Secondary Forms of Genocide and Command Responsibility under the Statutes of the ICTY, ICTR and ICC

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ABSTRACT

This article examines the ways in which secondary forms of genocide and command responsibility have been integrated into the statutes of the ICTY, ICTR and ICC. These secondary forms of genocide are namely: conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide. The integration of the *Genocide Convention* into the statutes of the ICTY and ICTR and the overlaps of these provisions with those pertaining to general individual criminal responsibility have given rise to some confusion in the jurisprudence regarding the appropriate application of these provisions. Nonetheless, the decisions of the *ad hoc* tribunals have overcome the difficulties inherent in their statutes, and, as a result, the case law has contributed significantly to the development of customary international law in relation to both secondary forms of genocide and command responsibility for secondary forms of genocide. These developments, however, are not recognised in the provisions of the *Rome Statute*. Furthermore, although it may be regarded as an attempt to normalise the crime of genocide in international law, the omission in the *Rome Statute* of parts of the *Genocide Convention* leads to substantial and possibly insurmountable inconsistencies between the *Rome Statute* and customary international law.

Part One – Prior to the *Rome Statute*

A. Introduction

While there is a substantial volume of academic commentary on, and judicial consideration of, the history and development of the crime of genocide in international law, the implementation of certain provisions of the *Convention of the Prevention and Punishment of the*

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Crime of Genocide 1948 (*Genocide Convention*)[1] creates a degree of uncertainty regarding the appropriate application of these provisions. These concerns arise with the integration of the *Genocide Convention* into the statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY), [2] the International Criminal Tribunal for Rwanda (ICTR)[3] and, more recently, the International Criminal Court (ICC), [4] and their prosecution of activities that may be regarded as secondary forms of genocide. For the purposes of this paper, these 'secondary forms' of genocide are conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide. Additional concerns arise because, while the *Genocide Convention* makes no mention of the concept of superior or command responsibility, the statutes of the ICTY, ICTR and ICC all contain provisions that criminalise command responsibility for genocide.

The first part of this article examines the statutes of the ICTY and ICTR in relation to these matters, as well as any relevant judicial consideration that has been given to these provisions by those *ad hoc* tribunals. The second part considers the mechanics of the *Rome Statute* of the ICC, specifically in relation to the interaction of the articles relating to 'Genocide' (article 6, *Rome Statute*), 'Individual criminal responsibility' (article 25, *Rome Statute*) and the 'Responsibility of commanders and other superiors' (article 28, *Rome Statute*, commonly referred to as 'command responsibility'). Significantly, there have been no proceedings before the ICC as yet that have presented the Court with the opportunity to evaluate, in detail, the nature of the interaction of these provisions. This article outlines and evaluates a number of differences that exist between the relevant provisions of the statutes of the ICTY, ICTR and ICC. It also considers potential arguments that could be raised to counter any possible indictments before the ICC that rely on a combination of the articles relating to secondary forms of genocide and command responsibility.

B. The Relevant Provisions of the Genocide Convention and the Statutes of the ICTY and the ICTR

Before the adoption of the *Rome Statute*[5] in 1998, the statutes of the ICTY and the ICTR contained the most relevant and comprehensive provisions for the prosecution of acts of genocide in international criminal law. This was primarily due to their adoption, in full, of articles II and III of the *Genocide Convention.*[6] Both statutes went one step further by

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[1] *Convention of the Prevention and Punishment of the Crime of Genocide*, New York, 9 December 1948, accessed online at <http://treaties.un.org/doc/Publication/UNTS/Volume%2078/volume-78-I-1021English.pdf>.

[2] *Updated Statute of the International Criminal Tribunal for the Former Yugoslavia*, accessed online at <http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf>.

[3] *Basic Documents – Statute of the International Criminal Tribunal for Rwanda*, accessed online at <http://69.94.11.53/ENGLISH/basicdocs/statute.html>.

[4] *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) ('Rome Statute').

[5] Adopted in Rome, 17 July 1998.

[6] Article II contains the definition of the crime of genocide. It includes the requirement of specific intent to commit genocide, as well as listing a number of acts that constitute genocide. Article II is not discussed further, as the focus

[footnote continued on the next page]

introducing the concept of command responsibility for acts of genocide. It appears that at the time of the drafting of the *Genocide Convention*, the possibility of a commander being held responsible for genocide had not been considered.[7]

Article 4(3) of the statute of the ICTY and article 2(3) of the statute of the ICTR reproduce article III of the *Genocide Convention*. Articles 7(1) and 7(3) of the statute of the ICTY and articles 6(1) and 6(3) of the statute of the ICTR address forms of responsibility. These articles are identical in both statutes. The relevant provisions from the statute of the ICTY are as follows:

Article 4: Genocide

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3. The following acts shall be punishable:
   (a) genocide;
   (b) conspiracy to commit genocide;
   (c) direct and public incitement to commit genocide;
   (d) attempt to commit genocide;
   (e) complicity in genocide.

…

Article 7: Individual criminal responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.

…

3. The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.[8]

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of this article is on the secondary forms of genocide contained in article III of the *Genocide Convention* and their implementation into the statutes of the ICTY, ICTR and ICC.

[7] G Mettraux, *International Crimes and the ad hoc Tribunals*, (Oxford University Press, 2005) 261. Schabas also states that 'command responsibility in the case of genocide, as a form of criminal participation, is not contemplated by Article III of the Genocide Convention or elsewhere in the instrument', in WA Schabas, *Genocide in International Law – The Crime of Crimes*, (Cambridge University Press, 2000) 305-6.

[8] For the purposes of this paper, all references are to the relevant articles in the statute of the ICTY as extracted here. All commentary in this paper on the provisions of the statute of the ICTY applies equally to the statute of the ICTR except where otherwise stipulated.

1. Article 4(3) - the Genocide Provisions

In examining first the provisions on genocide in article 4(3), the question raised is whether the activities outlined in subparagraphs (b)-(e) of article 4(3) constitute crimes in and of themselves, or whether they are forms of responsibility for the more general crime of genocide.

It is asserted by the majority of commentators that the first three of these four activities - conspiracy to commit genocide, direct and public incitement to commit genocide and attempt to commit genocide—are generally understood as inchoate crimes and not forms of responsibility.[9] The case law on this point is also clear, with the ICTY recognising the 'inchoate offences relating to genocide' as 'conspiracy, direct and public incitement and attempt',[10] and the ICTR stating that 'inchoate offences … are punishable only for the crime of genocide pursuant to article 2(3)(b), (c), and (d) (of the statute)'.[11] As inchoate offences, these actions constitute crimes in and of themselves and the commission of these acts in itself, without genocide necessarily occurring, is sufficient for grounds of criminal liability. This notion can be contrasted with the concept of forms of responsibility, which are not themselves punishable but are ways of attributing criminality to a person in relation to the commission of certain acts and the possession of the relevant mental state.

