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INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS

Seven Canons of ICC Treaty Interpretation: Making Sense of Article 25's Rorschach Blot

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Abstract

This article draws on well-established understandings of international treaty interpretation and the role of the judicial function to propose seven canons of treaty construction that may serve as the basis of a principled interpretation of the substantive law of the Rome Statute. This interpretative framework is then applied to the seemingly intractable debate within the Court and among scholars over the correct interpretation of Article 25, on modes of liability. The seven canons provide guidelines that may enable the 'Rorschach blot' of Article 25, capable of many divergent interpretations, to become uniformly and consistently understood and interpreted.

Key words

Article 25; control theory; International Criminal Court; interpretation; methodology; modes of liability; Vienna Convention

1. INTRODUCTION

As the International Criminal Court moves into its second decade of existence, questions involving the proper methodological approach to the interpretation of the Rome Statute have never been more pressing. Differences regarding the meaning of the 'policy' element in Article 7, the evidence required to constitute a 'reasonable basis' under Article 15, and the meaning of 'commission' in Article 25 have generated lively debates at the Court and amongst scholars and practitioners. The correct scope of Article 25, in particular, has led to divergent views at the Court and spawned a vast literature on modes of liability in international criminal law. This article explores the debate surrounding Article 25's meaning and proposes seven canons of ICC treaty construction that may serve as the basis of a principled interpretation of the substantive law of the Rome Statute. Building upon classic methodologies of treaty

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interpretation, these seven canons nonetheless incorporate the specificity of the Rome Statute regime, including the rules regarding sources of law in Article 21 and the legality principle in Article 22(2).

Why Article 25? First, it is particularly important for practical and expressive reasons. Its expressive function is to describe the actions of the accused that may subject him or her to potential criminal liability. In this way it may put not only the accused but also other perpetrators on notice of what behaviour is prohibited and allow the lay reader to understand what conduct the Court is pursuing. Its practical function is to permit the prosecutor, defence counsel, judges, and the accused to understand just what the individual indicted by the Court is said to have done, and to ensure that the proof adduced in a particular case establishes, beyond a reasonable doubt, the culpability of the accused. Second, like other provisions of the Statute which were negotiated and understood by individuals hailing from diverse legal traditions, Article 25 is like a legal Rorschach blot,[1] taking on a different meaning depending upon the underlying legal training, tradition, and even policy-orientation of those seeking to interpret it. Finally, there is now a well-developed – and divergent – jurisprudence from the Court on Article 25 and the issue of its interpretation is now squarely before the Appeals Chamber in the *Lubanga* case,[2] rendering this analysis particularly timely.

In *Prosecutor* v. *Thomas Lubanga Dyilo*,[3] the ICC's first completed trial and judgment, the majority relied upon a line of jurisprudence emanating from the Court's pre-trial chambers assigning a complex meaning to Article 25(3)(a), based upon Claus Roxin's 'control of the crime' theory (explored below in Section 3.3).[4] Judge Adrian Fulford took issue with the majority's analysis, arguing that its interpretation of Article 25(3)(a) was erroneous and that it had improperly imported the 'control of the crime' theory into Article 25.[5] Subsequently, in *Prosecutor* v. *Mathieu Ngudjolo Chui*,[6]

1 The 'Rorschach inkblot test' is a psychological test in which individuals are shown a series of cards, each containing a picture of an inkblot that has been folded on itself to create a mirror image. The theory suggests that a person will impose a meaning on the image (which is otherwise meaningless), thus revealing something about his or her own character and thoughts.

2 See *Prosecutor v. Thomas Lubanga Dyilo*, Mémoire de la Défense de M. Thomas Lubanga relatif à l'appel à l'encontre du « *Jugement rendu en application de l'Article 74 du Statut* » rendu le 14 mars 2012, ICC-01/04-01/06-2948-Red, A.Ch., 3 December 2012, paras. 327–38; *Prosecutor v. Thomas Lubanga Dyilo*, Prosecution's Response to Thomas Lubanga's Appeal against Trial Chamber I's Judgment Pursuant to Article 74, ICC-01/04-01/06-2969-Red, A.Ch., 18 February 2013, paras. 258–73; *Prosecutor v. Thomas Lubanga Dyilo*, Legal Representatives of Victims, V01 Team, Corrigendum of Observations on the Appeals against the Decisions Pursuant to Articles 74 and 76 of the Rome Statute, ICC-01/04-01/06-2966-Corr-tEN, A.Ch., 4 February 2013, paras. 59–71. See also the Dissenting Opinion of Judge Cuno Tarfusser to *Prosecutor v. Germain Katanga*, Judgment on the Appeal of Mr Germain Katanga Against the Decision of Trial Chamber II of 21 November 2012, entitled 'Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges Against the Accused Persons', ICC-01/04-01/07-3363, A.Ch., March 27, 2013, paras. 15–16 (noting that the Court's jurisprudence on Art. 25 is 'far from being uncontentious or settled').

3 *Prosecutor v. Thomas Lubanga Dyilo*, Judgment Pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, T.Ch.I., 14 March 2012 [hereinafter *Lubanga* Trial Judgment].

4 Ibid., at paras. 918–33, 976–1006. See, in particular, para. 999, note 2705 (citing a long line of the Court's jurisprudence in support of its view that 'the contribution of the co-perpetrator must be essential').

5 Separate Opinion of Judge Adrian Fulford to *Prosecutor v. Thomas Lubanga Dyilo*, Judgment Pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, T.Ch.I, 14 March 2012 [hereinafter *Lubanga* Trial Judgment (Fulford Opinion)].

6 *Prosecutor v. Mathieu Ngudjolo*, Judgment Pursuant to Article 74 of the Statute, ICC-01/04-02/12-4, T.Ch.II, 18 December 2012 [hereinafter *Ngudjolo* Trial Judgment].

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Judge Christine Van den Wyngaert appended a concurring opinion[7] to the decision of Trial Chamber I acquitting Ngudjolo, aligning herself with Fulford's position, upon which she substantially elaborated. The recent judgment in *Prosecutor* v. *Germain Katanga* saw Van den Wyngaert once more reiterating her position in her dissent,[8] while the majority diverged in a significant way from prevailing interpretations of Article 25.[9]

The Fulford and Van den Wyngaert opinions in *Lubanga* and *Ngudjolo* articulated the unease that many observers of the ICC's early case law had felt (including these authors) that the ICC had embarked upon a methodological approach to Article 25 that seemed to fit uneasily with the plain language of the Rome Statute, the work of the ad hoc international criminal tribunals, and customary international law. The continued debate in the *Katanga* judgment gives rise to the same concern. But given the differing views on Article 25 at the Court, it is timely to ask, what principles *should* guide the Court in its interpretative work?

This article proposes an answer, at least as regards provisions of the Statute which, like Article 25(3)(a), form part of the 'substantive' criminal law of the Rome Statute referred to in Article 22.[10] Rather than rehash the terms of what has become a highly contested and inconclusive debate, this article takes a different approach, using first principles to resolve the interpretative difficulty postulated by Article 25.

This article begins by outlining the rules and sources of law relevant to interpreting the Rome Statute and highlighting the inherent tensions between these. On the basis of this analysis, we propose seven canons of construction that may serve as the foundations of a principled interpretation of the Rome Statute. Section 3 charts the evolution of Article 25 through customary international law, the jurisprudence of the ad hoc tribunals, and the drafting of the Rome Statute, before exploring the emerging jurisprudential divisions at the ICC on this provision. Endeavouring to resolve these divisions, Section 4 applies the seven canons to Article 25(3) in particular. We conclude that it was improper for the ICC to incorporate the so-called 'control theory' into its interpretation of Article 25, regardless of the merits of that theory in describing the complexity of system criminality.[11] Indeed, doing so violates – to varying degrees – each one of the seven canons we suggest should guide the Court in

7 Concurring Opinion of Judge Christine Van den Wyngaert to *Prosecutor v. Mathieu Ngudjolo Chui*, Judgment Pursuant to Article 74 of the Statute, ICC-01/04-02/12-4, T.Ch.II, 18 December 2012 [hereinafter *Ngudjolo* Trial Judgment (Van den Wyngaert Opinion)].

8 Minority Opinion of Judge Christine Van den Wyngaert to *Prosecutor v. Germain Katanga*, Jugement rendu en application de l'article 74 du Statut, ICC-01/04-01/07-3436, T.Ch.II, 7 March 7 2014, paras. 277–81 [hereinafter *Katanga* Trial Judgment (Van den Wyngaert Opinion)].

9 *Prosecutor v. Germain Katanga*, Jugement rendu en application de l'article 74 du Statut, ICC-01/04-01/07-3436, T.Ch.II, 7 March 7 2014 [hereinafter *Katanga* Trial Judgment].

10 The analysis here is reminiscent of D. J. Bederman's influential article (which concerned the jurisprudence of the United States Supreme Court, not international courts) entitled, 'Revivalist Canons and Treaty Interpretation', (1994) 41 UCLA L. Rev. 953.

11 The merits and substance of the control theory have been discussed in depth elsewhere and are not further examined in this article. See, e.g., J. D. Ohlin, E. van Sliedregt, and T. Weigend, 'Assessing the Control-Theory', (2013) 26 LJIL 725; N. Jain, 'The Control Theory of Perpetration in International Criminal Law', (2011) 12 Chicago JIL 157; T. Weigend, 'Perpetration through an Organization: The Unexpected Career of a German Legal Concept', (2011) 9 JICJ 91; J. D. Ohlin, 'Joint Intentions to Commit International Crimes', (2010) 11 Chicago JIL 693.

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its work. We also reject the notion that Article 25(3) sets out a well-defined hierarchy of criminal participation, and six of the seven canons we propose suggest that the sharp distinction between principals and accessories is neither required by the text of the Rome Statute nor customary international law. Instead, the plain meaning of Article 25(3) suggests neither any particular hierarchy implicit in its application, nor any importation of the principal/accessory distinction from municipal law. Rather, we suggest, sub-paragraphs (a) through (d) set out various overlapping forms of criminal participation, any one of which may give rise to criminal responsibility under the Statute, responsibility that will then be assessed in terms of culpability at the sentencing stage of the proceedings.

We recognize that treaty interpretation partakes 'as much of art (the art of judgment) as of science (the science of law)'.[12] Our approach is therefore modest, drawing from well-established understandings of international treaty interpretation and the role of the judicial function. At the same time, we suggest guidelines that enable the 'Rorschach blot' of Article 25, capable of so many divergent interpretations, to become uniformly and consistently understood and interpreted, and note the utility of 'identifying and applying different hermeneutics' – including canons of construction – to different treaty regimes.[13] Moreover, it is important to note that this method does not forbid the Court from adopting a more teleological approach to elements of the Rome Statute not constrained by the application of Article 22(2), particularly the provisions of the Statute that touch upon the its nature as a constitutive document.[14] The difficulty and complexity of the Rome Statute is extraordinary, making it vital that the Court develop a consistent methodology of interpretation, particularly as regards the 'criminal code' embedded in the treaty. This will assist the Court's judiciary in being appropriately creative where the Statute leaves difficult and open-textured problems of interpretation, but help them to avoid charges of 'judicial activism' in going beyond interpretations that are foreseeable and predictable.[15] This may strengthen both the expressive value and common understanding of the Rome Statute and enhance its legitimacy in the eyes of the many constituencies it was established to serve.

12 G. Abi-Saab, 'The Appellate Body and Treaty Interpretation', in G. Sacerdoti et. al. (eds.), *The WTO at Ten: The Contributions of the Dispute Settlement System* (2006), 453 at 459.

13 C. Brölmann, 'Specialized Rules of Treaty Interpretation: International Organizations', in D. B. Hollis (ed.), *The Oxford Guide to Treaties* (2012), 507 at 508, citing J. Weiler, 'The Interpretation of Treaties: A Re-examination', (2010) 21 EJIL 507.

14 See Brölmann, *supra* note 13, at 508–9.

15 '[J]udicial creativity cannot be used to fill any conceivable gap in the law. A reasonable limitation must be found. There is a reasonable limitation in the idea that the gap in the law must be one which prevents a court from dispensing justice as it is required to do under its constituent instrument. Judicial creativity is not license for unregulated action. A view is that it was really fear of unregulated action that underlay some of the more spectacular episodes of judicial reticence in the past. In conclusion, it appears that there is a basis for holding that states, having established an international criminal court, are to be regarded as also vesting it with a power of judicial creativity.' M. Shahabuddeen, 'Judicial Creativity and Joint Criminal Enterprise', in S. Darcy and J. Powderly (eds.), *Judicial Creativity at the International Criminal Tribunals* (2010), 184 at 187.

