

International Humanitarian Law Series

Elements of Accessorial Modes of Liability

*Article 25(3)(b) and (c)
of the Rome Statute of the
International Criminal Court*

Sarah Finnin



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Elements of Accessorial Modes of Liability

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Rome Statute of the International Criminal Court

by

Sarah Finnin



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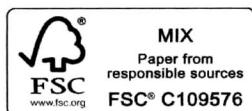
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International Humanitarian Law Series

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Foreword

I was delighted to be asked to contribute a foreword to this very creative and clearly written piece of work. It began as a PhD dissertation at the University of Melbourne, for which I was an external examiner. Sarah Finnin does a thorough analysis of Article 25(3)(b) and (c) of the Rome Statute of the International Criminal Court (ICC). These provisions deal respectively with the criminal responsibility of one who ‘orders, solicits or induces the commission’ of a crime within the jurisdiction of the Court, and with one who ‘aids, abets, or otherwise assists in its commission or attempted commission’. Using the methodology that the Preparatory Commission for the Court adopted in defining the substance of the crimes within the jurisdiction of the Court—the so-called ‘Elements of Crimes’—she undertakes some work that the Preparatory Commission abandoned. Specifically, she creates elements (physical and mental building blocks) for each of these modes of participation in paragraphs (b) and (c). She is brilliantly successful in this endeavor. Her work is likely to be of considerable value to scholars of the ICC and to practitioners and judges alike. I am very hopeful that the Assembly of States Parties to the Court will return to these issues and use her work as a very advanced draft for their adoption. If they don’t, I am sure that counsel and the judges will find her suggestions extremely useful as they shape their arguments in the developing case law.

Sarah’s analysis entails remarkable familiarity with several bodies of knowledge: the drafting history of the Rome Statute leading up to its adoption in 1998 and of the Preparatory Commission (mostly between 1998 and 2000); the handful of issues so far decided by the ICC; the extensive and arguably relevant case law of the International Criminal Tribunals for the former Yugoslavia and Rwanda, the Special Court for Sierra Leone, Nuremberg and post-Nuremberg trials and the jurisprudence of several other international and part-international tribunals; the work of the International Law Commission on the Draft Code of

Crimes against the Peace and Security of Mankind; secondary writing on all of these; and numerous works on comparative criminal law. What is marvelous about her work is the way she manages to weave all of this material into her narrative without getting lost in the detail. She keeps coming back to the main point: what the Statute says.

Roger S. Clark
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Preface

This volume is derived from my PhD thesis, submitted to the University of Melbourne in May 2011. The idea for a thesis on accessorial modes of liability under international criminal law evolved from my interest in the tension between individual responsibility and collective guilt for international crimes, and the apparent preference of international criminal justice for ‘perpetrators’ far removed from the actual perpetration of the criminal act. My interest was drawn to the question of how to divide criminal responsibility amongst all those who have contributed to the same criminal act: those who plan the crimes, and those who carry out those plans; those who give the orders to commit crimes, and those who follow those orders; those who provide the means to commit crimes, and those who make use of such means.

This topic has allowed me to catalogue the various factual scenarios which have brought individuals before international courts and tribunals, and thereby develop a theory of participation in international crimes in the form of ‘elements’ of accessorial modes of liability. It is hoped that the formulation of the proposed ‘elements’ will provide guidance to the International Criminal Court over the coming years when it seeks to apply the provisions of its Statute which set out the accessorial modes of liability to the first cases which come before it for trial. This will enable the Court to properly identify individuals who have made a substantial contribution to international crimes committed by others as accessories to such crimes, while ensuring that individuals who are not deserving of such categorisation remain free from criminal liability.

Throughout my PhD candidature, numerous people provided me with support, advice and comments on drafts. Most importantly, I would like to thank my supervisors. Professor Tim McCormack was my principal supervisor throughout my candidature, and showed great patience through many changes in topic and direction. Tim has had a considerable impact on my professional development since my time as an undergraduate law student, and has offered me amazing opportunities for study, work and travel over the years. His warmth, kindness and generosity made my time at the Asia Pacific Centre for Military Law (APCML) both enjoyable and fruitful.

