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**Holding Domestic Judges Accountable under  
International Criminal Law –  
A Useful Step to Foster the International Rule of Law?**

Berlin Potsdam Research Group „The International Rule of Law – Rise or Decline?“

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## **Holding Domestic Judges Accountable under International Criminal Law – A Useful Step to Foster the International Rule of Law?\***

*Konrad Neugebauer*<sup>1</sup>

### **Abstract:**

*This article explores, whether domestic judges might be held accountable under international criminal law (ICL). To date, international criminal justice has almost entirely focused on prosecuting political or military leaders. The Justice Case tried before the Nuremberg Military Tribunal in 1946 marks the most prominent exception. Prior to it, the judiciary – otherwise considered the epitome of justice – had mutated into a murderous machinery under Nazi rule. Judicial decisions do have far-reaching implications possibly constituting or contributing to international crimes. This holds true in a wide range of cases, for instance on practices of warfare and torture, on the use of certain weapon technologies, or on policies relating to minorities or racial segregation. I argue that domestic judges are accountable when engaging in international crimes. The article delves into technical aspects of criminal law; as well as the notions of judicial independence and immunity. While guaranteeing the rule of law, these two notions challenge the core idea of ICL: its equal application vis-à-vis all perpetrators of international crimes irrespective of official capacity. In order to differentiate due judicial conduct and its abuse in violation of ICL, I suggest a threshold a judicial act needs to exceed for entailing accountability for an international crime.*

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## 1. Introduction

When crimes are being perpetrated, the judiciary,<sup>2</sup> conceptually, provides the last resort for justice. However, this rarely holds true in situations of macro-criminality. When States or other powerful entities engage in large-scale, systematic atrocities, the judiciary risks to fail to meet its responsibility to do justice.

The prevention of international crimes requires independent, impartial, and in many cases courageous domestic judges. A judiciary lacking these qualities can contribute in a devastating manner to international crimes. The atrocities tried before the U.S. Military Court at Nuremberg (NMT) in the Justice Case<sup>3</sup> are a striking example in this regard. Judicial involvement in international crimes has seemed secondary as compared to that of military and political leaders. And yet, it is oftentimes the judiciary handing down far-reaching and binding decisions, which approve or establish practices challenged in court and thus frequently on the edge of potential illegality.

I argue that the phenomenon of judges engaging in international crimes is not limited to scenarios of systemic failure of the judiciary as a whole likely occurring in *prima facie* less democratic States not founded on the rule of law. I submit that even democratic States, which in general do abide by the rule of law and which do have an independent judiciary, are by no means immune against judges engaging in international crimes, albeit in a much subtler way.

Lately, some tendencies in both the international and domestic arenas have pointed towards a growing awareness for the considerable level of influence exerted by individuals interpreting and applying the law.

One recent example is the judgment rendered by the Federal Court of Mendoza in Argentina.<sup>4</sup> This court convicted former high-ranking judges for the atrocities they contributed to during the rule of the military dictatorship. It chose to base the sentence on domestic statutory crimes such as murder rather than on crimes under customary international law. However, it made clear that if committed today, these crimes would qualify as crimes against humanity.

What is more, the German Federal Prosecutor initiated investigations against the former Chief Justice of Iran for alleged crimes against humanity on the basis of the German Code of Crimes Against International Law.<sup>5</sup>

In the same vein, the ICC Prosecutor proved awareness for the far-reaching effects potentially caused by individuals interpreting the law, if not judges in the narrow sense. She did so by requesting authorisation of an investigation against two individuals delivering legal opinions on

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<sup>2</sup> In the following, I will use the terms ‘judiciary’ and ‘judicial’ to refer to judges of all kind. No matter their designation in any given domestic jurisdiction, this includes all officials performing duties that can reasonably be deemed functionally equivalent.

<sup>3</sup> *United States of America v. Altstoetter et al.* (‘Justice Case’), U.S. Military Tribunal in Nuremberg (NMT), Judgment, 3 T.W.C. 1 (1948), 4 December 1947.

<sup>4</sup> *Tribunal Criminal Federal de Mendoza*, Judgment, 26 July 2017, Sentencia No. 1718 (‘Mendoza case’).