2. The interpretative methodology of the Rome Statute

The prevailing jurisprudential interpretation of Article 25 has developed in an unconvincing manner, with scant attention paid to explicitly distilling and applying an interpretative methodology suited to the Rome Statute.[16] As the following analysis shows, traditional interpretative methodologies (including a straightforward application of the Vienna Convention on the Law of Treaties)[17] do not fit neatly with the unique characteristics of the Rome Statute.[18] After all, like the constitutive treaties of other international organizations, the Rome Statute takes the form of an international treaty, but many provisions have constitutional status, with others performing the function of legislation, in particular Articles 6 through 8 *bis*, which incorporate a criminal code within the text of the treaty itself.[19] Indeed, depending upon which provision is sought to be interpreted, a 'plain meaning', subjective, or teleological (or effective) approach may be appropriate.[20] The Rome Statute itself does not prescribe an interpretative methodology, although the thrust of Articles 21 and 22 suggest an emphasis upon textual interpretation as opposed to expansive interpretation of substantive law.[21] Moreover, the Statute includes provisions on applicable law and certain guides to the Court in interpreting the Statute, such as Article 21(3)'s admonition to apply and interpret Rome law consistently with international human rights norms. The following sections are devoted to identifying a methodological framework that can be used to interpret provisions of the Rome Statute subject to Article 22(2)'s requirement of strict construction, which we assume, as Judge van den Wyngaert did,[22] includes Article 25 in its ambit, although an argument can certainly be made that Article 25 is not part of the crime's definition

16 Perhaps responding to this criticism, which was articulated by these authors in an earlier version of this paper presented to the Court in June 2013, the majority in the *Katanga* judgment endeavours to address this in a section on interpretation found in the judgment at paras. 43–57. See *Katanga* Trial Judgment, *supra* note 9.

17 Vienna Convention on the Law of Treaties, May 23, 1969, 1155 UNTS 331 [hereinafter VCLT].

18 See generally L. Grover, 'A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court', (2010) 21 EJIL 543.

19 See generally Brölmann, *supra* note 13; L. N. Sadat, 'Crimes Against Humanity in the Modern Age', (2013) 107 AJIL 334, 372; L. N. Sadat, 'The Legacy of the ICTY: The International Criminal Court', (2003) 37 New Eng. L. Rev. 1073, 1077–8; Bederman, *supra* note 10, at 963–4 (suggesting that the methods of treaty construction applicable may depend on whether a treaty is legislative, constitutional, or contractual in character); J. Powderly, 'Judicial Interpretation at the *Ad Hoc* Tribunals: Method from Chaos', in S. Darcy and J. Powderly (eds.), *Judicial Creativity at the International Criminal Tribunals* (2010), 17–44, at 33–4 (noting that early decisions of the ad hoc Tribunals recognized the '*sui generis* nature of their respective Statutes, as neither treaties nor strictly penal statutes').

20 See, e.g., G. G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points', (1951) 28 BYIL 1. On the wide range of ill-defined interpretive methodologies historically employed in international criminal law see Grover, *supra* note 18, at 547–9 (Grover notes that the jurisprudence of the ICTY and ICTR 'contains inconsistent reasoning with references to *inter alia* the following methods of interpretation: literal, logical, contextual, purposive, effective, drafter's intent, and progressive. Human rights standards, including fairness to the accused, as well as interpretation most consistent with customary law have also been invoked as guiding considerations'.).

21 See generally A. Pellet, 'Applicable Law', in A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002), 1051; G. Bitti, 'Article 21 of the Statute of the International Criminal Court and the Treatment of Sources in the Jurisprudence of the ICC', in C. Stahn and G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (2008), 285.

22 See *Ngudjolo* Trial Judgment (Van den Wyngaert Opinion), *supra* note 7, at para. 18.

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and therefore not subject to Article 22(2)'s application.[23] This is then applied to the debate over the meaning of Article 25.

2.1. Article 21: The applicable law

Article 21 of the Rome Statute tasks the Court with applying first, the Statute itself, the Elements of Crimes and its Rules of Procedure and Evidence (Article 21(1)(a)); second, *where appropriate*, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict (Article 21(1)(b)); and third, '*failing that*',

> general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with [the] Statute and with international law and internationally recognized norms and standards. (Article 21(1)(c)).

Article 21(1)(a) is further qualified by Article 9 which identifies the Elements as a subsidiary source of law.[24] The Appeals Chamber has ruled that the application of the second and third subsidiary sources of law can only be justified where there is a lacuna in the text of the Statute.[25] There has been some debate over what constitutes the subsidiary sources referred to in paragraphs 1 (b) and (c);[26] however a general framework can be identified.

'Applicable treaties', referred to in sub-paragraph (1)(b), have been held by the Appeals Chamber[27] to include, inter alia, the Vienna Convention on the Law of Treaties (VCLT).[28] This has been criticized on the grounds that the interpretation of the Statute as an internal document of the Court is different from the interpretation of a treaty between states.[29] While a comprehensive treatment of this debate is beyond the scope of this article, it is worth noting that the VCLT is both widely recognized as a codification of customary international law and a persuasive and

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23 For the purposes of this article, we have accepted the applicability of Art. 22(2) to the interpretation of Art. 25. However, it is perhaps useful to observe that some legal systems would not treat modes of criminal responsibility in the same manner as the substantive criminal law to which they apply, and it is not obvious from the Rome Statute itself that this was the drafters' intent. A full treatment of this question, therefore, is left for another day.

24 Art. 9(1) states that 'Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties'; para. 2 of Art. 21 provides that the Court may apply principles and rules of law as interpreted in its previous decisions.

25 *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court Pursuant to Article 19 (2) (a) of the Statute of 3 October 2006, ICC-01/04-01/06-772, A.Ch., 14 December 2006, para. 34; See also W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010), 385.

26 See generally Bitti, *supra* note 21; M. M. de Guzman, 'Article 21 Applicable Law', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2008), 705–12.

27 See *Lubanga* Trial Judgment (Fulford Opinion), *supra* note 5, at para. 13 note 25 (citing various decisions of the Appeal Chamber on this point). See also Schabas, *supra* note 25, at 387.

28 Vienna Convention on the Law of Treaties, May 23, 1969, 1155 UNTS. 331.

29 See generally D. Jacobs, 'Positivism and International Criminal Law: The Principle of Legality as a Rule of Conflict Theories', in J. d'Aspremont and J. Kammerhofer (eds), *International Legal Positivism in a Post-Modern World* (forthcoming), draft manuscript available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2046311>.

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helpful rubric for the judges of the Court to apply.[30] The VCLT provides a more explicit interpretive framework than the Rome Statute itself, and for this reason reliance on it by judges and scholars seems both natural and logical. However, as discussed further in Section 2.2 below, there may be some tension between certain rules of the VCLT and their application to the criminal code within the Rome Statute.

It is generally understood that 'principles and rules of international law', as per paragraph 1(b), incorporates customary international law into the Rome Statute,[31] but as a gap filler, subsidiary to the text of the Statute itself. Thus, the possibility arises that earlier case law explicitly based upon customary international law could be contrary to the Rome Statute, which is undoubtedly why Judge Van den Wyngaert recently worried aloud that it may be impermissible for the ICC, unlike the ICTY Chambers, to 'draw [directly] on customary international law in order to interpret modes of liability under their Statute'.[32] Yet, at the same time, the Statute must be understood within the context of the rules of international humanitarian law that it codifies. For example, to understand the meaning of the word 'civilian' in Article 8(2)(b)(i) or (ii) (prohibiting attacks against the civilian population and civilian objects), one must refer to authoritative commentaries on the laws of war – the dictionary would be of limited assistance. For this reason, as noted below, it is the view of these authors that, whenever possible, ICC judges should align their jurisprudence with customary international law to avoid the fragmentation of international criminal law and its decreased legitimacy, particularly as regards referrals of situations to the Court involving ICC non-states parties that have not accepted the Court's jurisdiction explicitly.[33]

As a last resort the Court can turn to 'general principles of law derived by the Court from national laws of legal systems of the world'.[34] William Schabas suggests

30 The International Law Commission has noted that both Arts. 31 and 32 of the VCLT reflect customary international law. See United Nations, Report of the International Law Commission, Sixty-fifth Session (6 May–7 June and 8 July–9 August 2013), UN Doc. A/68/10 (2013), at 22. See also Powderly, *supra* note 19, at 34 ('The customary international law status of the Vienna rules is beyond doubt, having been confirmed by a host of international tribunals'.).

31 See de Guzman, *supra* note 26, at 706–7 (noting the view that '"principles and rules of international law" is simply an awkward reference to customary international law'. 'The inclusion of "principles … of international law" as a source of law distinct from "general principles" derived from national laws may reflect the drafters' intention to enable the Court to apply principles that are neither derived from national laws nor part of customary international law. … In interpreting the term "principles" in paragraph 1 (b), the Court therefore must resolve whether the drafters intended anything more than a redundancy that, along with "rules", refers simply to customary international law'.); Schabas, *supra* note 25, at 391 ('Of course, "principles and rules of international law" is also an invitation to apply customary international law, where appropriate.') [internal citations omitted].

32 *Ngudjolo* Trial Judgment (Van den Wyngaert Opinion), *supra* note 7, at para. 9. Judge Van den Wyngaert rejects an argument in the literature that the phrase 'unless otherwise provided' in Art. 30(1) of the Statute would allow ICC Chambers to apply customary international law for the interpretation of the modes of liability. Ibid., at note 16.

33 While it might be argued that Art. 10 of the Rome Statute is indicative of the drafters' intention to limit recourse to customary international law, the '[t]he better legal view seems to be that Art. 10 is intended to contain the influence of the Rome Statute on the development of custom but not the influence of custom on the Rome Statute for purposes of interpretation'. Grover, *supra* note 18, at 572. See also L. N. Sadat, 'Custom, Codification and Some Thoughts about the Relationship Between the Two: Article 10 of the ICC Statute', (2000) 49 DePaul L Rev 909.

34 Rome Statute, Art. 21(1)(c). See de Guzman, *supra* note 26, at 709 ('[t]his provision codifies the practice of other international courts, in particular the ICJ').

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that Article 21(1)(c) should be interpreted as 'an invitation to consult comparative criminal law as a subsidiary source of norms'.[35] The task of identifying a 'general principle of law' is exceedingly difficult given the diversity of the world's legal systems and presents its own methodological challenges.[36] However, the *Erdemovic* case suggests some guidance as to how such an analysis may be accomplished:

> [O]ur approach will necessarily not involve a direct comparison of the specific rules of each of the world's legal systems, but will instead involve a survey of those jurisdictions whose jurisprudence is, as a practical matter, accessible to us in an effort to discern a general trend, policy or principle underlying the concrete rules of that jurisdiction which comports with the object and purpose of the establishment of the International Tribunal.[37]

The Court has generally been resistant to arguments based upon national practice as a source of general principles and some delegations expressed a view during the drafting process that, 'as a matter of principle, no reference to any national law of states should be made. The Court ought to derive its principles from a general survey of legal systems and their respective laws'.[38]

2.2. The application of the VCLT to the Rome Statute, Article 22 of the Rome Statute, and the principle of legality

The 'kaleidescopic' difficulties surrounding application of the Vienna Convention notwithstanding,[39] there is significant judicial support for recourse to the VCLT when interpreting the Rome Statute. Article 31(1) requires that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose'. Article 32 provides that supplementary means of interpretation include the preparatory work of the treaty and the circumstances of its conclusion. Recourse to these tools is available when an interpretation according to Article 31 'leaves the meaning ambiguous or obscure' or 'leads to a result which is manifestly absurd or unreasonable'.[40] Although this suggests a two-step process, the International Law Commission recently proposed that '[t]he interpretation of a treaty consists of single combined operation, which places appropriate emphasis on the various means of interpretation indicated, respectively, in Articles 31 and 32'.[41]

Relying solely on rules of interpretation derived from the VCLT, however, is inappropriate within the Rome Statute system as regards the substantive law of the

35 Schabas, *supra* note 25, at 393.
36 See generally C. A. Ford, 'Judicial Discretion in International Jurisprudence: Article 38(1)(c) and "General Principles of Law"', (1994) 5 Duke J Comp & Int'l L 35, 66–80 (suggesting three possible approaches to the identification of general principles of law: comparativism, categoricism, and 'an emerging synthesis').
37 Joint Separate Opinion of Judge MacDonald and Judge Vohrah to *Prosecutor v. Drazen Erdemovic*, Judgment of the Appeals Chamber, IT-96-22-A, A.Ch., 7 October 1997, para. 57.
38 Schabas, *supra* note 25, at 394 (citing 'Report of the Working Group on Applicable Law, UN Doc. A/CONF.183/C.1/WGAL/L.2, p.2. Adopted without change by the Committee of the Whole: UN Doc. A/CONF.183/C.1/L.76/Add.2, p.17.').
39 M. Bos, 'Theory and Practice of Treaty Interpretation', in S. Davidson (ed.), *The Law of Treaties* (2004), 374.
40 VCLT, Art. 32.
41 See United Nations, Report of the International Law Commission, Sixty-fifth session (6 May–7 June and 8 July–9 August 2013), UN Doc. A/68/10 (2013), 25–6.