Professor Jenny Morgan, Associate Professor Andrew Mitchell and Dr Helen Durham acted as co-supervisors at different periods throughout my candidature. Helen's support and enthusiasm in the first half of my candidature gave me the confidence to tackle this difficult topic. I thank her for her ongoing interest in my personal and professional development and her continued friendship. The willingness of Jenny and Andrew to come on board half way through my candidature, and to see my thesis through to completion, is greatly appreciated. Their invaluable advice and constructive criticism enabled me to make substantial progress in my final year in particular.

Finally, Professor Markus Dubber from the University of Toronto Law Faculty kindly agreed to act as an external supervisor during the final six months of my candidature. I benefited from five weeks of research and writing at the University of Toronto under his supervision in late 2010. This trip was generously funded by a grant of Research Support Funds by the Office for Research at the Melbourne Law School. I also benefited greatly from attendance at the Marie Curie Top Summer School in June–July 2009 in The Hague. I thank the Grotius Centre for International Legal Studies at Leiden University for funding and organising the program, and to the many participants (both students and speakers) for their interesting and thought-provoking presentations on various aspects of international criminal law.

A number of other academics at the University of Melbourne supported my research and professional development. Associate Professor Bruce 'Ozzie' Oswald CSC, Professor Gerry Simpson, Associate Professor Alison Duxbury and Dr Kevin Heller acted as friends, advisors and mentors and I thank them for acting in such roles. Cathy Hutton, the Administrator of the APCML, provided friendship, administrative support, editorial advice and a welcoming environment throughout my time at the Centre.

The University of Melbourne, and in particular the Melbourne Law School, has provided a welcoming and encouraging environment for my studies. The A O Capell prestigious scholarship allowed me to focus my energy on full-time study. Lucy O'Brien, Mas Generis, Domingo Cordoba and Dr Madeline Grey from the Melbourne Law School's Office for Research provided administrative support at the various milestones throughout my candidature. Professor Carolyn Evans and Associate Professor Sean Cooney, in their positions as Associate Deans of Research, gave counsel and assistance during my time as a PhD candidate. Professor Michael Crommelin, as Dean of the Law School, gave financial and institutional support throughout my time as an undergraduate and post-graduate student.

My fellow PhD students generously agreed to read and give feedback on parts of my thesis at various stages in its formation, and offered immeasurable support over the years. In particular, I would like to thank the members of our study group, Michelle Lesh, Rain Liivoja, Róisín Burke, Anna Hood and Sasha Radin. My PhD examiners, Professor Roger Clark and Professor Albin Eser, took the time to conduct a thorough examination of my thesis, and provide kind comments on, and useful suggestions for improvements to, its content. I would

also like to thank my family for their substantial personal and financial support throughout my many years of study. Finally, I would like to thank the editorial board of Martinus Nijhoff Publishers for agreeing to publish this thesis as part of the International Humanitarian Law series.

Sarah Finnin

Table of Abbreviations

AFRC	Armed Forces Revolutionary Council (Sierra Leone)
ALI	American Law Institute
ASP	Assembly of States Parties to the Rome Statute
CDF	Civil Defense Forces (Sierra Leone)
GA	General Assembly of the United Nations
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
IMT	International Military Tribunal (at Nuremberg)
IMTFE	International Military Tribunal for the Far East (at Tokyo)
OKW	German Armed Forces High Command
OTP	Office of the Prosecutor of the International Criminal Court
PrepCom	Preparatory Commission of the International Criminal Court
RUF	Revolutionary United Front (Sierra Leone)
SCSL	Special Court for Sierra Leone
UN	United Nations
UNWCC	United Nations War Crimes Commission

