić* jurisprudence and rejecting the 'specific direction' requirement, has extensively discussed not only the ICTY and ICTR case law, but also the meaning of the wording of Article 25(3)(c) of the ICC Statute (on aiding and abetting), coming to the conclusion that '"specific direction" is not an element of aiding and abetting under customary international law' (*Šainović et al.* Appeal Judgment, supra n. 136, paras. 1648–1649). The same conclusion has been reached in the *Taylor* Appeal Judgment, supra n. 48, at para. 474 and 478.

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(e) Ability to act

**43** The '*ability to act*', which is one of the conditions of liability for (commission by) omission,[141] encompasses two aspects. Firstly, the concrete possibility for the alleged perpetrator to influence the course of events. Secondly, an adaptation to the very circumstances of the particular case. The first aspect is again related to the debate on causation and has been rather undisputed since the post-Second World War judgments.[142]

**44.** It should also be undisputed that the extent of the duty to act must be adapted to the circumstances and the context of the particular case, as no one can be held responsible for something beyond his/her control (*ultra posse nemo tenetur*). However, as regards justification of non-action due to *objective* circumstances, the approach of the case law has been rather restrictive. For instance, 'lack of resources' is an insufficient 'legal justification', at least when 'absolute legal standards' are at stake.[143] Arguments of a *subjective* nature, such as the absence of any intention to discriminate or the absence of qualified intent, have been received more positively. That was for instance the case where 'the accused [had] not . . . deliberately ordered or allowed these poor detention conditions to arise'.[144] Another argument draws on the impossibility to influence the course of events and on the alternatives to the conduct for which the accused is being blamed and prosecuted. This argument leads us back to the issue of hypothetical causality. The partial acquittal in the *Aleksovski* case illustrates the reasoning: 'the only recourse available to the accused would have been to report the situation to the judicial authorities or to resign. In either case, the situation would have remained unchanged or would have worsened for the detainees themselves.'[145] In other words, the maintained presence of the accused on the site did not expose the victims to *increased risks*.[146]

(f) Role of 'control'

**45.** One of the most contested issues in ICL concerns the so-called 'control theory' based on the German scholar C. Roxin's doctrinal constructions of *Kontrolherrschaft* (command

[141] See above para. 23.
[142] E.g. *United States of America* v. *Pohl et al. ('The Pohl Case')*, Case No. 4, Military Tribunal II (Nuremberg), 3 November 1947, *TWC (Green Series)*, Vol. V, at 1002; *USA* v. *Milch*, supra n. 32, at 774 ss; *United States of America* v. *Flick ('The Flick Case')*, Case No. 5, Military Tribunal IV (Nuremberg), 22 December 1947, *TWC (Green Series)*, Vol. VI, at 1196 ss. For a detailed analysis of this case law, see Grimminger, supra n. 4, at 139 ss.
[143] *Delalić et al.* Trial Judgment, supra n. 79, para. 1117. Duttwiler, supra n. 5, at 50 rightly wonders whether this does not amount to 'requir[ing] the impossible'. On the assessment of the 'ability to do more', see *Karadžić* Trial Judgment, supra n. 36, paras. 2500 ss.
[144] *Aleksovski* Trial Judgment, supra n. 49, paras. 215 and 221.
[145] *Alekovski* Trial Judgment, supra n. 49, para. 216; see also the doubts expressed in ICTY, *Strugar*, Trial Chamber Judgment, supra n. 135, para. 355. A parallel may be drawn with the case law on which Cassese elaborated in his dissenting opinion in ICTY, *Erdemović*, Appeals Chamber Judgment, IT-96-22-A, 7 October 1997, at para. 35: in the *Masetti* case, an Italian court held that: '[T]he possible sacrifice [of their lives] by Masetti [the accused] and his men [the members of the execution platoon] would have been in any case to no avail and without any effect . . . in that it would have had no impact whatsoever on the plight of the [two] persons to be shot, who would have been executed anyway even without him [the accused]' (original square brackets; emphasis omitted. Translation by Judge Cassese of the Decision of the Court of Assize of L'Aquila of 15 June 1948 (unpublished)). Special thanks to Marjolein Cupido for reminding me of this precedent.
[146] See on this argument (in relation with causation) Ambos, *Treatise*, supra n. 17, at 215; Ambos, 'Article 25' supra n. 17, para. 26.

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through control) and *Organisationsherrschaft* (command through an organization). The implementation of these 'control theory' constructions in the case law, of the ICC in particular, has been significant.[147] Supporters of the control theory, especially as it relates to liability for omissions, argue that it is 'the sole, all-embracing criterion to establish omission liability, encompassing causation and capacity to act'.[148] The problem here is that the control theory has mainly been used to distinguish between main participants and accessories.[149] For aiding and abetting and instigation by omission, which by definition concern accessories, the control theory serves no useful purpose. It will only be helpful to a limited extent for omission liability in general, by legitimizing the approximation of action and omission when the alleged perpetrator by omission qualifies as a main participant.[150]

### *4.3.3 Overall Assessment*

**46.** This chapter has presented a series of issues regarding which the case law of the ad hoc Tribunals is either inconsistent or not fully convincing. The former category includes the complex relations with command responsibility, the combination of aiding and abetting by omission with participation in a JCE and the variations concerning the notion of 'causation'. The best example of the latter is instigation by omission. A comprehensive norm, such as Article 28 of the draft ICC Statute of June 1998 or Section 13 of the German Criminal Code, would certainly have closed some open questions and provided a solid basis for omission liability. This basis is currently missing. Given this lacuna, the tribunals have been able to adapt the frame of liability for improper omission to the specificities of each case.[151] Such adaptability does not fit well with the exigency of predictability as part of the principle of legality. However, there is general agreement on the necessity not to leave unpunished a conduct that may not constitute positive action (commission), such as in cases when the conduct reaches a certain level of influence on the occurrence of major damage to persons or goods or on the perpetration of major crimes. There are, however, two major conceptual difficulties.