<sup>5</sup> Thomas Escritt, Iranian cleric leaves Germany under threat of prosecution, Reuters, 11 January 2018, <https://www.reuters.com/article/us-germany-iran/iranian-cleric-leaves-germany-under-threat-of-prosecution-idUSKBN1F02CN> (last access 24 April 2019).

behalf of the U.S. Department of Justice as, allegedly, agents of the executive have tortured individuals relying on these opinions.<sup>6</sup>

And yet, the underlying and to date unanswered question is the following: are domestic judges accountable under ICL as applied by international and/or national courts at all – despite the notion of judicial immunity well known in domestic jurisdictions, and despite the widespread perception of the role of the judiciary being secondary when it comes to international crimes? Arguing for judicial accountability is consistent with one of the most fundamental rationales of ICL reflected in Article 27(1) and (2) of the Rome Statute (RS), namely that of its equal application *vis-à-vis* all perpetrators irrespective of official capacity or immunity. Its first paragraph specifies that a defense based on the official capacity of a person is invalid. Parallely, its second paragraph declares immunities derived from domestic or international law inapplicable before the ICC.

But is it all that easy or do judicial privileges or immunities exceptionally apply in ICL? It seems paradoxical that domestically, judges are well protected from prosecution for ordinary statutory crimes, while under ICL they would be exposed to prosecution for the worst crimes humankind has witnessed. But if domestic judges were not exempt from accountability under ICL: under which norms precisely could they be held accountable? How does ICL differentiate between due judicial conduct on one and involvement in international crimes on the other hand – in particular in rule of law abiding States with an independent judiciary?

In this paper, I will examine the criminal offenses and modes of criminal liability subject to which a judicial act constitutes an international crime. This primarily necessitates exploring the threshold for judicial decisions to turn into criminal offenses. It secondarily relates to potential defences as well as other obstacles of holding the perpetrators to account.

#### **a) Relevant cases**

The phenomenon of judicial involvement in international crimes as most prominently, but not uniquely<sup>7</sup> dealt with in the Justice Case is neither of purely historical, nor of singular relevance. Instead, it is one recurring within a wide range of cases, as the following examples reaching from rather obvious systemic ones to borderline cases show. Their selection is purely instructive, and jurisdictional and non-retroactivity impediments notwithstanding.

The South African judiciary during Apartheid times sustained the perpetration of this crime by applying, implementing, and upholding Apartheid legislation. Likewise, Syrian military judges in the on-going conflict can *prima facie* be considered complicit in, amongst other crimes, crimes against humanity for torture against persons suspected of forming part of the opposition. In the same vein,

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<sup>6</sup> See the Public Redacted Version of the “Request for Authorisation of an Investigation pursuant to Article 15”, 20 November 2017, ICC-02/17-7-Red, paras 235, 237–238. As of April 2019, PTC I of the ICC has not granted the investigation authorisation as requested by OTP. OTP might, however, appeal this decision.

<sup>7</sup> Other than the Nuremberg Military Tribunal, various judicial bodies such as the Military Tribunal for the Far East in Japan, as well as military and national courts in China, Australia, and Norway handed down judgments based on international crimes against persons who had claimed judicial roles during World War II. See C Abahuni, ‘Willkürverfahren als Kriegsverbrechen’, 2015, pp. 25–106; J DePiazza, ‘Denial of Fair Trial as an International Crime’ (2017) 15 Journal of International Criminal Justice, pp. 257–289.

What is more, some judges faced prosecution in the domestic arena for domestic crimes resembling international crimes. Examples include the highly controversial and politicized Dresden Justice Trial of 1947 and the Waldheim Trials of 1950. A more recent case tried in a rule-of-law abiding context is the *Mendoza Case* of 2017 [see fn. 4].

the judicial practice in Iran of treating the victims of sexual abuse as perpetrators of adultery or unchastity and imposing prison or even death sentences on them *prima facie* constitutes the crime against humanity of murder and persecution against an identifiable group.

What is more, the decision handed down by the Russian Supreme Court approving the annexation of Crimea could amount to a case of judicial complicity in the crime of aggression. By contrast, the rejection in a German court of first instance of a case challenging the on-going use of an airbase on German soil used by the United States for the supposed commission of war crimes in third States<sup>8</sup> illustrates one of the far less obvious borderline cases, and thus the other end of the spectrum of relevant cases. In the same vein, one might consider Israeli Supreme Court judges who may uphold a bill passed by Knesset legalizing the annexation of territory and of population transfers into this territory<sup>9</sup> another case in point. Lastly, the rejection of a case brought against Tony Blair before the British High Court for his involvement in the Iraq War<sup>10</sup> may fall within this range of borderline cases.