Table of Instruments and Cases

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1954 ILC Draft Code of Offences	International Law Commission, 'Draft Code of Offences against the Peace and Security of Mankind with Commentaries' in 'Report of the International Law Commission to the General Assembly Covering its Sixth Session, 3 June – 28 July 1954' [1954] II <i>Yearbook of the International Law Commission</i> 140, 149
1991 ILC Draft Code of Crimes	International Law Commission, 'Draft Code of Crimes against the Peace and Security of Mankind: Text of Draft Articles 3, 4, 5, 11, 14, 19 to 22 and 26, with Commentaries Thereto and Commentary to Part Two as a Whole, as Provisionally Adopted by the Commission at its Forty-Third Session' in 'Report of the International Law Commission to the General Assembly on the Work of its Forty-Third Session, 29 April – 19 July 1991' [1991] II(2) <i>Yearbook of the International Law Commission</i> 1, 98
1996 ILC Draft Code of Crimes	International Law Commission, 'Draft Code of Crimes against the Peace and Security of Mankind with Commentaries' in 'Report of the International Law Commission to the General Assembly on the Work of its Forty-Eighth Session, 6 May – 26 July 1996' [1996] II(2) <i>Yearbook of the International Law Commission</i> 1, 17
Control Council Law No 10	<i>Control Council Law No 10: Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity</i> , signed 20 December 1945, in <i>Official Gazette of the Control Council for Germany</i> , No 3, Berlin, 31 January 1946, 50–5
Elements	<i>Elements of Crimes</i> , Doc No ICC-ASP/1/3 (adopted 9 September 2002)

Final Act of the UN Diplomatic Conference	<i>Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court</i> , UN Doc A/CONF.183/10, 17 July 1998
Geneva Convention I	<i>Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field</i> , opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950)
Geneva Convention II	<i>Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea</i> , opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950)
Geneva Convention III	<i>Geneva Convention Relative to the Treatment of Prisoners of War</i> , opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950)
Geneva Convention IV	<i>Geneva Convention Relative to the Protection of Civilian Persons in Time of War</i> , opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950)
Genocide Convention	<i>Convention on the Prevention and Punishment of the Crime of Genocide</i> , opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951)
ICTR Statute	<i>Statute of the International Criminal Tribunal for Rwanda</i> , adopted 8 November 1994, annexed to SC Res 955 (1994), UN Doc S/RES/955 (8 November 1994)
ICTY Statute	<i>Statute of the International Criminal Tribunal for the former Yugoslavia</i> , adopted 25 May 1993, annexed to SC Res 827 (1993), UN Doc S/RES/827 (25 May 1993)
Nuremberg Charter	<i>Charter of the International Military Tribunal</i> , annexed to <i>Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis</i> , signed in London on 8 August 1945, 82 UNTS 279
Nuremberg Principles	International Law Commission, 'Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, with Commentaries' in 'Report of the International Law Commission to the General Assembly Covering its Second Session, 5 June – 29 July 1950' [1950] II <i>Yearbook of the International Law Commission</i> 364, 374
Additional Protocol I	<i>Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts</i> , opened for signature 12 December 1977, 1125 UNTS 3 (entered into force 7 December 1978)

Rome Statute	<i>Rome Statute of the International Criminal Court</i> , opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002)
SCSL Statute	<i>Statute of the Special Court for Sierra Leone</i> , adopted 16 January 2002, annexed to Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, signed 16 January 2002, reproduced in Appendix II to <i>Report of the Planning Mission on the Establishment of the Special Court for Sierra Leone</i> , UN Doc S/2002/246, 8 March 2002
Tokyo Charter	<i>Charter of the International Military Tribunal for the Far East</i> , signed in Tokyo on 19 January 1946, amended 26 April 1946, TIAS 1589, 4 Bevans 20
VCLT	<i>Vienna Convention on the Law of Treaties</i> , opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980)