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Statute, as Article 22(2) explicitly incorporates the principle of legality or *nullum crimen sine lege*, providing:

> The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.

Some commentators have noted that application of the principle of legality contradicts the rules of interpretation in the VCLT in a number of circumstances,[42] such as the reference to subsequent practice in Article 31(3) potentially conflicting with the rules on non-retroactivity.[43] Moreover, referencing the 'object and purpose' of the Rome Statute can lead to interpretations of provisions that seek to protect more victims but at the expense of the rights of the accused.[44]

While it is true that the principle of legality, strictly applied, is often at odds with the teleological method of interpretation, the fact remains that ambiguities in the law must be resolved and this can only be done through judicial interpretation. Moreover, it is not possible (or appropriate) to 'elevate strict construction over every other goal of the ICC Statute, including substantive justice'.[45] Rather, what is required by the principle of legality is that a judicial interpretation is 'reasonably foreseeable' and consistent with the essence of an offence.[46] Indeed, the art of interpretation is important because 'it is impossible to foresee and point out all the particular cases that may arise'.[47] This is particularly the case with Article 25 given its relatively eclectic combination of national and international sources of law, as is further explained below. The challenge then is to balance these interpretative tensions and distill a methodological framework of interpretation that can be used to give meaning to the Rome Statute. How can the judges of the Court engage in much needed interpretative – and creative – work while avoiding the charge that they are engaged in improper judicial activism?[48]

2.3. Seven canons of ICC interpretation

Because traditional methods of treaty interpretation may not always be suited to the Rome Statute, this section suggests seven core principles or canons of ICC interpretation, applicable to the criminal code within the Statute, that is, those provisions of

42 See Powderly, *supra* note 19, at 40; Grover, *supra* note 18, at 552–8; D. Akande, 'Sources of International Criminal Law', in A. Cassese et al. (eds.), *Oxford Companion to International Criminal Justice* (2009), 41 at 44–5.

43 See Jacobs, *supra* note 29, at 32–3 of draft manuscript.

44 See Powderly, *supra* note 19, at 41–2; Jacobs, *supra* note 29, at 33–5 of draft manuscript; D. Robinson, 'The Identity Crisis of International Law', (2008) 21 LJIL 925, 933–8.

45 Grover, *supra* note 18, at 554.

46 *SW v. United Kingdom*, *Merits and Just Satisfaction*, 335-B & 335-C Eur. Ct. H.R. (ser. A), paras. 34, 36 (1995).

47 Emer de Vattel, *The Law of Nations, or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury*, B. Kapossy and R. Whatmore (eds.), 2008, 407.

48 See generally M. Shahabuddeen, 'Does the Principle of Legality Stand in the Way of Progressive Development of the Law', (2004) 2 JCIJ 1007, 1013 ('Thus, the principle of *nullum crimen sine lege* does not bar progressive development of the law, provided that the developed law retains the essence of the original crime'); B. Van Schaack, '*Crimen Sine Lege*: Judicial Lawmaking at the Intersection of Laws and Morals', (2008) 97 Geo. L.J. 119; J. Powderly, 'Distinguishing Creativity from Activism: International Criminal Law and the "Legitimacy" of Judicial Development of the Law' in W. A. Schabas, Y. McDermott, and N. Hayes (eds.), *The Ashgate Research Companion to International Criminal Law* (2013), 223.

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the Statute that must be read in light of Article 22(2). These canons endeavour to balance the inherent tensions between the principle of legality, traditional methods of interpretation, and the need to resolve ambiguities in the Rome Statute, as well as consider the ICC's important and central role in law-making as the world's first permanent international criminal court. Additionally, although Article 21(1)(a) and (b) and (c) establish, by their terms, an interpretative hierarchy, it is important to view these provisions and the canons articulated here in a holistic fashion, as it may be difficult at each stage to have a complete understanding as to a provision's meaning and proper interpretation without doing so. Thus, analogous to Article 38(1) of the Statute of the International Court of Justice, they are listed 'in the order that they would normally present themselves to the mind of an international judge', and in this way form a practical methodology, as follows:[49]

Canon 1: Fidelity to the text and reliance upon plain meaning including ordinary principles of treaty interpretation such as good faith and consideration of context should guide the Court's construction of a particular provision.

Canon 2: Provisions should be construed to be faithful to the object and purpose of the ICC Statute, consistent with the legality principle embodied in Article 22(2).

Canon 3: Where the meaning of a particular provision remains ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable, the *travaux préparatoires* may be consulted.

Canon 4: If gaps remain in the interpretation of a particular provision, the Court should look to Article 21(1)(b) sources of law, including the jurisprudence of the ad hoc international criminal tribunals, and, *failing that*, Article 21(1)(c) sources.

Canon 5: All provisions should be construed with the objective of protecting the rights of the accused and ensuring that the application of the Statute is consistent with internationally recognised human rights.

Canon 6: The interpretation adopted should enhance judicial efficiency and the effectiveness of the ICC trial system, without compromising the values expressed in Canon 5.

Canon 7: The interpretation of a particular provision should enhance the expressive and normative function of international criminal law by rendering it transparent and comprehensible and reducing opportunities for fragmentation.

Each of these canons is discussed further below, and subsequently, applied to the interpretation of Article 25, in Section 4.

49 The Permanent Court of International Justice, Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee: June 16th–July 24th 1920 (with Annexes)* (2006), 333.

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2.3.1. Canon 1: Fidelity to the text and reliance upon plain meaning including ordinary principles of treaty interpretation such as good faith and consideration of context should guide the Court's construction of a particular provision.

Consistent with Article 21(1) of the Rome Statute, the first and overriding principle of ICC interpretation should be a fidelity to the text and reliance upon the plain meaning of the words of the Statute before moving to any subsidiary sources.

Determining the 'plain meaning' of a text, however, is often easier said than done. While resort to the dictionary is sometimes useful, and was a technique employed by the judges in *Lubanga* regarding the meaning of 'enlistment' and 'conscription',[50] this is a methodology to be sparingly employed given that a text like the Rome Statute is 'authentic' or official in six languages and is a highly complex instrument with ancillary texts like the Rules of Procedure and Evidence and Elements of Crimes that complete its meaning.[51] Rare indeed will be the utility of such an exercise, and it should not be used to disguise overly expansive or restrictive interpretations of provisions that are easily understood without resort to extrinsic aides. A judge is not required 'to superimpose customary international law upon every treaty provision' but the interpreter does need to be 'sensitive to the fact that in treaty-making, no peculiar domestic construction of legal terms is contemplated or acceptable'.[52] In other words, the treaty should be read and understood against the backdrop of the international legal order from which it both emanates and to which it contributes.

This is particularly difficult at times with multilateral treaties and it may often be important to consult a provision's meaning in multiple languages,[53] as Judge Kaul did quite appropriately in the Kenya Article 15 decision determining the meaning of 'State or organisational policy' in Article 7(2)(a) of the Rome Statute.[54] Moreover, it is clear that plain meaning only exists 'in context', and that the provisions of a treaty cannot be artificially dissected out of the whole and examined. The ICC Appeals Chamber has recognized this, noting that its task is to examine the 'sub-section of the law [in question] read as a whole in conjunction with the … enactment in its entirety'.[55] In addition, 'the interpreter must fairly decide which articles are coordinate to the interpretive exercise, and which ones are not' so as to avoid creating ambiguity via structural readings 'in which the subject clause is made nonsensical by parallel readings with irrelevant provisions'.[56]

Finally, as recognized in the Vienna Convention, the Court should only move beyond the text when a plain reading of a provision leaves an 'ambiguous or obscure'

50 *Lubanga* Trial Judgment, *supra* note 3, at para. 608.
51 Rome Statute, Art. 128.
52 Bederman, *supra* note 10, at 1031.
53 See VCLT, Art. 33.
54 See Dissenting Opinion of Judge Hans-Peter Kaul to *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-1, P.T.Ch. II, 31 March 2010, paras. 37–8.
55 *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, para. 33.
56 Bederman, *supra* note 10, at 1031.

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meaning or leads to a result that is 'manifestly absurd or unreasonable'.[57] Where this is considered to be the case, judges ought to explicitly detail their reasoning.

2.3.2. Canon 2: Provisions should be construed to be faithful to the object and purpose of the ICC Statute, consistent with the legality principle embodied in Article 22(2).

Article 31 of the Vienna Convention requires not only that a treaty provision be given its 'ordinary meaning' but that this meaning should read according to the principle of 'good faith', and examined in light of the treaty's 'object and purpose'.[58] While seemingly clear, this principle of treaty interpretation is considerably more ambiguous in application, for different constituencies – or different states – may harbour conflicting views regarding the 'object and purpose' of a given treaty. With the Rome Statute, in particular, there is a certain tension between the purpose of the Court, 'to put an end to impunity for perpetrators of [atrocity] crimes and thus to contribute to the prevention of such crimes' (the object and purpose of the Court set forth in the preamble),[59] and the legality principle in Article 22(2). As noted in Section 2.2 above, many provisions of the Rome Statute are susceptible to liberal overreach if they are interpreted according to the 'object and purpose' of the Rome Statute. Yet although 'interpretation cannot camouflage expansion',[60] neither should judges craft extraordinarily rigid understandings of the Statute's more open-ended or debatable provisions, but rather interpret these in a manner consistent with the object and purpose of the Statute.

2.3.3. Canon 3: Where the meaning of a particular provision remains ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable, the travaux préparatoires may be consulted.

Recourse to the *travaux préparatoires* may be useful in resolving ambiguities in the text, but 'inherent weaknesses' in this source must be realized.[61] As Bederman notes, 'treaty-making bears little relation to the legislative process', whereby votes taken at diplomatic conferences can be 'misleading as to the consensus that actually exists around certain provisions'.[62] The International Court of Justice, and the Permanent Court before it, has generally 'refused to resort to preparatory work if the text is sufficiently clear in itself'.[63] At the same time, the Court has referred to a treaty's preparatory work 'to confirm a conclusion reached by other means'.[64] This suggests that ICC judges may examine the negotiating history of the Rome Statute, but with an eye towards confirming understandings of the text arrived at through less problematic means of analysis. The danger of relying upon individual statements

57 VCLT, Art. 32.
58 VCLT, Art. 31.
59 See, e.g., J. Klabbers, 'Some Problems Regarding the Object and Purpose of Treaties', (1997) 8 Fin. Y.B. Int'l L 138, 141.
60 Partly Dissenting Opinion of Judge Shahabuddeen to *Prosecutor v. Milomir Stakić*, Judgment of the Appeals Chamber, IT-97-24-A, A.Ch., 22 March 2006, para. 34.
61 See generally, Powderly, *supra* note 19, at 41–2.
62 Bederman, *supra* note 10, at 1032.
63 I. Brownlie, *Principles of Public International Law* (2008), 634.
64 Ibid.

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(which may represent only the views of one or two governments) necessitates that the Court 'must look for a more subtle expression of consensus'.[65] This can be achieved by focusing less on statements made by individual delegates, and 'more on consensus explications of documents and the actual evolutionary process of drafting a particular treaty clause'.[66] As the International Court of Justice famously noted in the *Lotus* case, it is relatively easy to find arguments on both sides of an interpretative question in the *travaux préparatoires* of a given treaty provision, leading it to declare that 'there is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear'.[67] To this end, emphasis should be placed upon using the *travaux préparatoires* to confirm or reject a textual meaning, rather than finding a new one.

2.3.4. Canon 4: If gaps remain in the interpretation of a particular provision, the Court should look to Article 21(1)(b) sources of law, including the jurisprudence of the ad hoc international criminal tribunals, and, failing that, Article 21(1)(c) sources.