The status of subparagraph (e) of article 4(3) - complicity in genocide—is different.[12] The case law strongly suggests that, unlike the other activities outlined in article 4(3), complicity in genocide is a form of responsibility and its successful prosecution does indeed rely on a finding that genocide occurred. The ICTY has confirmed on several occasions that complicity in genocide is a form of liability for the crime of genocide and not a crime in and of itself,[13] and this has been supported by judgments of the ICTR. The Trial Chamber of the ICTY in *Prosecutor v Radoslav Brdanin*[14] stated that 'genocide and complicity in genocide are two different forms of participation in the same offence'.[15] This finding was further supported in *Prosecutor v Blagojevic and Jokic*[16] and by the ICTR in *Prosecutor v Jean-Paul Akayesu*.[17]

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[9] G Boas, JL Bischoff and NL Reid, *International Criminal Law Practitioner Library, Volume 1 – Forms of Responsibility in Criminal Law*, (Cambridge University Press, 2007) 282-84. Specifically, the authors assert that, '(i)t is relatively uncontroversial that conspiracy to commit genocide, direct and public incitement to commit genocide, and attempt to commit genocide are inchoate crimes and not forms of responsibility. Several chambers of both Tribunals have made explicit statements to this effect, and there appears to be considerable support for this proposition in the scholarly literature'. This is supported by W.A. Schabas, *The UN International Criminal Tribunals, The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press, 2006) 179; and also in Schabas, above n 8, 257.

[10] *Prosecutor v Radoslav Brdanin (*ICTY, Case No. IT-99-36-T, 1 September 2004) 725.

[11] *Prosecutor v Semanza* (ICTR, Case No. ICTR-97-20-T, 15 May 2003) 378.

[12] For a detailed discussion on this point, see Boas, Bischoff and Reid, above n 10, 285-91.

[13] Ibid 286.

[14] ICTY, Case No. IT-99-36-T, 1 September 2004 (*Brdanin*).

[15] Ibid 725, quoting *Prosecutor v Bagilishema* (ICTR, Case No. ICTR-95-1A-T, 7 June 2001).

[16] ICTY, Case No. IT-02-60-T, 17 January 2005, 684, (*Blagojevic*): 'Since complicity in genocide … is a form of liability of the crime of genocide and not a crime itself'.

[17] ICTR, Case No. ICTR-96-4-T, 2 September 1998, 532, (*Akayesu*).

As an accused cannot be convicted of both the principal offence of genocide and of complicity in genocide in relation to the same set of facts,[18] the charge of complicity in genocide has not proven particularly significant, since, in the case law of the *ad hoc* tribunals, persons who are found guilty of complicity in genocide have generally been convicted as perpetrators of genocide.[19] In fact, relatively few chambers of either of the *ad hoc* tribunals have examined complicity in genocide in detail, including how it relates to other provisions under the relevant statutes. This is in part because prosecutors at both tribunals adopted a tendency to charge complicity in genocide as an alternative to genocide once the judgments of the tribunals began to suggest that a successful prosecution for complicity rested on finding that genocide had taken place.[20]

2. Article 7 - the Provisions on Individual Criminal Responsibility

There is a degree of overlap in the provisions of the ICTY and ICTR statutes in that they incorporate the provisions of article III of the *Genocide Convention* within the definition of the crime of genocide (article 4 (ICTY) and article 2 (ICTR)) and also contain a general provision addressing criminal participation (article 7 (ICTY) and article 6 (ICTR)). Several commentators have explained this overlap as resulting from inadvertence on the part of the drafters of the documents, or as an 'innocent consequence of the verbatim incorporation'[21] of article III of the *Genocide Convention* into the statutes.

Nonetheless, the result is a not insubstantial level of judicial and academic uncertainty in at least three areas: (i) the relationships and distinctions that may exist between charges laid solely under article 4(3) or under a combination of article 4(3) and article 7(1); (ii) the possibility of a broadening of the range of activity that may be criminalised under the combination of article 4(3) and article 7(1); and, (iii) the extent to which there may be an overlap of article 7(1) and article 7(3), and whether the same conduct may be criminalised under both these articles or if charges in relation to the same conduct under one of these articles is to be preferred over the other.

(a) The relationships and distinctions that may exist between charges laid solely under article 4(3) or under a combination of article 4(3) and article 7(1)

There is a degree of uncertainty as to whether differences exist between, for example, charges of complicity in genocide (solely under article 4(3)(e)), aiding and abetting genocide, and genocide committed by means of a joint criminal enterprise (the latter two charges combining article 4(3) with article 7(1)).[22]

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[18] See further J. Jones and S. Powles, *International Criminal Practice* (Oxford University Press, 3rd ed., 2003) 175.
[19] Schabas, above n 10, 184.
[20] Boas, Bischoff and Reid, above n 10, 291-92.
[21] Schabas, above n 10, 183.
[22] For a detailed examination of the differences between complicity in genocide and aiding and abetting genocide, see Boas, Bischoff and Reid, above n 10, 291-3.

In *Prosecutor v Milomir Stakic*,[23] the ICTY Trial Chamber described the overlap between article 7(1) and article 4(3)(e) by characterising the latter as *lex specialis* and the former as *lex generalis*.[24] As such, in the event of conflict between the two provisions, the more specialised provision should take precedence. This suggests that the tribunal would favour a conviction for complicity in genocide over aiding and abetting genocide for the same conduct. Alternatively, the tribunal suggested in the same case that the forms of responsibility in article 7(1) could be 'read into' article 4(3).[25]

In contrast, the ICTY Appeal Chamber in *Prosecutor v Krstic*[26] appears to have altered the findings of the Trial Chamber in *Stakic*. Acknowledging the two alternative interpretations posited in *Stakic*, the Appeal Chamber provided a third alternative:

> [The Appeals Chamber] may not conclude that the consequent overlap between Article 7(1) and 4(3)(e) is a result of an inadvertence on the part of the legislator where another explanation, consonant with the language used by the Statute, is possible. In this case, the two provisions can be reconciled, because the terms 'complicity' and 'accomplice' may encompass conduct broader than that of aiding and abetting.[27]

Further, the Appeal Chamber in *Krstic* drew a distinction between the charges of aiding and abetting genocide and complicity in genocide on the basis of intent.[28] The decision of the Appeal Chamber suggests that, where the individual charged possesses a specific intent to destroy in whole or in part a protected group, the appropriate charge is complicity in genocide.[29] However, where the individual charged is aware of the specific intent of the perpetrator but did not share that intent, the appropriate charge is that of aiding and abetting genocide.[30] This distinction is more coherent and convincing than the vague division between *lex specialis* and *lex generalis*, and it appears to surmount the theoretical difficulties created by the overlap between article 4(3) and article 7(1)—at least in this case.