**47.** Firstly the chain of events that leads to the perpetration of major crimes is generally so complex that the delimitation between relevant and irrelevant causes is very delicate; the qualification as 'significant' (contribution) does not function as a secure line of demarcation. Secondly, the fundamental – and undisputed – requirement that a legal duty, as opposed to moral duty, be violated is a serious limitation when it comes to holding the real responsible person liable for a crime. At the same time, this limitation is a cornerstone of our *secular* criminal law.

## 4.4 Status under International Criminal Law

**48.** The quasi-universal recognition of commission by omission as a mode of liability under domestic criminal law, and the consistency of the jurisprudence of the ad hoc

[147] See Ch 3.
[148] Ambos, *Treatise*, supra n. 17, at 195, who provides a comprehensive summary of the PhD thesis by L. Berster, *Die Strafrechtliche Unterlassungsverantwortlichkeit* (Munich: Urz, 2008); see also Berster, supra n. 90, at 632 ss and Ambos, 'Article 25' supra n. 17, para. 53.
[149] Cf. van Sliedregt, supra n. 18, at 83 ss.
[150] See Berster, supra n. 90, at 632.
[151] See Zappalà, supra n. 39, at 524–525.

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Tribunals in admitting improper omission certainly raise the question as to whether the former has reached the status of a rule under international customary law. Some scholars have argued in the affirmative, considering that customary law *allows* for the admission of said rule. Yet this consideration simply means that omission 'can suffice for criminal liability'.[152] The majority of scholars do not adhere to this view, invoking the uncertainties surrounding the general conditions of this mode of liability, which have been described above.[153] Nevertheless, this argument appears unconvincing: customary law is not supposed to meet the requirements of precision and certainty that apply to written law. By approaching both sources of law in the same way, these scholars fail to recognize the differences between these sources.[154] Only through codification can customary law approximate the degree of certainty of written law. The question is then whether, even in the absence of such codification, improper omission is nevertheless customary. The practice both international and domestic appears yet dense enough. Moreover, the certainty regarding the necessity to supplement liability for actions is widespread if not universal, especially when major crimes are at stake.

### 4.5 Evidentiary Factors

**49.** The evidentiary balance of (improper) omission is ambivalent. On the one hand, the importance of the factor of authority,[155] which is relatively easy to prove, may alleviate the prosecutor's task.[156] On the other hand, compared to acts of commission, omission liability requires additional elements to be proved. First of these elements is the existence of a duty to act, which is however essentially a legal element for which reasoning is more important than the gathering of facts. Secondly, causation (or any of its related notions) must be proved, regardless of the standard that is applied; from an evidentiary point of view, this is certainly the most difficult issue.[157] To establish that the absence of any positive act has 'caused' an event, especially when considering that such an absence may persist over a long period of time, is conceptually 'adventurous' and often close to impossible.[158]

[152] Cryer, supra n. 33, at 240; see also more generally A. Pellet, 'Applicable Law', in Cassese, *Commentary*, supra n. 86, Vol. II, at 1057.
[153] E.g. F. Jeßberger, 'Omission', in Cassese, *Oxford Companion*, supra n. 66, at 446; Ambos, *Treatise*, supra n. 17, at 193–194; Boas, supra n. 42, at 207 ss, especially 220–221 (also on the unsatisfactory methodology ('declaratory lawmaking') for establishing the existence of a customary rule). For the opponents of the existence of a customary rule, the obligations to act included in the Geneva Conventions, for instance (see also above paras. 9 and 29), cannot be invoked in this debate, as these obligations address the state and not the individual. The scholars contesting the customary nature of commission by omission are divided on the question whether this form of liability should nevertheless be considered a general principle of law (for a negative answer, see Jeßberger, supra this note, at 446; for a positive answer, see Ambos, *Treatise*, supra n. 17, at 194).
[154] See e.g. Pellet, supra n. 152, at 1057 (with a rather rash attack on 'criminal lawyers, with the self-interested support of the United States', who support the opposite view, as if 'criminal lawyers' had a unified view on this issue).
[155] See above para. 14.
[156] In this sense, Zappalà, supra n. 39, at 521.
[157] See above para. 40 ss.
[158] See the developments on the 'counterfactuals' by Ingle, supra n. 3, at 764 ss.

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## 4.6 Concluding Principles

**50.** The following concluding principles can be drawn from the above analysis: improper omission supposes the violation of a legal duty to act, a duty that is not enshrined in a criminal law provision. The holder of the duty must have had the ability to act, failed to act, and this failure must have had comparable effects to those resulting from the infringement of a criminal provision in the form of an action. The main fields of application of improper omission in international law are, beyond direct commission, aiding and abetting, and participation in a JCE. The violation of a legal duty to act only qualifies as improper omission when it has had a substantial effect on (aiding and abetting) or significantly contributed (JCE) to the perpetration of a crime or to a consequence that a criminal provision aims at preventing.

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