Table of Cases

<i>Abbaye Ardenne</i>	<i>Trial of SS Brigadeführer Kurt Meyer</i> (Canadian Military Court, Aurich, Germany, 10–28 December 1945), reported as Case No 22 in United Nations War Crimes Commission, <i>Law Reports of Trials of War Criminals</i> (1948) vol IV, 97
<i>Abu Garda Confirmation</i>	<i>Prosecutor v Bahar Idriss Abu Garda (Decision on the Confirmation of Charges)</i> (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-02/09, 8 February 2010)
<i>AFRC TJ</i>	<i>Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu (Trial Judgment)</i> (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-04-16, 20 June 2007)
<i>AFRC AJ</i>	<i>Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu (Appeal Judgment)</i> (Special Court for Sierra Leone, Appeals Chamber, Case No SCSL-04-16, 22 February 2008)
<i>Akayesu TJ</i>	<i>Prosecutor v Jean-Paul Akayesu (Trial Judgment)</i> (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4, 2 September 1998)
<i>Akayesu AJ</i>	<i>Prosecutor v Jean-Paul Akayesu (Appeal Judgment)</i> (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-96-4, 1 June 2001)
<i>Aleksovski TJ</i>	<i>Prosecutor v Zlatko Aleksovski (Trial Judgment)</i> (International Criminal Tribunal for the former Yugoslavia, Trial Chamber I, Case No IT-95-14/1, 25 June 1999)
<i>Aleksovski AJ</i>	<i>Prosecutor v Zlatko Aleksovski (Appeal Judgment)</i> (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No IT-95-14/1, 24 March 2000)
<i>Almelo</i>	<i>Trial of Otto Sandrock and Three Others</i> (British Military Court for the Trial of War Criminals, Almelo, Holland, 24–26 November 1945), reported as Case No 3 in United Nations War Crimes Commission, <i>Law Reports of Trials of War Criminals</i> (1947) vol I, 35
<i>Bagaragaza TS</i>	<i>Prosecutor v Michel Bagaragaza (Trial Sentencing Judgment)</i> (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-05-86, 17 November 2009)
<i>Bagilishema TJ</i>	<i>Prosecutor v Ignace Bagilishema (Trial Judgment)</i> (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-95-1A, 7 June 2001)

<i>Bagosora TJ</i>	<i>Prosecutor v Théoneste Bagosora, Gratien Kabilligi, Aloys Ntabakuze and Anatole Nsengiyumva (Trial Judgment)</i> (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-98-41, 18 December 2008)
<i>Banda Confirmation</i>	<i>Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus (Decision on the Confirmation of Charges)</i> (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-03/09, 7 March 2011)
<i>Bashir Arrest Warrant Decision</i>	<i>Prosecutor v Omar Hassan Ahmad Al Bashir (Decision on the Prosecutor's Application for a Warrant of Arrest)</i> (International Criminal Court, Pre-Trial Chamber I, Case No ICC-02/05-01/09, 4 March 2009)
<i>Bemba Confirmation</i>	<i>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)</i> (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/05-01/08, 15 June 2009)
<i>Bisengimana TJ</i>	<i>Prosecutor v Paul Bisengimana (Trial Judgment)</i> (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-00-60, 13 April 2006)
<i>Blagojević 98bisT</i>	<i>Prosecutor v Vidoje Blagojević and Dragan Jokić (Trial Judgment on Motions for Acquittal Pursuant to Rule 98bis)</i> (International Criminal Tribunal for the former Yugoslavia, Trial Chamber I, Case No IT-02-60, 5 April 2004)
<i>Blagojević TJ</i>	<i>Prosecutor v Vidoje Blagojević and Dragan Jokić (Trial Judgment)</i> (International Criminal Tribunal for the former Yugoslavia, Trial Chamber I, Case No IT-02-60, 17 January 2005)
<i>Blagojević Appeal Transcript</i>	<i>Prosecutor v Vidoje Blagojević and Dragan Jokić (Appeal Transcript)</i> (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No IT-02-60, 5 December 2006)
<i>Blagojević AJ</i>	<i>Prosecutor v Vidoje Blagojević and Dragan Jokić (Appeal Judgment)</i> (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No IT-02-60, 9 May 2007)
<i>Blaškić TJ</i>	<i>Prosecutor v Tihomir Blaškić (Trial Judgment)</i> (International Criminal Tribunal for the former Yugoslavia, Trial Chamber I, Case No IT-95-14, 3 March 2000)
<i>Blaškić AJ</i>	<i>Prosecutor v Tihomir Blaškić (Appeal Judgment)</i> (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No IT-95-14, 29 July 2004)