As a general principle, then, where it can be shown that the individual charged acted with the specific intent to destroy in whole or in part a protected group, charges should be laid under the relevant provisions of article 4(3). However, where the specific intent of the individual charged is less certain, charges should be laid under a combination of article 4(3) and article 7(1).

> (b) The possibility of a broadening of the range of activity that may be criminalised under the combination of article 4(3) and article 7(1)

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[23] ICTY, Case No. IT-97-24-T, 31 July 2003 (*Stakic*).
[24] Ibid 531.
[25] Ibid.
[26] ICTY, Appeals Chamber, Case No. IT-98-33-A, 19 April 2004, discussed in Boas, Bischoff and Reid, above n 10, 296-7.
[27] Ibid 139, quoted in Boas, Bischoff and Reid, above n 10, 297.
[28] Ibid 140.
[29] Ibid 142.
[30] Ibid 140.

The combination of article 4(3) and article 7(1) raises the possibility that actions which may be associated with—but do not fall directly under - those activities prescribed under articles 4(3)(b)-(d) may have been criminalised under the statutes of the ICTY and ICTR. In other words, the interaction between these articles suggests that, theoretically at least, there exists the possibility of charging a person with being an accomplice to an attempt to commit genocide or to any of the other inchoate crimes in articles 4(3)(b)-(d). The combination of accomplice liability and inchoate crimes, however, may lead to 'absurd results'[31] whereby, for example, planning a conspiracy to commit genocide or instigating direct and public incitement to commit genocide are characterised as criminal acts.

There is a justifiable concern that, in some cases, the combination of charges may risk violating the principle of culpability. The relationship between the accused and the crime described by certain permutations of these articles would be more remote than that appropriate for a system of criminal law. In particular, the ICTR Trial Chamber in *Akayesu* decided that there could be no complicity in an attempted genocide.[32] A similar observation was made by the Trial Chamber in *Prosecutor v Musema*:[33]

> [T]he Genocide Convention did not provide the possibility for punishment of complicity in an attempt to commit genocide, complicity in incitement to commit genocide nor complicity in conspiracy to commit genocide, all of which were, in the view of some States, too vague to be punishable under the Convention.

However, in dismissing certain combinations of the relevant articles, the case law on this issue is substantially reliant on the *travaux préparatoires* of the *Genocide Convention* and neglects to consider adequately the interaction of the provisions in the statutes. Examination of the construction of the statutes reveals that the general provision on criminal liability applies equally to genocide as well as to the other crimes within the jurisdiction of the tribunal.[34] Paradoxically, then, while the statutes of the ICTY and ICTR seek to replicate the provisions of the *Genocide Convention*, the overlapping provisions in the statutes create a situation that broadens the range of genocide-related activities that are criminalised and, therefore, is arguably at odds with the range of criminal action contemplated by the *Genocide Convention*.

However, the combination of article 4(3) and article 7(1) gives rise to several possible charges that may be deemed as falling within the scope of behaviour that is appropriately regarded as criminal, even though such behaviour, while not excluded by the *Genocide Convention*, may not have been envisaged by it. Such charges include the planning of genocide and the ordering of genocide. Further, if one adopts reasoning similar to that of the Appeal Chamber in *Krstic* discussed earlier,[35] there are certainly grounds for arguing that the differences between the *Genocide Convention* and the statutes of the tribunals may not simply be

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[31] Boas, Bischoff and Reid, above n 10, 303.

[32] Schabas, above n 8, 284.

[33] ICTR, Case No. ICTR-96-13-T, 27 January 2000 (*Musema*) discussed in Boas, Bischoff and Reid, above n 10, 302.

[34] Schabas, above n 8, 284.

[35] Relevantly, and as discussed earlier in this paper, the Appeal Chamber in *Krstic* stated at 139 that it '[m]ay not conclude that (an overlap of the provisions of the Statute) is a result of an inadvertence on the part of the legislator where another explanation, consonant with the language used by the Statute, is possible.'

dismissed as inadvertent where another explanation—in this case perhaps that the range of genocide-related activities has been justifiably broadened in those statutes—is possible.

The decision whether to lay seemingly weak and remote charges, such as planning conspiracy to commit genocide or even instigating an attempt to commit genocide, naturally rests with the prosecutor. However, the broadening of the range of activity that may be regarded as criminal can be seen as a positive and justifiable development of the law relating to genocide and as addressing the ever-increasing tendency of individuals to distance themselves from actual participation in the offence.

Further, the case law does not definitively rule out the existence of more remote charges. In *Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze v Prosecutor*,[36] as an alternative argument to the matters raised on appeal by Nahimana in relation to his conviction at trial for command responsibility for direct and public incitement to commit genocide, the prosecutor argued that the relevant acts of Nahimana could also lead to a finding of his being guilty of 'having instigated others to instigate genocide, of having aided and abetted others in instigating genocide, or having planned the instigation of genocide.'[37] Although these three characterisations of the defendant's actions may appear too remote and convoluted on which to base culpability, the Appeal Chamber did not dismiss the possibility of criminalising Nahimana's actions in such terms, finding instead that it was unnecessary to examine these modes of liability in that case.[38]

> (c) The extent to which there may be an overlap of article 7(1) and article 7(3), and whether the same conduct may be criminalised under both these articles or if charges in relation to the same conduct under one of these articles is to be preferred over the other.

Article 7(3) of the statute of the ICTY, identical to article 6(3) of the statute of the ICTR, contains the provision relating to command responsibility of superiors for the criminal activity of subordinates. While the *Genocide Convention* does not contemplate this type of liability, judicial consideration by the *ad hoc* tribunals of extending criminal liability so that it encompasses command responsibility for genocide 'indicate(s) a profound judicial malaise with the entire concept.'[39]

There is a degree of uncertainty regarding the relationship between the provisions relating to individual criminal responsibility under article 7(1) and those relating to command responsibility under article 7(3). The question raised by some commentators is whether, in situations where the conditions under both subsections are met, the accused may be found responsible for taking part in the crime *as well as* failing in his duty to prevent or punish it.[40]

There are two main lines of jurisprudence on this issue. On the one hand, it would be illogical to convict a superior for planning, instigating or ordering the commission of a crime

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[36] ICTR, Appeals Chamber, Case No. ICTR-99-52-A, 28 November 2007 (*Nahimana*).
[37] Ibid 584.
[38] Ibid 601.
[39] Schabas, above n 8, 309.
[40] Mettraux, above n 8, 311.

under article 7(1) while simultaneously reproaching him for his failure to prevent or punish that crime under article 7(3). Alternatively, it may be posited that the responsibility under article 7(3) is an added burden specifically placed on a superior that exists in addition to any possible individual criminal responsibility under article 7(1). As such, an individual who is also a superior should be convicted under both subsections in order to reflect the totality and gravity of the criminal conduct.