As described in Section 2.1 above, Article 21(1) sets forth a hierarchical listing of the sources of law that can be used by the Court. Treaties, customary international law and general principles of law are, in theory, secondary to the textual analysis described in the first three canons listed above. At the same time, the analysis of a particular provision will necessarily proceed more holistically than the linear progression set forth in Article 21(1). Nonetheless, ICC judges should endeavour to explicitly justify why an Article 21(1)(b) or (c) source of law is being relied on. Presumably, the Court should only move beyond the text of the Statute when a purely textual analysis leaves the meaning of a provision 'ambiguous or obscure', leads to a result that is 'manifestly absurd or unreasonable,'[68] or where the Statute is simply silent on an important question (the meaning of 'participate actively in hostilities' in Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Elements of Crimes as interpreted in *Lubanga* comes to mind).[69] Where resort to customary international law or general principles of law is deemed necessary, the Court should itself genuinely engage in this comparative legal analysis and avoid relying heavily on secondary sources and commentary or law emanating from one particular country.[70] The need to fill gaps is likely to be a frequent occurrence given the paucity of definitions in the ICC Statute itself and the constant stream of unforeseen questions the Court has faced since its inception, and it will be important for the Court to develop a consistent and credible methodology to do so. The jurisprudence of the ad hoc international criminal tribunals was explicitly based upon customary international law, and may therefore be a reserve of useful interpretative doctrine for ICC judges. Of course, to the

65 Bederman, *supra* note 10, at 1032.
66 Ibid.
67 *S.S. Lotus (France v. Turkey)*, 7 September 1927, PCIJ (Ser. A) No. 10, para. 37.
68 VCLT, Art. 32.
69 *Lubanga* Trial Judgment, *supra* note 3, at paras. 531–3.
70 See, e.g., A. Pellet, 'Article 38', in A. Zimmermann et al. (eds.), *The Statute of the International Court of Justice: A Commentary* (2006), 780 (observing a hierarchy in Art. 38); see also Joint Separate Opinion of Judge MacDonald and Judge Vohrah to *Prosecutor v. Drazen Erdemovic*, Judgment of the Appeals Chamber, IT-96-22-A, A.Ch., 7 October 1997, para. 57; *Prosecutor v. Kupreskic, et al.*, Judgment, IT-95-16-T.Ch. II, 14 January 2000, para. 591.

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extent that the jurisprudence of the tribunals was explicitly directed at interpreting their own statutes, for example, the elaboration of the doctrine of JCE, and where the ICC arguably has an explicit provision on the same subject matter (Article 25(3)(d)), ICC judges should look first to the text of the Rome Statute (Canons 1 and 2) rather than unquestioningly incorporating tribunal jurisprudence. However, in interpreting Article 25(3)(d), it would surely be relevant to consider the elaboration of JCE at the ad hoc tribunals in considering the meaning of that provision, since the concepts are clearly related.[71]

2.3.5. Canon 5: All provisions should be construed with the objective of protecting the rights of the accused and ensuring that the application of the Statute is consistent with internationally recognised human rights.

What makes interpreting the Rome Statute fundamentally different from many other treaties is that the rights of an accused are at stake. International criminal law is still a relatively new field of law and gap-filling is inevitable. At the same time, making unjustified interpretative leaps in order to 'end impunity' risks destroying the legitimacy of the endeavour by subjecting individuals to definitions of crimes that could not possibly have been foreseen. In this context, it is of utmost importance that provisions of the Statute affecting the accused's rights and liability be strictly construed to give a meaning that is predictable and reflective of the basic tenets of domestic criminal law systems. Most importantly, any interpretation must be made with an awareness of the fact that an accused cannot be found liable for conduct which was not a crime at the time of its commission,[72] meaning that retroactive criminalization via creative interpretations of the Statute must be avoided.

Article 21(3) underscores the fundamental importance the drafters of the Rome Statute attached to maintaining human rights protections in the application of the Statute, not only as regards the accused but also as regards victims and witnesses.[73] Thoughtful adherence to the admonition of this provision will allow the ICC to serve as a model for the fair administration of justice by states, and enhance not only the combat against impunity, but the building of a human rights culture in the national jurisdictions that will hear most of the cases tried in the aftermath of mass atrocities.

2.3.6. Canon 6: The interpretation adopted should enhance judicial efficiency and the effectiveness of the ICC trial system, without compromising the values expressed in Canon 5.

Overly complex or creative interpretations of the Rome Statute are bound to result in disagreement and appeals. International criminal law is, by virtue of its infancy,

71 See *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, ICC-01/04-01/06-803-tEN, P-T.Ch.I, 29 January 2007, paras. 334–5 [hereinafter *Lubanga* Confirmation Decision]; J. D. Ohlin, 'Joint Criminal Confusion', (2009) 12 New Crim L Rev 406. It would seem that jurisprudence of the ad hoc tribunals can be considered by the ICC but only within the scope and hierarchy of Art. 21 of the Rome Statute, although the relevance of 'international criminal practice' is perhaps less clear. See Bitti, *supra* note 21, at 296–9 (noting various instances in which the jurisprudence of the ad hoc tribunals was considered by the ICC).

72 Rome Statute, Art. 22(1).

73 See generally Grover, *supra* note 18, at 558–63.

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an unsettled field of law. Judges should seek to interpret the Rome Statute in a manner that does not promote litigation that is unlikely to be fruitful, and should work to promote the efficiency and transparency of the ICC trial process without sacrificing the rights of the accused. In particular, the accused has a right to 'be tried without undue delay'.[74] Thus, like the ICTY, ICC judges should consider the need to permit charging in the alternative, not just of crimes but of differing modes of liability under Articles 25 and 28.[75] This is perhaps one of the most difficult and sophisticated tasks they have been asked to accomplish as the Rome Statute includes procedural innovations not known either to national criminal justice systems or the ad hoc international criminal tribunals (like the confirmation of charges hearing required by Article 61). This might be the area in which judges are freest to fill gaps and interpret the Statute in a purposive manner (subject of course to Article 22(2)). Indeed, without taking sides in the debate between the majority and the dissent in the *Katanga*[76] case regarding the appropriateness of recharacterizing Katanga's mode of individual criminal responsibility in that case, in many national jurisdictions and in the ad hoc international criminal tribunals, it is perfectly appropriate to plead modes of liability in the alternative, and allow the court to choose the proper characterization of the accused's criminal participation after hearing the evidence at trial.[77] Had this been permitted in *Katanga*, it would have likely avoided both the delay occasioned by the recharacterization of his mode of liability and the subsequent controversy over whether he had been granted a fair and impartial trial.

2.3.7. *Canon 7: The interpretation of a particular provision should enhance the expressive and normative function of international criminal law by rendering it transparent and comprehensible and reducing opportunities for fragmentation.*

Finally, we propose that simplicity, clarity, transparency, and fairness should be the lodestar for ICC Statute interpretation. As will be shown, the breathtaking complexity of the ICC's jurisprudence on modes of liability makes it difficult for even the specialist to understand, and has given rise to an extraordinary number of academic articles debating the meaning (and appropriateness) of the case law. Even more problematic, as it now stands, the ICC is issuing arrest warrants against heads of state like Muammar Gaddafi (Libya) and Laurent Gbagbo (Côte d'Ivoire) as 'indirect co-perpetrators' of crimes committed by their own forces, suggesting they are

74 Rome Statute, Art 67(1)(c).

75 See War Crimes Research Office, American University Washington College of Law, *Regulation 55 and the Rights of the Accused at the International Criminal Court* (2013), 53–6 (recommending that the prosecution adopt a more flexible approach to charging from the outset, including charging multiple modes of liability, rather than relying on Regulation 55 later in proceedings).

76 See *Katanga* Trial Judgment, *supra* note 9; and *Katanga* Trial Judgment (Van den Wyngaert Opinion), *supra* note 8.

77 See, e.g., *Prosecutor v. Zoran Kupreškić et al.*, Judgement, Case No. IT-95-16-T, T.Ch., 14 January 14 2000, paras. 720–48; G. Boas, J. L. Bischoff, and N. L. Reid, *International Criminal Law Practitioner Library, 1: Forms of Responsibility in International Criminal Law* (2008), 382–8; R. Cryer et al., *An Introduction to International Criminal Law and Procedure* (2010), 458–60; C. Damgaard, *Individual Criminal Responsibility for Core International Crimes: Selected Pertinent Issues* (2008), 233.

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somehow less responsible than they would be if they were 'direct' perpetrators.[78] As one commentator pithily observed, 'when the ICC indicts former President Laurent Gbagbo as an indirect co-perpetrator, the BBC places the mode of liability in parentheses to mark the technocratic reference to legalese that only a small élite (who has no personal stake in the injustice) is likely to understand'.[79] This is a real problem for the Court. It is unlikely to promote the kind of normative development needed to promote international criminal justice, and does not truly express the outrage felt that a head of state has presided over the commission of atrocities against civilians.

The ICC should see itself as the permanent embodiment of the customary international law principles established in and by the ad hoc international tribunals except insofar as the Statute clearly directs it in a different direction. This will ensure the universality of the ICC Statute, which applies (through the possibility of Security Council action) to individuals living in Rome State party states and non-state party states, enhance its legitimacy, and help to strengthen and consolidate rather than fragment the application of international criminal law. The Court has occasionally suggested that it cannot look at customary international law established in the ad hoc tribunals;[80] however, unless its own Statute so requires, maintaining the coherency of international criminal law is vitally important and should be a goal embraced by the judges at the ICC, just as it has been embraced by other international courts and tribunals, such as the International Court of Justice in *Bosnia* v. *Serbia*, for example, which extensively cited the jurisprudence of the ICTY in determining whether genocide had been committed in Bosnia. [81]

It is worth noting that one can find very few examples of international courts and tribunals purposefully deciding to fragment international criminal law by opting for differing, rather than uniform, interpretation of their texts.[82] Jonathan Charney observed this phenomenon in his classic Hague Academy Lecture, noting that many international courts and tribunals share a 'coherent understanding' of the international law they have been charged with applying.[83]

3. Evolution of the concept of individual criminal responsibility and the Article 25 debate

Before considering the application of the seven canons set forth above to Article 25(3) (Section 4), it is useful to consider the evolution of this provision under customary international law, in the ad hoc international criminal tribunals (Section 3.1), and

78 See *Situation in the Libyan Arab Jamahiriya*, Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi, ICC-01/11-13, P.T.Ch.I, 27 June 2011, 6; *Situation in the Republic of Côte D'Ivoire*, Warrant of Arrest for Laurent Koudou Gbagbo, ICC-02/11-26-US-Exp, P.T.Ch.III, 23 November 2011, 5.

79 J. G. Stewart, 'The End of "Modes of Liability"', (2012) 25 LJIL 165, 212.

80 See, e.g., *Ngudjolo* Trial Judgment (Van den Wyngaert Opinion), *supra* note 7, at para. 9.

81 *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, [2007] ICJ Rep. 43.

82 One example is the decision of the *Tadić* court to reject the test articulated by the ICJ for attribution of state responsibility.

83 J. I. Charney, 'Is International Law Threatened by Multiple International Tribunals', (1999) 271 *Recueil Des Cours* 101, 347.

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during the negotiation of the Rome Statute (Section 3.2). Finally, we turn to the difficulties engendered by Article 25(3)'s complexity in the early jurisprudence of the ICC (Section 3.3).

3.1. Customary international law and the ad hoc tribunals

The principle of individual criminal responsibility means that 'no one may be held accountable for an act he has not performed or in the commission of which he has not in some way participated, or for an omission that cannot be attributed to him'.[84] Applying this seemingly simple proposition to those accused of international crimes has challenged international criminal courts and tribunals since the end of the Second World War.

References to the principle of individual criminal responsibility appeared in some international legal documents prior to the post-Second World War tribunals.[85] However, it was the Charters governing the International Military Tribunal (IMT) at Nuremberg and the International Military Tribunal for the Far East (IMTFE) at Tokyo that first set out modes of criminal responsibility, albeit 'scattered throughout the text'.[86] There is a general consensus that the IMT and IMTFE Charters and case law adopted a unitary model of attribution, which did not strictly distinguish between the perpetration of a crime (principal liability) and participation in a crime committed by a third person (accessorial liability), and did not suggest that the degree of an accused's culpability depended upon the form of criminal responsibility under which he was charged.[87] This is particularly evident in Article II(2) of Control Council Law No. 10, which provides:

> Any person ... is deemed to have *committed* a crime as defined in paragraph 1 of this Article, if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission or (e) was a member of any organization or group connected with the commission of any such crime or (f) with reference to paragraph 1 (a) if he held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or satellites or held high position in the financial, industrial or economic life of any such country.[88]

As a textual matter, this provision suggests that all forms of criminal participation were forms of 'commission' before US military tribunals, and that any distinction between principal and accessory was 'irrelevant' in practice.[89]

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84 A. Cassese, *International Criminal Law* (2008), 33.