<i>Boškoski TJ</i>	<i>Prosecutor v Ljube Boškoski and Johan Tarčulovski (Trial Judgment)</i> (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II, Case No IT-04-82, 10 July 2008)
<i>Boškoski AJ</i>	<i>Prosecutor v Ljube Boškoski and Johan Tarčulovski (Appeal Judgment)</i> (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No IT-04-82, 19 May 2010)
<i>Brđanin 98bisT</i>	<i>Prosecutor v Radoslav Brđanin (Trial Decision on Motion for Acquittal Pursuant to Rule 98bis)</i> (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II, Case No IT-99-36, 28 November 2003)
<i>Brđanin TJ</i>	<i>Prosecutor v Radoslav Brđanin (Trial Judgment)</i> (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II, Case No IT-99-36, 1 September 2004)
<i>Brđanin AJ</i>	<i>Prosecutor v Radoslav Brđanin (Appeal Judgment)</i> (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No IT-99-36, 3 April 2007)
<i>Buck</i>	<i>Trial of Karl Buck and Ten Others</i> (British Military Court, Wuppertal, Germany, 6–10 May 1946), reported as Case No 29 in United Nations War Crimes Commission, <i>Law Reports of Trials of War Criminals</i> (1948) vol V, 39
<i>CDF TJ</i>	<i>Prosecutor v Moinina Fofana and Allieu Konderwa (Trial Judgment)</i> (Special Court for Sierra Leone, Trial Chamber I, Case No SCSL-04-14, 2 August 2007)
<i>Čelebići TJ</i>	<i>Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Lanždo (Trial Judgment)</i> (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II, Case No IT-96-21, 16 November 1998)
<i>Đorđević TJ</i>	<i>Prosecutor v Vlastimir Đorđević (Trial Judgment)</i> (International Criminal Tribunal for the former Yugoslavia, Trial Chamber II, Case No IT-05-87/1, 23 February 2011)
<i>Dostler</i>	<i>Trial of General Anton Dostler, Commander of the 75th German Army Corps</i> (United States Military Commission, Rome, 8–12 October 1945), reported as Case No 2 in United Nations War Crimes Commission, <i>Law Reports of Trials of War Criminals</i> (1947) vol I, 22

<i>Einsatzgruppen</i>	<i>United States v Otto Ohlendorf et al (Opinion and Judgment)</i> , Case No 9 in <i>Trials of War Criminals before the Nuernberg Military Tribunals under Control Council No 10, Nuernberg, October 1946 – April 1949</i> (1950) vol IV, 411
<i>Essen Lynching</i>	<i>Trial of Erich Heyer and Six Others</i> (British Military Court for the Trial of War Criminals, Essen, 18–19 and 21–22 December 1945), reported as Case No 8 in United Nations War Crimes Commission, <i>Law Reports of Trials of War Criminals</i> (1947) vol I, 88
<i>Flick</i>	<i>United States v Friedrich Flick et al (Opinion and Judgment)</i> , Case No 5 in <i>Trials of War Criminals before the Nuernberg Military Tribunals under Control Council No 10, Nuernberg, October 1946 – April 1949</i> (1950) vol VI, 1187
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<i>Gacumbitsi AJ</i>	<i>Prosecutor v Sylvestre Gacumbitsi (Appeal Judgment)</i> (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-01-64, 7 July 2006)
<i>Galić TJ</i>	<i>Prosecutor v Stanislav Galić (Trial Judgment)</i> (International Criminal Tribunal for the former Yugoslavia, Trial Chamber I, Case No IT-98-29, 5 December 2003)
<i>Galić AJ</i>	<i>Prosecutor v Stanislav Galić (Appeal Judgment)</i> (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No IT-98-29, 30 November 2006)
<i>Haradinaj TJ</i>	<i>Prosecutor v Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj (Trial Judgment)</i> (International Criminal Tribunal for the former Yugoslavia, Trial Chamber I, Case No IT-04-84, 3 April 2008)
<i>Haradinaj AJ</i>	<i>Prosecutor v Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj (Appeal Judgment)</i> (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No IT-04-84, 19 July 2010)