The decision of the Appeal Chamber of the ICTY in *Prosecutor v Tihomir Blaskic*[41] has been interpreted as having determined that a conviction under both subsections in relation to the same conduct, while theoretically possible under the statute, would not be appropriate. Rather, an accused who meets the requirements of both subsections should be convicted pursuant to article 7(1), and his position as a superior should be regarded as an aggravating factor at sentencing.[42] The ICTR Appeal Chamber has followed the jurisprudence of the ICTY on this issue and has overturned a decision of the ICTR Trial Chamber that held the defendant liable under both subsections. The Appeal Chamber found that the ICTR Trial Chamber should have convicted the accused solely under article 6(1), and treated the accused's 'abuse of his superior position as an aggravating circumstance to be considered during sentencing.'[43]

While the possibility of concurrent convictions under subsections (1) and (3) perhaps remains, in practice it is not an issue. The prosecutor at both *ad hoc* tribunals has tended to attempt to establish liability first on the basis of individual responsibility under subsection (1) and, in the alternative, on the basis of superior responsibility under subsection (3).

C. The Jurisprudence of the ICTY and ICTR in Relation to Command Responsibility for Secondary Forms of Genocide

There have been numerous cases in the *ad hoc* tribunals examining the conditions that must be met in order to prosecute an accused for command responsibility for genocide. Fewer in number are decisions that have addressed command responsibility for the activities of subordinates where the activities of the subordinates involve secondary forms of genocide.

There is little doubt that the statutes of the *ad hoc* tribunals allow for prosecution of an accused for secondary forms of genocide on the basis of command responsibility where those secondary forms of genocide are inchoate crimes. For example, the Appeal Chamber of the ICTR in *Nahimana* examined in detail command responsibility for the crime of direct and public incitement to commit genocide. More uncertain is whether an accused may be charged with command responsibility for complicity in genocide.

In *Prosecutor v Blagojevic and Jokic,*[44] the Trial Chamber of the ICTY found that:

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[41] ICTY, Appeals Chamber, Case No. IT-95-14-A, 29 July 2004 (*Blaskic*).
[42] Mettraux, above n 8, 312 and Jones and Powles above n 19, 441-2.
[43] See *Nahimana,* above n 38, 667.
[44] ICTY, Case No. IT-02-60-T, 17 January 2005 (*Blagojevic*).

> Article 7(3) is a mode of liability that … explicitly refers to the crime within the jurisdiction of the Tribunal. Since complicity in genocide … is a form of liability for the crime of genocide and not a crime itself, Article 7(3) cannot but refer to the crime of genocide … The Trial Chamber therefore finds that command responsibility would be more appropriately pleaded under Article 4(3)(a).[45]

The Trial Chamber then proceeded to examine the superior responsibility under article 7(3) in relation to the crime of genocide itself under article 4(3)(a), not in relation to complicity in genocide under article 4(3)(e). The characterisation here of complicity in genocide as a form of liability for the crime of genocide itself—and not an inchoate crime - accords with the earlier examination and conclusion in this paper, and also reflects the general consensus in judicial and academic consideration on this matter.

The precise place of command responsibility within theories of legal culpability is unclear. It has been suggested that 'superior responsibility establishes liability for *omission*'[46] and that this liability for omission is 'unique in international criminal law'.[47] Although the exact classification of the principle of command responsibility is debatable[48], there is little doubt that command responsibility cannot be considered a crime in and of itself. As such, any charge for command responsibility requires the commission by the relevant subordinates of a crime as articulated in the relevant statute.

As discussed above, the position of complicity in genocide under article 4(3)(e) is to be distinguished from the activities listed in articles 4(3)(b)-(d) (conspiracy to commit genocide, direct and public incitement to commit genocide and attempt to commit genocide), as it is correctly described as a form of liability for genocide, and not as an inchoate crime. The reasoning in *Blagojevic* is that it is not possible to have a charge that alleges two modes of liability—i.e. command responsibility and complicity in genocide—and no actual crime. Hence, the proper charge in this case was command responsibility for the crime of genocide.

Part Two – The *Rome Statute*

A. Secondary Forms of Genocide under the Rome Statute

While the statutes of the ICTY and ICTR contain a verbatim reproduction of article III of the *Genocide Convention* and incorporate the secondary forms of genocide into the definition of the crime of genocide itself, the *Rome Statute* of the ICC merges the secondary forms of genocide into a general provision dealing with criminal participation. That article, article 25, is applicable not only to genocide, but also to the other crimes within the jurisdiction of the

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[45] Ibid 684-5.

[46] K Ambos, 'Superior Responsibility', in A Cassese, P Gaeta and JRWD Jones (eds) *The Rome Statute of the International Criminal Court, Volume 1*, (Oxford, Oxford University Press, 2002) 823-72, 850.

[47] Ibid 850.

[48] See, e.g., G Werle, *Principles of International Criminal Law*, (T.M.C. Asser Press, 2nd ed., 2009) 188-9: '[s]uperior responsibility takes its place as a subsidiary mode of participation *sui generis*. Here, criminal liability arises from failure to act despite a legal duty to do so. Hence, superior responsibility is not a specific crime of omission.'

Court.[49] This decision was apparently made 'in the belief that the modes of participation in the offences which may constitute genocide were adequately captured in the provisions set forth in article 25 of the Statute.'[50] No chamber of the ICC has yet had the opportunity to examine the application of article 25 to article 6. The relevant articles of the *Rome Statute* are as follows:[51]

> **Article 6**
> **Genocide**
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> For the purpose of this Statute, 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group.
> …

[49] Schabas notes that, 'most national penal codes do the same thing, distinguishing between general principles or a "general part", and the definition of the individual offences or the "special part"', in Schabas, above n 8, 309.

[50] G Boas, JL Bischoff and NL Reid, *International Criminal Law Practitioner Library, Volume 2 – Elements of Crimes Under International Law*, (Cambridge University Press, 2007) 199-200. This view is supported by the relevant *Travaux Préparatoires* – Committee of the Whole, Summary Record of the 3rd Meeting, held on 17 June 1998, UN Doc. A/CONF.183/C.1/SR.3, 20 November 1998, 174; Report of the Working Group on General Principles of Criminal Law, UN Doc. A/CONF/183/C.1/WGGP/L.4, 18 June 1998, 3; Report of the Drafting Committee to the Committee of the Whole, UN Doc. A/CONF.183/C.1/L.91, 16 July 1998, 2. See further H Abtahi and P Webb, *The Genocide Convention – The Travaux Préparatoires*, (Matinus Nijhoff Publishers, 2008); MC Bassiouni, *The Statute of the International Criminal Court – A Documentary History* (Transnational Publishers, 1998).

[51] *Rome Statute*, above n 5.