85 E. van Sliedregt, *Individual Criminal Responsibility in International Law* (2012), 61.

86 H. Olásolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes* (2009), 20.

87 Ibid., at 20–1 (citing the work of Kai Ambos in support); A. Eser, 'Individual Criminal Responsibility', in A. Cassese, P. Gaeta, and J. Jones (eds.), *The Rome Statute of the Criminal Court: A Commentary* (2002) Vol. I, 767 at 781; Stewart, *supra* note 79, at 170 fn. 17; G. Werle, 'Individual Criminal Responsibility in Article 25 ICC Statute', (2007) 5 JICJ 953, 955.

88 Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, December 20, 1945, 3 Official Gazette Control Council for Germany 50–5 (1946) [emphasis added].

89 Hèctor Olàsolo suggests that this provision introduced the distinction between principal and accessorial liability in international criminal law. This is debatable given the plain language of the provision, which treats them both as forms of commission. In any event, he notes that 'US military tribunals acting under

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In the 1990s, the Statutes of the ICTY[90] and ICTR[91] were adopted. Article 7(1) of the ICTY Statute and Article 6(1) of the ICTR Statute state that '[a] person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in [the Statute], shall be individually responsible for the crime'. The initial understanding of these provisions suggested they follow a unitary perpetrator model because they put 'the commission of the crime on the same level and within the same category as planning, instigating, ordering, or otherwise aiding'.[92] The subsequent elaboration of the draft code of offences against the peace and security of mankind by the International Law Commission (ILC) included the modes of liability found in earlier instruments as well as the Statutes of the ICTY and ICTR separated out into sub-paragraphs, but was silent on the question of 'unitary' versus 'differentiated' modes of liability, suggesting either no view as to the same, or that customary international law continued to regard all those who commit crimes under international law as 'perpetrators' regardless of the form of their criminal participation. [93]

Recent case law from the ICTY and ICTR suggests a departure from the 'unitary' perspective previously extant under customary international law, attributing greater culpability to 'principals' than 'aiders and abettors'. This is evidenced by cases such as *Krstić*, in which the ICTY Appeals Chamber lowered the accused's sentence based upon its conclusion that he was an 'aider and abettor' rather than guilty of 'complicity' as a principal.[94] Although this issue is not entirely settled at the ICTY,[95] and discussion of the issue at the ICTR has been notably more limited, given the express reliance on customary international law by the ad hoc tribunals, it may be relevant either as evidence of an evolution in customary international law (or may simply be an interpretation of the ICTY/ICTR Statutes).

The ICTY and the ICTR treat 'common plan' liability as a primary form of commission, having developed the doctrine of joint criminal enterprise (JCE) to do so.

Allied Control Council Law No. 10 embraced a unitary model'. Olásolo, *supra* note 86, at 21. See also K. J. Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (2011), 251–4 (noting that the irrelevance of the principal/accessory distinction stemmed from the fact that 'any defendant any defendant whose actions fell within the parameters of Article II(2) was "deemed to have committed" a war crime, crime against humanity, or crime against peace'); S. Finnin, *Elements of Accessorial Modes of Liability: Article 25(3)(b) and (c) of the Rome Statute of the International Criminal Court* (2012), 16–17.

90 Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, SC Res. 827, UN SCOR 48th sess., 3217th mtg. at 1–2 (1993); 32 ILM 1159 (1993).

91 Statute of the International Criminal Tribunal for Rwanda, SC Res. 955, UN SCOR 49th sess., 3453rd mtg., UN Doc. S/Res/955 (1994); 33 ILM 1598 (1994).

92 Eser, *supra* note 87, at 781.

93 The absence of any reference to 'principals' or 'accessories' in the text of the 1996 Draft Code is notable, as is the fact that conviction under a particular mode of liability, per Art. 2(3), did not entail a different form of punishment, per Art. 3. But see Finnin, *supra* note 89, at 18 (suggesting that the enumeration of various modes of liabilities in Art. 2(3) of the 1996 Draft Code represented a 'significant departure from previous drafts' and 'a move closer to the differential participation model').

94 *Prosecutor v. Radislav Krstić*, Appeals Judgment, IT-98-33-A, A.Ch., 19 April 2004, paras. 135–44.

95 See, e.g., Separate Opinion of Judge David Hunt to *Prosecutor v. Milutonović et al.*, Decision on Dragoljub Ojdanić Motion Challenging Jurisdiction: Joint Criminal Enterprise, IT-99-37-AR72, T.Ch., 21 May 2003, para. 31 (contending that attempts to apply the principal–accomplice classification is 'unwise' because it is 'unnecessary' to categorize different types of offenders for the sentencing purposes). See also van Sliedregt, *supra* note 85, at 78.

This form of criminal responsibility was introduced by the ICTY Appeals Chamber in the *Tadić* case as a 'gap filling' measure required by the failure of the ICTY/ICTR Statute drafters to include common plan or conspiracy in the modes of liability available to those tribunals, bases of liability that were clearly present in earlier international criminal law instruments.[96] The ICTY Appeals Chamber has held that the JCE doctrine constitutes customary international law.[97] Although most commentators agree, there is no doubt that the elaboration of this form of liability by the tribunals' judiciary was one of its most controversial efforts, particularly as regards the most extended form of JCE liability, which has been widely criticized in the literature as unsupported in customary international law and insufficiently attentive to the principles of *nullum crimen sine lege* and individual culpability.[98] In other words, although many would agree that the gap-filling nature of this doctrine places it's elaboration in the 'judicial creativity' category,[99] failure to carefully adhere to a clear methodological approach in doing so has some wondering whether this wasn't more like judicial activism.[100]

Scholars are divided as to the import of this evolution at the ad hoc tribunals. Although 'the practical relevance of distinguishing between principals and accessories is limited', it is arguable that the distinction in international criminal law has 'gained importance in recent years' at least insofar as sentencing is concerned.[101] In the views of some, classifying particular forms of criminal participation as fitting into one mode of participation or another, 'serves a descriptive and conceptual or classificatory purpose only … devoid of any relevance as far as sentencing is concerned'[102] and more recently, the Special Court for Sierra Leone rejected the principal/accessory distinction for the purposes of sentencing in the Charles Taylor case, sentencing him to 50 years for 'aiding and abetting'. In finding that aiding and abetting did not generally warrant a lesser sentence, the Appeals Chamber held that the Court's Statute does not refer to or clearly establish a hierarchy of criminal participation. To find that such a hierarchy exists would, in the Appeal Chamber's view, be contrary 'to the essential requirement of individualisation that derives from the mandate of the Court, principles of individual criminal liability and the rights of the accused'.[103] So while some may argue that that the differentiated approach to

96 *Prosecutor v. Tadić*, Appeals Judgment, IT-94-1A, A.Ch., 15 July 1999, para. 190.
97 Ibid., at para. 220.
98 See generally A. M. Danner and J. S. Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law', (2005) 93 CalLRev 75; M. E. Badar, '"Just Convict Everyone!" – Joint Perpetration: From Tadić to Stakić and Back Again', (2006) 6 IntlCLR 293, at 301; J. D. Ohlin, 'Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise', (2007) 5 JCIJ 69 (2007). For a defence of JCE see A. Cassese, 'The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise', (2007) 5 JICJ 109.
99 See, e.g., Shahabuddeen, *supra* note 15, at 184–203; E. van Sliedregt, 'The Curious Case of International Criminal Liability', (2012) 10 JICJ 1171, at 1184.
100 Darryl Robinson, while not using the 'activist' label, suggests that the JCE doctrine was developed by judges of the ICTY using 'victim-focused teleological reasoning' to read in a ground of liability vastly broader than any specifically listed in Article 7(1) of the ICTY Statute. See Robinson, *supra* note 44, at 942–3.
101 van Sliedregt, *supra* note 85, at 77.
102 Cassese, *supra* note 84, at 324–5.
103 See *Prosecutor v. Charles Ghankay Taylor*, Judgment of the Appeals Chamber, SCSL-03-01-A (10766–11114), A.Ch., 26 September 2013, paras. 650–71 ('[T]he Appeals Chamber holds that the totality principle

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attributing liability is taking hold in international criminal law, it appears that the law is still in a state of flux.

3.2. Article 25 of the Rome Statute: a Rorschach blot?

Article 25 sets out a more comprehensive and detailed framework of liability than predecessor instruments and was the result of lengthy negotiations. Sub-paragraph (3)(a) introduces the concept of perpetration by commission of a crime by a person as an individual, jointly with another or through another person, while sub-paragraphs (3)(b)–(c) set out a variety of other forms of liability including ordering, soliciting, inducing, aiding and abetting. Sub-paragraphs (d), (e), and (f) provide for contributing to the commission or attempted commission of a crime by a group, incitement to genocide, and attempt. Per Saland, who chaired the Working Group on General Principles of Criminal Law throughout the ICC negotiations, has noted that the provision

> ... posed great difficulties to negotiate in a number of ways. One problem was that experts from different legal systems took strongly held positions, based on their national laws, as to the exact content of the various concepts involved. They seemed to find it hard to understand that another legal system might approach the issue in another way: e.g., have a different concept, or give the same name to a concept but with a slightly different content.[104]

While Article 25 has its origins in the work of the ILC on the Code of Crimes Against the Peace and Security of Mankind, later drafts more closely representing the final version of Article 25 were proposed by 'an informal group representing various legal systems'.[105] Indeed, the final version draws on various sources of national criminal law, including, but not limited to, German law and international treaty provisions.[106] The vast and divergent literature on Article 25 suggests it is a sort of 'Rorschach blot', in which scholars tend to see and read into the provision their own experience and understanding of criminal liability, based on their national legal system (including, admittedly, these authors).[107]

In our view, the *travaux préparatoires* do not demonstrate a clear preference for a strict principal/accessory distinction or suggest that the modes of liability listed

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exhaustively describes the criteria for determining an appropriate sentence that is in accordance with the Statute and Rules, and further holds that under the Statute, Rules and customary international law, there is no hierarchy or distinction for sentencing purposes between forms of criminal participation. The Appeals Chamber concludes that the Trial Chamber erred in law by holding that aiding and abetting liability generally warrants a lesser sentence than other forms of criminal participation.'). It is worth noting that the Appeals Chamber cited the separate opinion of Judge Fulford in *Lubanga* in support of its argument, see note 1945.

104 P. Saland, 'International Criminal Law Principles', in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (1999), 189 at 198.

105 See 'Working paper submitted by Canada, Germany, Netherlands, and the United Kingdom', UN Doc. A/AC.249/1997/WG.2/DP.1.

106 See van Sliedregt, *supra* note 85, at 64–5.

107 As Schabas notes, '[c]oncepts and words in one system did not necessarily have the same connotations as they did in others'. Schabas, *supra* note 25, at 424. M. Cherif Bassiouni similarly argues that many principles of criminal responsibility contained in the Statute reflect either a common law or civilist approach, with the choice between the two depending on the nature of diplomatic negotiations rather than a comparative legal analysis designed to 'ascertain the existence of a general principle in the major legal systems of the world, reflecting the families of legal systems'. M. Cherif Bassiouni, *Introduction to International Criminal Law: Second Revised Edition* (2013), 286–7.

in Article 25 were intended to be ranked hierarchically. Indeed, although some scholars have argued that Article 25 embodies both a differentiated and hierarchical approach to criminal participation,[108] others disagree, noting that 'it is difficult to find an unambiguous answer' to the question of what model of perpetration and participation it adopts.[109] Article 25(3) is likely a consensus provision that lacks a strong and logically cohesive theoretical underpinning of the kind that can be found in domestic jurisdictions.[110] In particular, the Statute drew the language on common plan liability in paragraph 3(d) from the International Convention for the Suppression of Terrorist Bombings[111] to avoid divisive discussions about incorporating the concept of conspiracy, which was rejected by most states parties.[112]

3.3. Emerging divisions at the ICC

The ICC has struggled to give substantive content to Article 25 from its earliest days, with sub-paragraph (a) ('commission') receiving the most attention. As will be shown, early pre-trial chamber decisions set the course for the ICC's jurisprudence on Article 25, often with very little reasoning. There is, however, growing discontent within the Court regarding both the substantive law on Article 25 and the interpretative methodology used to justify it.

3.3.1. Pre-trial chamber decisions

In an early arrest warrant decision in the *Lubanga* case in 2006,[113] Pre-Trial Chamber I stated – without citing any authorities in support -– that there is a distinction

108 See generally K. Ambos, 'Article 25: Individual Criminal Responsibility', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2008), 743; Werle, *supra* note 87, at 956–7. See also L. Yanev and T. Kooijmans, 'Divided Minds in the *Lubanga* Trial Judgment: A Case against the Joint Control Theory', (2013) 13 ICLR 789, at 804 (suggesting that the *travaux préparatoires* indicate that the drafters aimed to differentiate between principals and accessories on the basis that an early working paper submitted by Canada (UN Doc A/AC.249/L.4) contained a draft article on 'principals' and a separate one on 'the responsibility of other persons in the completed crimes of principals'). However, Art. 25 in its final form merges all modes of liability into the one provision and does not contain the language of 'principals' and 'the responsibility of other persons in the completed crimes of principals'. It can thus be plausibly argued that the drafters indeed *intended* to move away from a strict principal/accessory distinction by actually removing such specific language.