Article 25
Individual criminal responsibility

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3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
   (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
   (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
   (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
   (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
      (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
      (ii) Be made in the knowledge of the intention of the group to commit the crime;
   (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
   (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

It has been asserted that the fact that the *Rome Statute* does not specifically list the secondary forms of liability for genocide 'may be a positive step towards the "normalisation" of genocide as a legal concept'[52] and as 'contain(ing) the implicit message that this crime may be committed in just the same manner and under the same conditions as any other crime within the Court's jurisdiction.'[53]

This 'streamlined'[54] approach of the *Rome Statute*, such that the forms of criminal responsibility apply uniformly to the general crimes within the jurisdiction of the Court, certainly excludes the potential contradictions and overlaps between the genocide provisions

[52] Mettraux, above n 8, 203.
[53] Ibid.
[54] Boas, Bischoff Reid, above n 10, 332.

and those providing for individual criminal responsibility found in the statutes of the ICTY and ICTR.[55]

Yet while the structure of the *Rome Statute* avoids the potentially problematic overlaps found in the statutes of the ICTY and ICTR, the incorporation of the secondary forms of genocide in the *Rome Statute* into the general provision on individual criminal responsibility paradoxically gives rise to a number of other concerns, several of which will now be examined in further detail.

B. The Crimes of Conspiracy to Commit Genocide and Complicity in Genocide – Do They Exist under the Rome Statute?

Article 25 of the *Rome Statute* is regarded as 'the most recent and comprehensive provision on individual criminal responsibility in international criminal law.'[56] Further, article 25(3)—relating specifically to forms of responsibility—is seen by some commentators as 'almost entirely embody(ing) customary international law.'[57] However, far from clear is the degree to which article 25 reflects customary international law in so far as it interacts with the provisions regarding the secondary forms of genocide.

1. Conspiracy to Commit Genocide

While there is little uncertainty about the extent to which article 25 may have been intended to be the most up-to-date statement of international criminal law in relation to forms of responsibility, it is widely recognised that the attempt to incorporate article III of the *Genocide Convention* into article 25 of the *Rome Statute* has meant that the crime of conspiracy to commit genocide has seemingly disappeared.[58] Although there are provisions in article 25(3) - such as the aiding and abetting provisions in article 25(3)(c) and the 'contribut(ing) to the commission' of a crime provisions in article 25(3)(d)—that may be similar to the concept of conspiracy, article 25 fails to reflect fully and accurately the recognition in international criminal law of the specific crime of conspiracy to commit genocide. This failure of the *Rome Statute* to mention conspiracy to commit genocide—an act that was first criminalised in 1948 under the *Genocide Convention* and for which there have been several convictions at the

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[55] Acknowledged in G Boas, JL Bischoff and NL Reid, above n 52, 200; WA Schabas, 'Commentary on Article 6 of the Rome Statute', in O Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* (München, CH Beck, 2nd ed., 2008) 155; Mettraux, above n 8, 202; Jones and Powles, above n 19, 179.

[56] E van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* (T.M.C. Asser Press, 2003) 65.

[57] G Werle, *Principles of International Criminal Law*, (The Hague, T.M.C. Asser Press, 2005) 119.

[58] The observation that this crime has disappeared is made in WA Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press, 3rd ed., 2007) 214; Schabas, above n 57, 155; Schabas, above n 8, 264; Boas, Bischoff and Reid, above n 10, 333; Boas, Bischoff and Reid, above n 52, 200; A. Cassese, 'Genocide', 335-352, in Cassese, Gaeta and Jones, above n 48, 347; A. Cassese, *International Criminal Law* (Oxford University Press, 2nd edn., 2008) 146; Mettraux, above n 8, 202-03, Jones and Powles, above n 19, 179.

ICTR—is problematic. Cassese argues that, as a result of this failure, 'there is an inconsistency between customary international law and the *Rome Statute*.'[59]

The possibility of reading into article 25(3)(d) provisions that may be similar to the concept of conspiracy is difficult from the outset, as the requirement in article 25(3)(d) that there be a 'group of persons acting with a common purpose' more closely aligns this article with the concepts of joint criminal enterprise or co-perpetration than with conspiracy. If, however, it is accepted that article 25(3)(d) with its accompanying subparagraphs does, to some degree, address the concept of conspiracy, there nonetheless remains the question of whether this subsection accurately and appropriately reflects conspiracy as it relates specifically to genocide.

The *travaux préparatoires* to the *Genocide Convention* show that the crime of conspiracy to commit genocide was intended to punish acts that did not in themselves constitute genocide.[60] Indeed, the characterisation of conspiracy to commit genocide as an inchoate offence was discussed earlier in this paper in relation to the statutes of the ICTY and ICTR. Article 25(3)(d) of the *Rome Statute*, if it could be seen as articulating the concept of conspiracy, defines a form of conspiracy that involves 'the commission or attempted commission of such a crime by a group of persons acting with a common purpose'. Hence, there would be a requirement under this article that the 'conspiracy' be accompanied by the commission or attempted commission of the crime. Thus, this provision is not appropriate for conspiracy to commit genocide because it is not in keeping with the decision by the drafters of the *Genocide Convention* to conceive of conspiracy to commit genocide as an inchoate offence.

2. Complicity in Genocide

In addition, the *Rome Statute* fails to contain a provision directly addressing complicity in genocide. It is arguable, however, that although there is no clear provision directly addressing 'complicity'—and certainly not 'complicity in genocide'—subparagraphs (b), (c) and (d) of article 25(3) all address forms of complicity in the commission of a crime[61] and therefore the crime of complicity in relation to article 6 'Genocide' has, in fact, been recognised by the *Rome Statute*. It is certainly conceivable that, unlike the notable omission of the concept of conspiracy, the absence of a direct provision on complicity in genocide may be overcome in many circumstances by recourse to the subparagraphs of article 25(3). However, it seems that this is due mainly to the nebulous nature of complicity in contrast to the narrower concept of

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[59] Cassese, 'Genocide', above n 59, 347. Further, it is argued in G Mettraux, above n 8, 202-03, that the *Rome Statute* does not go as far as the *Genocide Convention*, nor as far as existing customary international law, in relation to criminalising conspiracy to commit genocide.

[60] See *Prosecutor v Alfred Musema* (ICTR, Case No. ICTR-96-13-A, 17 January 2000) 198; Schabas, above n 57, 155.

[61] This is posited in K Ambos, 'Commentary on Article 25 of the Rome Statute', 743-70, in Triffterer above n 57, 761. Schabas' examination of the provisions of Article 25 in relation to secondary forms of genocide leads him to conclude that, while conspiracy to commit genocide appears to have been omitted from the statute, the 'provisions concerning complicity (in genocide) and attempt (to commit genocide) appear to cover the same ground as the corresponding parts of article III of the *Genocide Convention*.' In Schabas, above n 57, 155.

conspiracy, rather than its being attributable to consideration by the drafters of appropriately incorporating the concept of complicity in genocide into the *Rome Statute*.