109 Eser, *supra* note 87, at 786–8.

110 For example, Schabas suggests, based on the drafting history of Art. 25, that 'the terms in paragraph (b) seem to be drawn from continental models, whereas those of paragraph (c) belong to the common law'. 'They should not be viewed as two different or distinct bases of liability, but rather as an effort to codify exhaustively various forms of complicity by drawing upon concepts familiar to jurists from different legal traditions.' See Schabas, *supra* note 25, at 431. Further, it has been argued by some scholars that *ordering* (under para. 3(b)) is better categorized as belonging to para. 3(a) (commission 'through another person'). See Ambos, *supra* note 108, at 765; Eser, *supra* note 87, at 797.

111 See 1997 International Convention for the Suppression of Terrorist Bombings, 2149 UNTS 256, Art. 2(3)(c).

112 'Another very divisive issue throughout the Preparatory Committee meetings was conspiracy, a concept strongly advocated by common law countries but unknown in some civil law systems. We were helped by the successful negotiations in 1997 of the Convention for the Suppression of Terrorist Bombings, which had been adopted by consensus. In Rome, it was easy to reach agreement to incorporate, with slight modifications, the text from the Convention which we now find in paragraph 3(d) of the Article 25 of the Rome Statute.' Saland, *supra* note 104, at 199–200. See also Ohlin, *supra* note 71; T. Weigend, 'Intent, Mistake of Law, and Co-Perpetration in the *Lubanga* Decision on Confirmation of Charges', (2008) 6 JICJ 471, 477–8; Werle, *supra* note 87, at 970–1, 974–5 (arguing that Art. 25(3)(d) is a subsidiary mode of participation yielding the weakest form of liability but also that it may also broadly cover acts that warranted liability under the ICTY's case law on JCE).

113 *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58, ICC-01/04-01/06-8-US-Corr, P-T.Ch.I, 10 February 2006 [hereinafter *Lubanga* Warrant of Arrest Decision].

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between (i) the commission *stricto sensu* of a crime by a person as an individual, jointly with another or through another person within the meaning of Article 25(3)(a) of the Statute, and (ii) the responsibility of superiors under Article 28 of the Statute and 'any other forms of accessory, as opposed to principal, liability provided for in article 25(3) (b) to (d) of the Statute'.[114] Curiously, it did so as a means of interpreting the word 'committed' in Article 58(1), distinguishing 'committed' in the Article 58(1) sense from 'committed *stricto sensu*' in Article 25(3)(a).[115] It adopted the view that 'the concept of indirect perpetration [...], along with that of co-perpetration based on joint control of the crime referred to in the Prosecution's Application', was 'provided for in Article 25(3)(a) of the Statute'.[116]

Subsequently, Pre-Trial Chamber I affirmed the principal/accessory distinction[117] as well as the incorporation of the 'control of the crime' theory, for which it cited the work of three scholars and the separate opinion of Judge Schomburg in the *Gacumbitsi* case, decided by the ICTR.[118] Rejecting the argument that joint criminal enterprise liability was incorporated into Article 25(3)(a), the judges opted instead for the 'control of the crime' approach, holding

> that principals to a crime are not limited to those who physically carry out the objective elements of the offence, but also include those who, in spite of being removed from the scene of the crime, control or mastermind its commission because they decide whether and how the offence will be committed.[119]

This interpretation was challenged by defence lawyers as beyond the 'clear terms' of the Statute and 'not supported by customary international law, or general principles of law derived from legal systems of the world'.[120] No doubt, defence counsel reading Judge Schomburg's opinion in *Gacumbitsi* were worried about the potential expansion of attribution to perpetrators far from the scene of the crime given his statement that this idea 'suits the needs ... of international criminal law particularly well ... [as] a means to bridge any potential physical distance from the crime scene of persons who must be regarded as main perpetrators'.[121] It was supported, however, both by the legal representatives of the victims and the prosecutor who

114 Ibid., at para. 78.
115 Ibid., at para. 77.
116 Ibid., at para. 96. It has been noted, however, that 'what the OTP [Office of the Prosecutor] formally labelled as co-perpetration based on joint control over the crime was in substance an articulation of the common purpose theory', and that the Defence complained that the OTP was 'in effect assimilating different theories'. See Yanev and Kooijmans, *supra* note 108, at 793.
117 *Lubanga* Confirmation Decision, *supra* note 71, at para. 320.
118 Ibid., at para. 322–67. See in particular fn. 418 (citing Professors Werle and Fletcher as well as Judge Schomburg) and fn. 421 (citing Professor Ambos' commentary on Article 25 in Triffterer, *supra* note 108). Normally a scholar's nationality would be irrelevant or at least not worth noting explicitly. However the work of Claus Roxin is particularly reliant upon and related to German criminal law ideas and is not accessible in many other languages, including English. Thus it is perhaps unsurprising that two of the three scholars referred to were German.
119 Ibid., at para. 330.
120 Ibid., at para. 324.
121 Separate Opinion of Judge Schomburg to *Prosecutor v. Gacumbitsi*, Judgment of the Appeals Chamber, ICTR-2001–64-A, A.Ch., 7 July 2006, para. 21 (citing Article 25(3)(a) and its interpretation by the Pre-Trial Chamber in the *Lubanga* Warrant of Arrest Decision, *supra* note 113, para. 96 in support).

argued that co-perpetration under Article 25(3)(a) best represented the criminal responsibility of the accused.[122]

Unlike JCE, which had antecedents in the Nuremberg precedent, the control theory is new to international criminal proceedings. Premised on German legal doctrine and the writings of Claus Roxin, a renowned German legal scholar,[123] it represents neither a purely subjective nor objective approach for distinguishing between principals and accessories.[124] Under this third conception, co-perpetration 'is rooted in the principle of the division of essential tasks for the purpose of committing a crime between two or more persons acting in a concerted manner'.[125] All participants 'share control because each of them could frustrate the commission of the crime by not carrying out his or her task'.[126] The Pre-Trial Chamber in *Lubanga* asserted that the control theory is applied in many legal systems,[127] but that does not appear to be the case,[128] and in any event, it neither conducted a survey of these systems nor attempted to establish that the theory constituted a 'general principle of law' under Article 21(1)(c) of the Rome Statute. Finally, the Pre-Trial Chamber did not explicitly reason that the adoption of this theory was necessary to fill a lacuna in the text of the Statute.

Following this decision, Pre-Trial Chamber I in the *Katanga/Ngudjolo* Confirmation Decision[129] examined the notion of committing a crime 'through another person' ('indirect perpetration') under Article 25(3)(a). The Pre-Trial Chamber confirmed the adoption of the control theory in *Katanga*, citing a range of secondary material to support the argument that it applied in a number of legal systems.[130] Noting that 'article 25(3)(a) uses the disjunctive "or"', the Pre-Trial Chamber reasoned that

> ... through a combination of individual responsibility for committing crimes through other persons together with the mutual attribution among the co-perpetrators at the senior level, a mode of liability arises which allows the Court to assess the blameworthiness of "senior leaders" adequately.[131]

It concluded:

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122 *Lubanga* Confirmation Decision, *supra* note 71, at para. 319.

123 See generally Ohlin et al, *supra* note 11, at 726; Jain, *supra* note 11, at 164 (Jain notes that '[t]he control theory was first systematized by Claus Roxin and is now endorsed [in Germany] by the majority of commentators, though in varying forms').

124 *Lubanga* Confirmation Decision, *supra* note 71, at para. 338.

125 Ibid., at para. 342.

126 Ibid.

127 Ibid., at para. 330 fn. 418 (the Court cites secondary material as well as a footnote in the Separate Opinion of Judge Schomburg in *Prosecutor v. Gacumbitsi*, Judgment of the Appeals Chamber, ICTR-2001-64-A, A.Ch., 7 July 2006, para. 15 fn. 30). The nature and diversity of the sources relied on in this footnote has been contested. See Yanev and Kooijmans, *supra* note 108, at 813–14.

128 See Yanev and Kooijmans, *supra* note 108, at 813–21; van Sliedregt, *supra* note 85, at 86–7; Weigend, *supra* note 11, at 105; Jain, *supra* note 11, at 184.

129 *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Confirmation of Charges, ICC-01/04-01/07-717, P-T.Ch.I, 30 September 2008 [hereinafter *Katanga/Ngudjolo* Confirmation Decision].

130 Ibid., at para. 485 fn. 647. But notably the Court did not attempt to identify these legal systems or conduct its own examination of how the control theory is supposedly applied in them. Indeed, the 'Chamber referred in fact exclusively to German and Spanish sources'. See S. Manacorda and C. Meloni, 'Indirect Perpetration *versus* Joint Criminal Enterprise', (2011) 9 JICJ 159, 170 and fn. 53.

131 Ibid., at para. 492.

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> An individual who has no control over the person through whom the crime would be committed cannot be said to commit the crime by means of that other person. However, if he acts jointly with another individual — one who controls the person used as an instrument — these crimes can be attributed to him on the basis of mutual attribution.[132]

The result was the controversial concept of 'indirect co-perpetration', 'a type of "perpetrator behind the perpetrator" liability based on control over a hierarchical organization (*Organisationsherrshaft*).'[133]

The reasoning and conclusions drawn from the *Lubanga* and *Katanga/Ngudjolo* confirmation decisions have been repeated in successive arrest warrant and confirmation of charges decisions with relatively little new analysis or critique, particularly in relation to interpretative methodology.[134]

3.3.2. The Lubanga trial judgment

The majority in *Lubanga* devoted nearly thirty-five pages of its judgment to the question of the mode of liability charged. It predicated its analysis of Article 25(3)(a) on a policy argument: that the modes of liability set out in the Statute must be interpreted in a way that allows for 'properly expressing and addressing' responsibility for crimes under the jurisdiction of the Court.[135] It suggested that the words 'jointly with another' in Article 25(3)(a) require that (1) at least two individuals are involved in the commission of the crime and (2) an agreement or common plan exists between them.[136] The majority concluded that the common plan must include 'a critical element of criminality, namely that, its implementation embodied a significant risk that, if events follow the ordinary course, a crime will be committed',[137] and that the accused must provide an 'essential contribution to the common plan'.[138] However,

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132 Ibid., at para. 493.

133 A. Cassese and P. Gaeta, *Cassese's International Criminal Law* (2013), 178. Neha Jain suggests that the theory of '*Organisationsherrshaft*' 'does not enjoy wide support in domestic legal systems, with the exception of Germany and a few Latin American states that are heavily influenced by German legal doctrine'. She notes that 'the Chamber cites Claus Roxin almost exclusively in its elucidation of the elements of the doctrine' and that 'there is considerable debate even in German academic circles about the viability of the doctrine'. See Jain, *supra* note 11, at 184–5.

134 See, e.g., *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11-382-Red, P-T.Ch.II, 23 January 2012, paras. 296–7; *Prosecutor v. William Samoei Ruto, Henry Kirpono Kosgey and Joshua Arap Sang*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11-373, P-T.Ch.II, 23 January 2012, paras. 289–92; *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Corrigendum of the Decision on the Confirmation of Charges, ICC-02/05-03/09-121-Corr-Red, P-T.Ch.I, 7 March 2011, para. 126; *Prosecutor v. Bahar Idriss Abu Garda*, Decision on the Confirmation of Charges, ICC-02/05-02/09-243-Red, P-T.Ch.I, 8 February 2010, paras. 152–7; *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, P-T.Ch.II, 15 June 2009, paras. 346–8; *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-3, P-T.Ch.I, 4 March 2009, paras. 210–13.

135 *Lubanga* Trial Judgment, *supra* note 3, at para. 976. However, the majority notes that the Rome Statute should also be interpreted in conformity with Art. 31(1) of the Vienna Convention on the Law of Treaties i.e. 'in good faith in accordance with the ordinary meaning to be given to the language of the Statute, bearing in mind the relevant context and in light of its object and purpose'. Ibid., at para. 979.