C. The Shift in the Theoretical Conception of Secondary Forms of Genocide under the Rome Statute

Unlike the *Rome Statute*, the *Genocide Convention* and the statutes of the ICTY and ICTR include the secondary forms of genocide in the articulation of the crime of genocide itself. This distinction between the *Rome Statute* and the earlier statutes results in a shift in the conception of these secondary forms of genocide. Where this shift is an inadvertent outcome of the attempt to streamline the individual criminal responsibility provisions of the *Rome Statute*, it is questionable whether this streamlining—that is, the integration of the secondary forms of genocide into the provision of *Rome Statute* on 'individual criminal responsibility'—is appropriate.

Under the *Genocide Convention* and the statutes of the ICTY and ICTR, the secondary forms of genocide are outlined in the relevant article addressing the crime of genocide. Further, in the statutes of the ICTY and ICTR, the later provisions on individual criminal responsibility refer to the earlier articles—including the article relating to genocide—such that there is a clear delineation between the *form of criminal responsibility* and the *crime*. Since the secondary forms of genocide are contained in the article addressing the crime of genocide and not in the part containing the forms of criminal responsibility, an individual charged with a secondary form of genocide is being charged, under these statutes, with a crime itself, as opposed to being charged with a form of responsibility for the crime of genocide.

In the *Rome Statute*, article 5 clearly specifies the 'crimes within the jurisdiction of the Court'. Under article 5(1)(a), the Court has jurisdiction with respect to the crime of genocide. Article 6 then outlines the crime of genocide, omitting the secondary forms. The only means by which to charge a person with a secondary form of genocide under the *Rome Statute* is through a combination of article 25(3) and article 6.

In contrast, then, to the provisions of the statutes of the ICTY and ICTR, a person who commits a secondary form of genocide is liable, under the *Rome Statute*, *through* article 25 *for* the crime under article 6. The result of this shift is two-fold. First, it marks a shift in the theoretical conception of the secondary forms of genocide from their being *crimes* to their being *forms of liability* for the crime of genocide. Second, and resulting from this, it means that, under the *Rome Statute*, if an individual is successfully prosecuted for a secondary form of genocide, then that individual is actually guilty of the crime of genocide itself.[62]

This latter result sets up a significant dichotomy regarding the prosecution of secondary forms of genocide where these secondary forms have been recognised by commentators and in the case law as being of an inchoate nature. This dichotomy lies in the fact that the finding here of an individual as guilty of the crime of genocide fails to recognise that genocide itself may not have actually occurred. In other words, where an individual is prosecuted through

[62] Schabas hints at this possibility in Schabas, above n 8, 258.

article 25 for the crime of genocide under article 6, where the acts in question are recognised as not having the occurrence of genocide as a pre-condition to their successful prosecution, it would not be appropriate to find that individual guilty of the crime of genocide, since such a finding necessarily and erroneously implies first, that the prosecution of such acts requires an examination of whether genocide did occur and second, that the conclusion that genocide did in fact occur is a pre-condition to the successful prosecution of such acts.

D. A Brief Note on the Crime of Direct and Public Incitement to Commit Genocide under Article 25(3)(e)

Unlike the secondary forms of genocide that involve notions of conspiracy, attempt and complicity—all of which are general concepts in criminal law—the crime of direct and public incitement to commit genocide stands alone as an exceptional and specific secondary form of genocide. This crime is contained in article 25(3)(e). It is logical that the decision to integrate the secondary forms of genocide into the general provisions on individual criminal responsibility necessitated that the specific crime of direct and public incitement to commit genocide—itself a secondary form of genocide—also be integrated into these same provisions.

As discussed earlier, the theoretical difficulties arising from the inclusion of the secondary forms of genocide within the provisions on individual responsibility are perhaps overcome by conceiving of these as having become forms of responsibility for the crime of genocide itself. However, the situation with respect to direct and public incitement to commit genocide is different. This is because there is little possibility of regarding direct and public incitement to commit genocide as having shifted from being an inchoate crime to a form of responsibility for genocide. There is no doubt that the drafting history and commentary on article 25(3)(e) 'make it clear that it is intended to be treated in the same manner as it is in the *ad hoc* Tribunals—that is, as an *inchoate crime*, not as a true *form of responsibility*'.[63]

Hence, while the integration of the secondary forms of genocide into the provisions on individual criminal responsibility gives rise to the possibility that these may have become forms of liability for genocide, the inclusion of direct and public incitement to commit genocide in these provisions and the accompanying affirmation of its having retained its character as an inchoate crime leads to further confusion. In addition, since it pertains unequivocally to an inchoate crime, article 25(3)(e) sits awkwardly between its preceding and subsequent subparagraphs. Specifically, although articles 25(3)(a)-(d) and article 25(3)(f) all require, to some degree, the commission or the attempted commission of a crime, article 25(3)(e) does not require that an additional crime in fact occurs or is attempted.[64]

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[63] Boas, Bischoff and Reid, above n 52, 200.
[64] See further Ambos, above n 63, 761.

E. Command Responsibility for Secondary Forms of Genocide under the Rome Statute

The provisions pertaining to command responsibility are found in article 28 of the *Rome Statute*:[65]

> **Article 28**
> **Responsibility of commanders and other superiors**
>
> In addition to other grounds of criminal responsibility under this Statute for crimes w In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:
> (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
> (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
> (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
> (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
> (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
> (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
> (iii)The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

This article is a significant expansion of the provisions on command responsibility in the *ad hoc* tribunals (see article 7(3) of the statute of the ICTY reproduced above). While there are substantial legal and theoretical hurdles facing any charge of command responsibility for genocide itself—including the well-recognised problem of addressing the question whether the specific intent required for a successful prosecution in relation to genocide has been

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[65] *Rome Statute*, above n 5.

met—the structure of the *Rome Statute* has created an equally significant set of complications regarding charges for secondary forms of genocide that are based upon command responsibility.

1. Crimes within the Jurisdiction of the Court

The first paragraph of the command responsibility provision makes it clear that a charge incorporating command responsibility may only be made in relation to the commission of a crime falling within the jurisdiction of the Court. As already noted above, article 5 clearly specifies the 'crimes within the jurisdiction of the Court' and, under article 5(1)(a), the Court has jurisdiction with respect to the crime of genocide. Article 6 of the *Rome Statute* then outlines the crime of genocide, omitting the secondary forms. The secondary forms of genocide are not mentioned or referenced at all in the part of the statute containing the provisions on the crimes themselves.

As discussed above, it is debatable whether the secondary forms of genocide have shifted from being crimes to forms of liability for genocide. However, even if these secondary forms may still be regarded as crimes and not as forms of liability, they are not outlined in article 6 of the statute. According to article 5, then, it is arguable that they do not fall strictly under the meaning of 'crimes within the jurisdiction of the Court'. Thus it is possible to assert that charges involving command responsibility may be laid only for the crime of genocide itself as it appears in article 6, and not for the secondary forms of genocide.