136 Ibid., at paras. 980–81.

137 Ibid., at para. 984.

138 Ibid., at para. 999.

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he need not 'be present at the scene of the crime, as long as he exercised, jointly with others, control over the crime'.[139] The majority differentiated between Article 25(3)(a) and Articles 25(3)(b)–(d), suggesting that the former embodies a form of principal liability, while paragraphs (b) to (d) attribute accessorial liability, arguing that its interpretation 'allows for the different degrees of responsibility to be properly expressed and addressed'.[140]

Judge Fulford sharply disagreed. He argued that 'the test laid down by the Pre-Trial Chamber is unsupported by the text of the Statute and it imposes an unnecessary and unfair burden on the prosecution'.[141] Indeed, in Fulford's view, paragraphs (a) to (d) of Article 25(3) were not meant to create a hierarchy of mutually exclusive forms of liability, as the majority contended. Rather, they were intended to anticipate the numerous and interconnected ways that a person might incur criminal responsibility.[142] Moreover, he rejected the notion that Article 25(3) creates a 'hierarchy of seriousness as regards the various forms of participation in a crime'.[143] He noted that such an approach might well be warranted within the German legal system (upon which the majority based its analysis) in which the sentencing range is determined by the mode of liability, but is inappropriate at the ICC where sentencing is not tied to any distinction between principals and accessories.[144] Finally, he suggested that the expression 'commits … jointly' self-evidently necessitates a 'sufficient meeting of the minds' and that there is no evidence that the Statute requires proof that the crime would *not* have been committed but for the accused's contribution,[145] thereby avoiding 'a hypothetical investigation as to how events might have unfolded without the accused's involvement (which is necessary under the 'essential contribution' formulation)'.[146]

3.3.3. The Ngudjolo trial judgment

On 18 December 2012, Trial Chamber II acquitted Mathieu Ngudjolo Chui, the alleged former leader of a Congolese rebel group involved in the Ituri conflict, of war crimes and crimes against humanity.[147] The majority did not address the proper interpretation of Article 25(3)(a) in its judgment. However, Judge Van den Wyngaert did in her separate opinion,[148] which outlined why, in her view, the control theory should be rejected by the Court. She advanced several reasons for her conclusion, which may be summarized as follows. First, she argued that the control theory is not consistent with Article 22(2) of the Statute (requiring that a definition of a crime be strictly construed) and the ordinary meaning of Article 25(3)(a). Second, she argued that the premise justifying incorporation of the control theory, that there is an alleged

139 Ibid., para.1005.
140 Ibid., at para. 999.
141 *Lubanga* Trial Judgment (Fulford Opinion), *supra* note 5, at para. 3.
142 Ibid., at para. 7.
143 Ibid., at para. 8.
144 Ibid., at para. 11.
145 Ibid., at para. 15.
146 Ibid., at para. 17.
147 *Ngudjolo* Trial Judgment, *supra* note 6.
148 *Ngudjolo* Trial Judgment (Van den Wyngaert Opinion), *supra* note 7.

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hierarchy in the modes of liability, is incorrect. Third, she contended that the control theory's treatment of the common plan as an 'objective' as opposed to 'subjective' element unduly focuses on the accused's link to the common plan as opposed to the crime; and finally, she found there to be no legal basis for the 'essential contribution' requirement imposed by the majority.[149] She concluded that 'perpetration through another person can [not] be equated to control over an organisation and ... that the notion of "indirect co-perpetration" has no legal basis in the Statute'.[150]

Judge Van den Wyngaert, like Judge Fulford, adopted a 'plain meaning' approach to Article 25(3), with some distinctions. She devoted considerable attention to justifying the interpretative methodology that guided her conclusion:[151] that for the purposes of joint perpetration under Article 25(3)(a), the contribution must be *direct*, not *essential* (as the preceding cases suggest), because '[o]nly those individuals whose acts made a direct contribution to bringing about the material elements can thus be said to have jointly perpetrated the crime'.[152] A 'direct contribution', according to Van den Wyngaert, 'is an immediate impact on the way in which the material elements of the crimes are realised'.[153] It does not, however, 'necessarily require the physical presence of the joint perpetrator on the scene of the crime and may, depending on the circumstances of the case and the nature of the crime charged, include certain forms of planning and coordination'.[154]

Judge Van den Wyngaert also rejected the Trial Chamber's interpretation of 'commission ... through another person', again opting to give the words their plain meaning. She argued that the concept of 'indirect co-perpetration', reached by combining joint perpetration and perpetration through another person, is a radical expansion of Article 25(3)(a) and inconsistent with Article 22(2) of the Statute (incorporating the principle of legality).[155]

3.3.4. The Katanga trial judgment

On 7 March 2014, the majority of Trial Chamber II found Germain Katanga guilty of complicity within the meaning of Article 25(3)(d), of one crime against humanity and four war crimes committed on 24 February 2003 during an attack on the village of Bogoro, in the Ituri district of the Democratic Republic of the Congo (DRC).[156] The majority confirmed the 'control of the crime theory' as consistent with the application of Article 25(3)(a), quoting extensively from Roxin regarding its application. At the same time, it suggested that it was not the only possible understanding of that provision, noting that '*elle estime qu'il n'y a pas lieu de faire de cette théorie un élément constitutif incontournable de la commission par l'intermédiaire*'.[157] It also found that that two forms of responsibility, 'auteur' and 'complice' (presumably translated

149 Ibid., at para. 6.
150 Ibid., at para. 67.
151 Ibid., at paras. 8–21.
152 Ibid., at para. 44.
153 Ibid., at para. 46.
154 Ibid., at para. 47.
155 Ibid., at paras. 49–64.
156 See *Katanga* Trial Judgment, *supra* note 9.
157 Ibid., at para. 1406.

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as 'principal' and 'accessory') is inherent in Article 25(3), but, unlike all previous cases, rejected that the modes of liability in Article 25(3)(a) are ordered hierarchically.[158] Finally, it simplified the test for indirect co-perpetration to a certain degree, but in so doing added yet another layer of potential confusion to the understanding of Article 25(3).[159] In sum, the majority judgment represented a significant divergence from prior ICC case law and heightens the case for revisiting Article 25 in the *Lubanga* Appeal. Judge Van den Wyngaert, in her Minority Opinion, also distanced herself from the majority's approach to recharacterizing the charges in the case[160] and reiterated her position outlined in *Ngudjolo* regarding the correct interpretation of Article 25.[161]

4. Application of the seven canons to Article 25(3)

Our analysis suggests that the majority opinions in *Lubanga* and *Katanga/Ngudjolo* (on confirmation) are methodologically flawed both as regards the reading of a hierarchical differentiated model of criminal responsibility into the text of Article 25(3) (Section 4.1) and as regards the importation of the control of the crime theory into Article 25(3)(a) (Section 4.2). Both holdings are inconsistent with Canon 1 (ordinary meaning), Canon 2 (object and purpose as constrained by the principle of legality), and Canon 3 (consultation of *travaux préparatoires*). They are not justified by a plain reading of the text, do not appear driven by the object and purpose of the Statute, may be inconsistent with the legality principle, and are not supported by a reading of the ICC's *travaux préparatoires*, which are at best inconclusive (suggesting they should not guide the Court's opinions in any event). Second, and perhaps even more problematically, these decisions and the preceding opinions upon which they are based made no effort to comply with the hierarchy of sources set forth in Article 21 (text followed by treaties, customary international law, and general principles of law) (Canon 4) and, to the extent they do consider the question, do not analyse those sources in a manner appropriate to their consideration before an international tribunal. It is possible that the superposition of a hierarchy upon the text of Article 25(3) complies with Canon 5, although it is equally plausible that the complexity introduced by the majority might work to the disadvantage of the accused and impede rather than promote the protection of human rights. This is a much greater risk as regards importation of the control theory into Article 25(3). Finally, both the establishment of a hierarchy of offences and the importation of the control of the crime theory into Article 25(3) has arguably led to a decrease in efficiency, the imposition of additional burdens on the prosecutor, fragmented international criminal law by imposing a sharp break between the practice of the ad hoc international criminal tribunals and

158 Ibid., at paras. 1383, 1384–88.
159 Ibid., at paras. 1373, 1384–88, 1400–12.
160 *Katanga* Trial Judgment (Van den Wyngaert Opinion), *supra* note 8. Van den Wyngaert was of the opinion that the Trial Chamber should have rendered its verdict under Art. 25(3)(a) and that Katanga should have been acquitted alongside Ngudjolo on 18 December 2012.
161 Ibid, at paras. 279–81. Indeed, Van den Wyangaert went further and highlighted that the Majority's rejection of the hierarchical interpretation of Art. 25(3) weakened the justification for importing the 'control over the crime' theory.

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the ICC, and created an extraordinarily complex and esoteric understanding of Article 25(3) that renders international criminal law obscure and difficult to understand (violating Canons 6 and 7). An explanation of these conclusions follows.

4.1. A hierarchy of modes of liability

Reading a hierarchy into the text of Article 25(3) seems clearly to breach six out of seven of our canons, and perhaps all seven. A plain reading of the text of Article 25, in accordance with Canons 1 and 2, does not suggest the modes of liability are intended to be hierarchal in order of gravity.[162] Certainly, there is no evidence that 'ordering' (in 25(3)(b)) is less culpable than 'committing' in 25(3)(a) or that 'common plan liability' in 25(3)(d) is less culpable than 'committing' or 'ordering'. It is possible to read 25(3)(c) (aiding and abetting) as suggesting some differentiation of culpability, but it is equally plausible to read this provision as not mandating any differentiation. It is perhaps worth observing that where the negotiators intended a provision to embody a hierarchy, they did so quite explicitly, as shown by Article 21 itself which employs the language, 'in the first place', followed by 'in the second place', followed by 'failing that'.[163] According to the contemporaneous histories of Article 25 that have been published, it was drafted to reflect a variety of overlapping modes of liability, incorporating diverse national and international models. An examination of the *travaux préparatoires*, while not particularly instructive, confirms this view and indicates that the states parties intended to create a consensus provision that reflected most common forms of criminal liability throughout the world, rather than create new forms of liability specifically suited to atrocity crimes.[164]

Likewise, the adoption by the ICC of the principle/accessory distinction is similarly not well supported, although we do not go so far as to say it is forbidden by the text of Article 25.[165] It translates poorly into the French text of the Statute (which is unsurprising since the concept is not really present in the same way in French law) and had the negotiators wished to include the words 'principal' or 'accessory' in the text, they could have done so.[166] Finally, even had they included the terminology of 'principal' and 'accessory' in the ICC Statute, it is worth observing that the Nuremberg judgment and the text of Control Council Law 10 embodied a unitary approach to culpability while still employing the terms 'principal' and 'accessory'. While this terminology appears in the jurisprudence of the ad hoc international criminal tribunals, that practice is far from uniform, and could not, in any event be adopted at the ICC unless it forms part of customary international law or general principles, an analysis that the ICC has not undertaken except to say that it is 'implicit' in the text of Article 25(3)[167] (in violation of Canon 4).

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162 See Section 3.2, *supra*, in particular note 110. See also Ohlin et al., *supra* note 11, at 744.
163 Rome Statute, Art. 21(1).
164 See Section 3.2, *supra*.
165 See Section 3.2, *supra*, in particular note 108.
166 If the drafters truly intended to draw a strict distinction between principals and accessories, such language could have been used. For example, Art. 25 of the German Criminal Code (StGB) (which broadly reflects the language in Art. 25(3)(a) of the Rome Statute) is entitled 'Principals', while 'aiding' and 'abetting' are separated out into separate sections with these titles. See Jain, *supra* note 11, at 161–2.
167 *Katanga* Trial Judgment, *supra* note 9, at para. 1386.

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It is also possible that attributing greater gravity to particular modes of liability over others risks breaching the rights of the accused (contrary to Canon 5). As the Charles Taylor case noted,[168] the seriousness of ones' offending must be judged on the facts. Sentencing on the basis of the mode of liability charged risks either attributing a sentence too high or too low depending on the circumstances. Indeed, Article 76 of the Statute, read in conjunction with Rule 145, make clear that in determining sentences, the Court shall consider all mitigating and aggravating factors and 'consider the circumstances both of the convicted person and of the crime', including the 'nature of the unlawful behavior and the means employed to execute the crime' and 'the degree of participation of the convicted person'.[169] Thus the ICC statutory scheme clearly places assessment of culpability at the end of the trial proceedings, once the evidence has been adduced and tested at trial, and not at the beginning in determining the accused's mode of liability. It is certainly more efficient to assess culpability after the evidence has been heard, than make guesses about it *ex ante*. Attempting to establish with precision the 'one' mode of liability attributable to an accused's conduct at the confirmation stage of the proceedings may be inefficient and even inappropriate given that limited evidence is available at that stage of the proceedings, contrary to Canon 6. It would seem preferable to permit the case to move forward alleging the forms of participation charged (committing, ordering, providing assistance, etc.), and then select the appropriate mode of participation established by the evidence presented at trial. Finally, reading a hierarchy or principal/accessory distinction into Article 25 does not improve the expressive or normative function of international criminal law (Canon 7).[170] Lay readers are unlikely to recognize differences between modes of liability charged and are more likely to view the sentence given and description of the requisite conduct as reflective of the seriousness of the crime.[171] Although some authors have suggested that a hierarchical understanding of Article 25 would promote 'fair labeling' and thereby have expressive value, the language and theory the Court has adopted is stunningly complex, causing scholars the world over to argue over its meaning and appropriateness, and suggesting that the educated lay reader is unlikely to understand much at all. The ICC should be seeking simplicity and universality in the labels it attaches to offenders and the prevailing interpretation of Article 25(3) does not achieve this.