2. Has the Necessary Nexus between Command Responsibility and a Crime been Jeopardised?

If the secondary forms of genocide have become forms of liability for the crime of genocide, it is unclear whether charges alleging command responsibility in combination with these secondary forms of genocide are possible under the *Rome Statute*. There are two reasons for this.

The first is that, as forms of liability rather than actual crimes, it is unlikely that the secondary forms of genocide would fall under the meaning of 'crimes within the jurisdiction of the Court'—a necessary precondition for the application of the command responsibility provisions. This uncertainty exists irrespective of whether or not one adopts the strict interpretation of 'crimes within the jurisdiction of the Court' noted earlier, as it rests solely on the fact that the secondary forms of genocide may no longer be regarded as crimes.

The second reason is that charges that combine forms of liability—such as command responsibility and the secondary forms of genocide—will probably fail to meet the requirement for a nexus between those charges and a crime. The situation with respect to command responsibility for direct and public incitement to commit genocide may be different, given that, as noted above, it is likely that direct and public incitement to commit genocide has retained its character as an inchoate crime. However, charges including

command responsibility for conspiracy to commit genocide,[66] command responsibility for attempt to commit genocide or charges involving any combination of article 28 with article 25(3) with respect to genocide may all face the same theoretical problem that confronted the Trial Chamber of the ICTY in *Blagojevic*.

As discussed earlier, the Trial Chamber determined in this case that the charge of command responsibility for complicity in genocide was not appropriate because complicity in genocide, unlike the other secondary forms of genocide under the statute of the ICTY, was a form of liability for genocide itself. Thus, the decision in *Blagojevic* means that a charge that combines command responsibility with a mode of liability, rather than directly with a crime, is likely to be regarded as inappropriate and impermissible, because such a charge lacks the necessary nexus with an actual crime.

On this basis, the imperative for charges of command responsibility for secondary forms of genocide to combine article 28 with article 25(3) and *only then* with the crime of genocide outlined in article 6, jeopardises the necessary nexus between command responsibility and a crime. As such, this gives rise to a situation where the crimes of command responsibility for secondary forms of genocide have seemingly disappeared under the *Rome Statute*, despite their recognition by the *ad hoc* tribunals[67] and, arguably, their existence in customary international law.

F. The Concurrency of the Application of Article 25(3) with Article 28

The possibility of concurrent charges in relation to individual criminal responsibility under article 25(3), as well as command responsibility under article 28, exists under the *Rome Statute*. This finds a parallel in the potential for concurrent charges under article 7(1) and article 7(3) of the statute of the ICTY discussed earlier. The most obvious situation that highlights the possibility of concurrent convictions is where a superior had a certain degree of knowledge regarding the activities of his or her subordinates but he or she refrained from intervening to prevent the criminal acts of the subordinates. In such a case, 'according to widespread opinion, the superior may be equated to a co-perpetrator, or at least an aider and abettor',[68] and could therefore potentially be charged under both article 25(3) and article 28.

As mentioned earlier in this paper, judicial consideration of this matter by the *ad hoc* tribunals suggests that a conviction under both individual criminal responsibility and command responsibility in relation to the same conduct would not be appropriate. An accused who meets the requirements of both subsections should be convicted under the

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[66] As discussed earlier, the attempted integration of article III of the *Genocide Convention* into article 25(3) of the *Rome Statute* means that the previously recognised crime of conspiracy to commit genocide is not specifically listed in the *Rome Statute*. Hence, where the charges laid involve the concepts of command responsibility and conspiracy with respect to genocide and are based on a combination of article 28 with article 25(3), the precise terminology for these charges under the *Rome Statute* may not be 'command responsibility for conspiracy to commit genocide.'

[67] With the exception of command responsibility for complicity in genocide which, as discussed earlier, has not been recognised as an appropriate charge by the ICTY in *Blagojevic*.

[68] Cassese, above n 60, 147.

provisions relating to individual criminal responsibility, and his position as a superior should be regarded as an aggravating factor at sentencing.[69]

The prospect of convicting an individual under both article 25(3) and article 28 in relation to the same conduct initially seems unlikely, given article 25(3)(b). This subparagraph criminalises an individual's behaviour if he or she is found to have 'order(ed)' the commission of a crime that occurs or is attempted. As such, article 25(3)(b) 'complements the command responsibility provision (article 28): in the latter case the superior is liable for an omission, in the case of an order to commit a crime the superior is liable for commission for having "ordered"'.[70] Hence, it appears that the intention of the drafters was that preference should be given to charging an individual in a superior position under article 25(3), except where his or her actions constitute an omission. In that case the provisions of article 28 ensure that this omission also falls within the scope of behaviour criminalised under the *Rome Statute*.

However, while some commentators point to the existence of article 25(3)(b) of the *Rome Statute* to support the argument that article 25(3) and article 28 are complementary and that, therefore, concurrent convictions under both articles are unlikely, the provisions of the statutes of the ICTY and the ICTR also criminalise 'order(ing)' the commission of a crime under the provisions relating to individual criminal responsibility.[71] The incorporation of 'order(ing)' into the provisions on individual criminal responsibility in these statutes, which may suggest that the command responsibility provisions are a 'catch-all' for behaviour which does not fall under the 'order(ing)' subparagraph, did not carry substantial weight when the *ad hoc* tribunals considered whether concurrent convictions were possible. Thus, the mere existence of article 25(3)(b) in the *Rome Statute* does not resolve the question of whether concurrent convictions in relation to the same conduct under both article 25(3) and article 28 are possible.

In fact, there is a substantial difference between the provisions of article 28 in the *Rome Statute* and the corresponding provisions relating to command responsibility in the statutes of the ICTY and ICTR. Specifically, this difference is contained in the opening paragraph of article 28—a paragraph that pertains to all of the alternative charges involving the concept of command responsibility under the *Rome Statute*. This paragraph explicitly states that article 28 exists *'(i)n addition* to other grounds of criminal responsibility under this Statute'.[72] This has been interpreted to mean that article 28 'does not substitute, but supplements all forms of participation as listed in article 25(3) sub a-f.'[73] Hence, 'in addition' suggests that, 'where participation under article 25 concurs with article 28, the former shall prevail as *lex specialis*'.[74] Such an interpretation accords with that of the *ad hoc* tribunals.

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[69] Discussed earlier in relation to the ICTY decision in *Blaskic*.

[70] Ambos, above n 63, 753.

[71] See article 7(1) in the statute of the ICTY and article 6(1) in the statute of the ICTR.

[72] *Rome Statute*, art 28, above n 5.

[73] O Triffterer, 'Causality, a Separate Element of the Doctrine of Superior Responsibility as Expressed in Article 28 Rome Statute?', (2002) 15 *Leiden Journal of International Law* 179, 186, and quoted in R. Arnold, 'Commentary on Article 28 of the Rome Statute' 824-43, in Triffterer, above n 57, 843.

[74] Ibid 843.

However, an alternative interpretation of 'in addition' is also possible. If the command responsibility provisions in the *Rome Statute* exist 'in addition' to other grounds of responsibility, then it may be argued that liability under article 28 exists 'in addition' to liability under article 25(3). In other words, 'in addition' suggests that concurrent convictions under both articles are indeed possible. Thus, it may be asserted that, unlike the statutes of the *ad hoc* tribunals, which do not expressly state the relationship of the command responsibility provision to the individual criminal responsibility provision, the *Rome Statute* makes it clear that a conviction under article 28 may be 'in addition' to a conviction under article 25(3) in relation to the same conduct.

If the insertion of 'in addition' has created the potential for such concurrent convictions, then the consequence of this is that, under the *Rome Statute*, the concept of command responsibility has been shifted more closely towards its being an added burden specifically placed on a superior which exists in addition to any possible individual criminal responsibility. This represents a departure from the earlier approach of the *ad hoc* tribunals, which was to take into account any superior position as a potentially aggravating factor at sentencing, rather than to view any such superior position as giving rise to a separate and additional burden of criminal responsibility.

Although the insertion of 'in addition' into article 28 means that there exists a stronger argument for concurrent convictions under both the individual criminal responsibility and the command responsibility provisions under the *Rome Statute* than that which may be advanced in relation to the statutes of the *ad hoc* tribunals, it would nonetheless be preferable generally to avoid such concurrency. First, this is because the provisions relating to individual criminal responsibility and command responsibility represent different forms of liability, not different criminal acts.[75] As such, convicting an individual for different forms of liability in relation to the same activity seems, for the most part, illogical. Second, the sensible practice of the *ad hoc* tribunals of convicting the individual under the individual criminal responsibility provisions, while regarding any superior position at sentencing, affords appropriate recognition of the gravity of that individual's criminal activity.

G. A Brief Discussion of Article 21

Article 21 of the *Rome Statute* allows for the possibility of the provisions of the statute to be supplemented by other sources of international law. This article provides as follows:[76]

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[75] See *Prosecutor v Dario Kordic and Mario Cerkez,* (ICTY, Appeals Chamber, Case No. IT-95-14/2-A, 17 Dec 2004) 1030, where the Appeal Chamber notes that convictions under both articles 7(1) and 7(3) of the statute are 'not a question of cumulative convictions, but rather a question of concurrence between two modes of responsibility.'

[76] *Rome Statute*, above n 5.

Article 21
Applicable law

(1) The Court shall apply:
  (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
  (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
  …

The recognised principles of customary international law, therefore, are applicable under article 21(1)(b) to supplement the provisions of the *Rome Statute*. Several of the uncertainties inherent in the *Rome Statute* detailed earlier may perhaps be overcome by recourse to this article. For example, since, as discussed earlier, the *Rome Statute* fails to mention explicitly the crimes of conspiracy to commit genocide and complicity in genocide, recourse to customary international law under article 21(1)(b) may allow such activities to be clarified as criminal under the *Rome Statute*.

However, reliance on article 21(1)(b) is not a sufficient means by which to resolve the differences between the somewhat deficient provisions of the *Rome Statute* and the case law of the *ad hoc* tribunals. In fact, it may be argued that, in some cases, the discrepancies between the *Rome Statute* and customary international law are to such a degree that they cannot be reconciled. Such an argument is particularly strong when one considers that, as noted earlier, previously recognised crimes involving secondary forms of genocide in combination with command responsibility seem to have disappeared under the *Rome Statute*.

The incongruities between the *Rome Statute* and customary international law present significant problems, given that, as the most recent and specific formulation of international criminal law, the provisions of the *Rome Statute* would likely take precedence over customary international law in the case of conflict between the two.[77] Although recourse to article 21(1)(b) may afford the Court a degree of discretion in reconciling the *Rome Statute* with customary international law, the fact remains that the primacy of the provisions of the *Rome Statute* means that the concepts and prosecution of secondary forms of genocide and command responsibility for secondary forms of genocide have been unquestionably altered in international law.

[77] This is the principle *lex posterior derogat legi priori*.

Part Three – Conclusion

A. Summary

The implementation of the provisions of the *Genocide Convention* into the statutes of the ICTY, ICTR and ICC gives rise to numerous complications and uncertainties regarding the criminalisation of the secondary forms of genocide and command responsibility for secondary forms of genocide.

The necessity for the statutes of the ICTY and ICTR to contain general provisions pertaining to individual criminal responsibility for all the crimes covered by those statutes, in combination with the explicit criminalisation of the secondary forms of genocide, creates a number of overlaps that have the effect of increasing the number and type of acts regarded as crimes. The introduction of the concept of command responsibility for genocide further extends the range of behaviour that has been criminalised. In contrast, the provisions of the *Rome Statute* avoid such overlaps but, in so doing, give rise to a significant lacuna regarding genocide-related crimes.

It is the integration of the exceptional crime of genocide into statutes which address several other international crimes that creates the difficulties examined in this article. The question whether to retain specific provisions pertaining to genocide or to attempt to have these subsumed within general provisions relating to all the crimes criminalised under the statutes goes to the heart of whether the exclusivity of genocide should be protected, or whether it should be normalised within international criminal law.

Conversely, it is also arguable that the increase in the range of behaviour that is criminalised as a result of the retention in the statutes of the ICTY and ICTR of specific provisions pertaining to genocide jeopardises the exclusivity and potency of this norm. In her partial dissent in *Prosecutor v Goran Jelisic*,[78] Judge Wald emphasised the importance of maintaining a narrow application of the crime of genocide such that it remains the 'apex' in the hierarchy of international crimes.[79] However, although the application of genocide to an increasing number of circumstances perhaps risks undermining the exceptional nature of this crime, the extension of the application of genocide made possible by the statutes of the *ad hoc* tribunals has nonetheless established it as a modern and relevant legal norm, instead of an historical phenomenon.[80]

Thus, the inconsistencies between the established case law of the *ad hoc* tribunals and the *Rome Statute* with respect to the secondary forms of genocide and command responsibility for these secondary forms of genocide are attributable to the tendency towards reducing the exclusivity of genocide in international criminal law. In the *Rome Statute* the normalisation of genocide, such that it may be committed in the same manner and under the same conditions

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[78] ICTY, Appeals Chamber, Case No. IT-95-10-A, 5 July 2001.
[79] Ibid 68.
[80] Mettraux, above n 8, 200.

as any other crime under the statute, results in the dilution of genocide to such a degree that acts that have been recognised in customary international law as criminal do not appear in the provisions of the *Rome Statute*. It remains to be seen how the Court will address the inconsistencies between the *Rome Statute* and customary international law—inconsistencies that result from the failure to recognise the exceptional and exclusive nature of genocide and that pose a greater threat to the integrity of this norm than any extension of its application to an increasing number of circumstances.