168 *Prosecutor v. Charles Ghankay Taylor*, Judgment of the Appeals Chamber, SCSL-03-01-A (10766-11114), A.Ch., 26 September 2013, paras. 650–71.

169 Rome Statute, Art. 76; International Criminal Court, Rules of Procedure and Evidence, rule 145.

170 For an argument to the contrary see Ohlin et al, *supra* note 11, at 745. See also van Sliedregt, *supra* note 99, at 1182–5.

171 See Stewart, *supra* note 79, at 212 ('A differentiated model uses legal terms to express graduated degrees of blame, but there is also a danger that modes of liability need not carry any great meaning for relevant audiences, further undermining the differentiated model's expressive capacity.'). James Stewart suggests that, under a unitary model, a judgment could append a concise plain-language explanation of the accused's contribution, thereby expressing culpability more effectively than by referring to formalistic modes of liability that vary widely in meaning between jurisdictions.

4.2. The importation of the control theory

The importation of the control theory is perhaps even more problematic than the insinuation of a hierarchy into the text of Article 25(3). As Judges Fulford and Van den Wyngaert demonstrated, a plain reading interpretation of Article 25, in accordance with Canons 1 and 2, is indeed possible, albeit contestable. Yet the ICC's pre-trial chambers simply never identified why a plain reading of the text was unworkable. The prevailing interpretation of Article 25 at the ICC also exemplifies how an 'object and purpose' approach has been employed to justify an otherwise improper incorporation of an isolated legal theory in violation of the legality principle (Canon 2). As Judge Van den Wyngaert noted, '[e]ven if the "fight against impunity" is one of the over-arching *raisons d'être* of the Court which may be relevant for the interpretation of certain procedural rules, this cannot be the basis for a teleological interpretation of the articles dealing with criminal responsibility',[172] suggesting that the inclusion of Article 22(2) in the Statute applies to the definition of criminal responsibility and indeed overrides convention interpretation methods in the VCLT.[173]

Even if, for argument's sake, it is accepted that a gap in the text needed to be filled (Canon 4), the control theory is unlikely to be found either in customary international law or as a 'general principle' of law and thus unhelpful as a subsidiary gap-filling source of law.[174] The *travaux préparatoires* make no reference indicating the states parties intended that this theory be read into Article 25 (Canon 3).[175] As previously stated, if the drafting history of the provision indicates anything, it is that Article 25 was drafted to incorporate varying and overlapping modes of liability designed to satisfy the wishes of states parties who came from a raft of different legal systems. The fact that common plan liability, in paragraph 3(d), is drawn from an international treaty is further indicative of an attempt to include a form of common plan liability palatable to most states parties.[176] The effectiveness and clarity of this particular mode of liability as it is currently drafted can be debated, but it should be for the states parties (not the judiciary) to resolve whether it is appropriately meeting its goals.[177]

Finally, the importation of the control theory may compromise the rights of the accused, hamper judicial efficiency and the effectiveness of ICC proceedings, and does little for the expressive and normative function of international criminal law, contravening Canons 5–7. It is difficult to see how any accused, or many legal

172 *Ngudjolo* Trial Judgment (Van den Wyngaert Opinion), *supra* note 7, at para. 16.
173 Ibid., at para. 18.
174 See notes 130 and 133. See also Yanev and Kooijmans, *supra* note 108, at 814–21 ('Put plainly, it would appear that the broad support which Pre-Trial Chamber I has claimed for incorporating the control theory in Article 25(3) is primarily based on i) German academia, ii) the dissenting opinions of the German Judge Schomburg and iii) German law. … The control theory, in particular, has been used in some but rejected in other civil law jurisdictions, and is also alien to the common law world … [T]here is no one theory of joint perpetration which is "so fundamental that it will be found in virtually every legal system" and can therefore be seen as a general principle of law, within the meaning of Article 21(1)(c) [Rome Statute].').
175 Ibid., at 803–7.
176 See note 112 and accompanying text.
177 'Article 25(3)(d) is hopelessly tangled because no coherent interpretation of the provision is possible; the only solution is amending the statute and establishing clear liability rules for joint criminal action.' See Ohlin, *supra* note 71, at 408.

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scholars for that matter, could have predicted that Article 25 would be interpreted to incorporate an isolated theory of criminal liability, and it is hard to see how it enhances the efficiency and effectiveness of the Court's proceedings to require the prosecutor to choose between an offender's categorization as a 'direct' and 'indirect' co-perpetrator. Indeed, it is unclear why it is helpful to read the requirement of a 'common plan' into the notion of joint commission under Article 25(3)(a) when it is already included as an element in Article 25(3)(d).

Judge Shahabudeen recently observed that both joint criminal enterprise and the control theory are not universally accepted, but argues that the ICTY was being (appropriately) judicially creative when it adopted the doctrine of joint criminal enterprise.[178] While an argument can and has been made that the ICC is similarly free to adopt the control theory, it remains unclear why the ICC should depart from the significant body of law developed by the ICTY on modes of liability. As we have argued, a plain reading of Article 25 does not justify the importation of either theory, but it is particularly curious as to why the Court has decided to *specifically* depart from ICTY jurisprudence. In this sense, the prevailing interpretation of Article 25 at the ICC represents a serious fragmentation of international criminal law, and one that may not come with any real benefits.[179]

5. Conclusion

This article suggests that there are sound arguments for rejecting the prevailing interpretation of Article 25(3) at the ICC both as to the incorporation of a differential hierarchy in the sub-paragraphs of Article 25(3)(a) through (d) and its incorporation of the control theory to explain joint commission in Article 25(3)(a). Indeed, it posits that the Court's current approach is fundamentally flawed at a methodological level, and suggests an approach that is consistent with prevailing understandings of treaty hermeneutics. The efforts of the Trial Chamber in *Katanga* are important and positive steps in the rights direction, but in the views of these authors, does not go quite far enough. This article does not delve into the theoretical specifics of what a plain reading of Article 25 *should* look like, but the contributions made by Judges Fulford and Van den Wyngaert have provided significant groundwork for this debate,[180] and we have appended a table that suggests a similar outcome to the one they propose.

The seven canons of ICC interpretation outlined in this paper are designed to provide a basic framework that balances traditional methods of interpretation with the unique characteristics of the Rome Statute. Application of these canons to Article 25 should ideally lead to a simpler, more internationally acceptable and predictable understanding of modes of liability at the ICC, one that does not sharply break with the practice of the ad hoc tribunals, but remains, at the same time, faithful to the

178 Shahabuddeen, *supra* note 15, at 202–3.
179 See Ohlin et al., *supra* note 11, at 745–6 ('So far, the control-theory does not provide the limitation of liability that some expected it to bring.').
180 See also the contribution of Yanev and Kooijimans, *supra* note 108 (advocating an abandonment of the control theory and endorsing an emphasis on a 'common intent' requirement with 'intentionality').

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provisions of the ICC Statute. This approach departs from the complexity of the Court's current decisions and recognizes that it is not the Court which is tasked with elaborating novel theories (particularly after many accused had already committed their alleged crimes).

The ICC is, unlike the ad hoc tribunals, a permanent institution; the theoretical construction embarked upon in its early cases will be critical to the future effectiveness and legitimacy of international criminal law. The Court must send a clear and unified message to potential perpetrators of atrocities of what constitutes the attribution of criminal liability. The crafting of this message requires simplicity and should attract a broad international consensus. It must also keep in mind that, through the vehicle of the Security Council referral process, the Rome Statute is applied to individuals whose states have not ratified its provisions. The legitimacy of their prosecution depends upon the ICC's Statute remaining consistent with customary international law understandings of international criminality.

When the Rome Statute was negotiated, it was hoped that the blend of the common and civil law traditions incorporated into its provisions would prove a felicitous melange that would protect the rights of the accused, render the trial process efficient and transparent, and protect state sovereignty by filtering out cases that should not be brought.[181] What the past decade of ICC practice has suggested, however, is that the task of bringing the Statute to life is more arduous than previously expected. In fact, the mix of common and civil law concepts has been difficult to negotiate, and the procedural novelties of the Rome Statute (such as the introduction of the pre-trial phase) have encumbered proceedings considerably. It is hoped that this article, with its suggestion of a methodology that can assist the Court in interpreting ambiguous and open-textured provisions of the Statute's criminal code, will be of assistance as the Court continues its challenging and important work.

181 L. N. Sadat, *The International Criminal Court and the Transformation of International Law* (2002), 16–17.

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Appendix 1: *Comparing various approaches to Article 25(3)*

	Majority in *Lubanga* (T.Ch.I)[182]	Fulford in *Lubanga* (T.Ch.I)[183]	Majority in *Katanga/Ngudjolo* (P-T.Ch.I)[184]	Van den Wyngaert in *Ngudjolo* (T-Ch.II)[185]	Majority in *Katanga* (T.Ch.II)[186]	Sadat & Jolly
Clear distinction between principals (Art. 25(3)(a)) & accessories (Art. 25(3)(b)–(d))?	Yes ¶ 999	No ¶ 6–11	Yes ¶ 486	No (but noting a 'conceptual difference') ¶ 22–30, 66	Yes ('implicit') ¶ 1383–88	No
A hierarchy of seriousness read into Art. 25(3)?	Yes ¶ 995–9	No ¶ 6–11	Yes ¶	No ¶ 22–30, 66	No ¶ 1386	No
Incorporation of the 'control theory' into Art. 25(3)(a)?	Yes ¶ 999, 1003–6	No ¶ 6–12	Yes ¶ 486	No ¶ 30, 67	Yes ¶ 1406 (but not the only possible theory)	No
Is the 'control theory' a 'general principle of law'?	Not addressed.	Not necessarily. Detailed assessment needed. ¶ 10	Yes ('applied in a number of legal systems, and is widely recognised in legal doctrine') ¶ 485	'unlikely' ¶ 17	N/A	No

182 *Lubanga* Trial Judgment, *supra* note 3.
183 *Lubanga* Trial Judgment (Fulford Opinion), *supra* note 5.
184 *Katanga/Ngudjolo* Confirmation Decision, *supra* note 129.
185 *Ngudjolo* Trial Judgment (Van den Wyngaert Opinion), *supra* note 7. Note that Van den Wyngaert later reiterated this position in the *Ngudjolo* Trial Judgment (Van den Wyngaert Opinion), *supra* note 8, at paras. 277–81.
186 *Katanga* Trial Judgment, supra note 9.

Appendix 1: *Continued*

	Majority in *Lubanga* (T.Ch.I)	Fulford in *Lubanga* (T.Ch.I)	Majority in *Katanga/Ngudjolo* (P-T.Ch.I)	Van den Wyngaert in *Ngudjolo* (T-Ch.II)	Majority in *Katanga* (T.Ch.II)	Sadat & Jolly
Is a plain text reading of Art. 25 possible?	No, interprets Art. 25 'in a way that allows properly expressing and addressing the responsibility for these crimes'. ¶ 976	Yes ¶ 13–17	No	Yes ¶ 30–64	N/A	Yes
Level or type of 'contribution' under Art. 25(3)(a)?	'essential' ¶ 989-–1006	'a contribution, direct or indirect, provided there is a casual link between the individual's contribution and the crime' ¶ 16	'essential' ¶ 524–6	'a direct contribution to the realisation of the material elements of the crime' ¶ 44	N/A	'a direct or indirect contribution'
'Common plan' needed for Art. 25(3)(a) ('jointly with another')?	Yes ('common plan') ¶ 980–88	Not strictly ('coordination' i.e. 'agreement, common plan or joint understanding') ¶ 16	Yes ¶ 522–3	No ('shared intent' i.e. 'voluntarily coordinated action' necessary) ¶ 32	N/A	No
'Control over an organisation' needed for Art. 25(3)(a) ('through another person')?	N/A	N/A	Yes ¶ 510	No ¶ 49–57, 67	N/A	No
'Indirect co-perpetration' under Art. 25(3)(a)?	N/A	N/A	Yes ¶ 491	No ¶ 67	N/A	No