#### **b) Judicial Involvement in International Crimes in General and the Specific Crimes laid down in Articles 8(2)(a)(vi) and 8(2)(c)(iv) RS**

One of the aspects making the Justice Case so unique is the fact that the NMT not only convicted former Nazi judges for having denied defendants a fair trial. The NMT went beyond that convicting the former Nazi judges for having perverted the justice system into one, by way of which international crimes of diverse kinds were committed under the pretext of the application of the law. What distinguishes the crimes tried in the Justice Case from the specific war crime of denying elementary procedural guarantees – as codified in Articles 8(2)(a)(vi) and 8(2)(c)(iv) RS – is that the Nazi judges were violating a diverse set of goods protected by ICL far beyond the good of observance of elementary fair trial guarantees. The Nazi judges had merely made use of the judicial system as a means to commit the crimes tried by “converting [it] to an engine of despotism, conquest, pillage, and slaughter”,<sup>11</sup> as the U.S. Prosecutor at the NMT Telford Taylor famously put it. Thus, the Justice Case dealt with the phenomenon of committing no matter which international crime, but embedded into the context of the judiciary. This is wholly distinct from what Articles 8(2)(a)(vi) and 8(2)(c)(iv) RS incriminate.

<sup>8</sup> While acknowledging a duty of the German Federal Government to protect human life even in third States stemming from both constitutional and international norms, the Cologne Administrative Court held that the Federal Government had a wide margin of appreciation in matters of foreign policy and refused to put forward any legal requirements limiting this margin due to the separation of powers. See *Cologne Administrative Court*, Judgment, 27 May 2015, Az.: 3 K 5625/14. On 19 March 2019, the Higher Administrative Court of North Rhine Westphalia has handed down a judgment, which in part comes to contrary conclusions than the courts of first instance. It *inter alia* requires the Federal Government to take appropriate measures to ensure that no international crimes are being committed from or through the military airbase of Ramstein used by the United States on German soil. The appellate court did however not find that closing the airbase was the only way to comply with this standard. See *Higher Administrative Court of North Rhine Westphalia*, 19 March 2019, Az.: 4 A 1361/15. This case is pending review of the Federal Administrative Court.

<sup>9</sup> Settlement Regulation Bill, 6 February 2017. For lack of official translation of the bill into English, cf. [https://main.knesset.gov.il/EN/News/PressReleases/Pages/Pr13341\\_pg.aspx](https://main.knesset.gov.il/EN/News/PressReleases/Pages/Pr13341_pg.aspx) (last access 24 April 2019).

<sup>10</sup> *R (Al Rabbat) v. Westminster Magistrates' Court and others*, [2017] EWHC 1969, Judgment, 31 July 2017. See also *R v. Jones (Margaret) and others*, [2006] UKHL 16, Appeal Judgment, 29 March 2006.

<sup>11</sup> U.S. Prosecutor Telford Taylor, Speech delivered in Nuremberg on the Justice Case, 1947, available at: [https://www.ushmm.org/wlc/en/media\\_fi.php?ModuleId=0&MediaId=5695](https://www.ushmm.org/wlc/en/media_fi.php?ModuleId=0&MediaId=5695) (last accessed 24 April 2019).

**c) Accountability serving the International Rule of Law versus Judicial Independence serving the National Rule of Law**

States have a duty to duly investigate and prosecute international crimes. It stems from various international instruments including Articles 1 and 6 of the Genocide Convention, Article 4 of the Apartheid Convention, as well as the Geneva Conventions and their First Additional Protocol.<sup>12</sup> This duty is furthermore acknowledged as a rule of customary international law in Paragraph 6 of the Preamble of the RS. States only comply with these obligations, if they hold perpetrators of international crimes to account – including judges if involved. In doing so, States enforce the framework of ICL and thus sustain the international rule of law.

At the same time, domestically, judicial independence is paramount to guarantee the national rule of law. Only a judiciary operating without the fear of prosecution for its professional conduct can freely and impartially exercise its role to safeguard justice. This holds even more true when it comes to prosecution for crimes as grave as those in question here. Judicial independence is enshrined in domestic legal orders across the world. And yet, ICL is not only blind towards official capacity as such, as reflected in Article 27 RS. It is also institution-blind and draws no distinction between a perpetrator being a judge or any other State official. However, there may be exceptions to this rule.

One such exception could apply to judges. In this regard, ICL might need to reconcile its elementary principle to apply equally to all on the one hand with the notion of domestic judicial independence on the other. This might necessitate to consider the specifics of the judicial profession via Article 21 RS. Doing so requires identifying the core distinctive criterion of the judicial branch as compared to the executive or the legislative. It would also postulate some sort of judicial exceptionalism. But while most domestic legal orders *a priori* exempt the judiciary from prosecution in order to safeguard the national rule of law, ICL does not. Contrarily, ICL aims at protecting other goods it deems most relevant of all, i.e. in particular compliance with the most fundamental rules of international humanitarian law and international human rights law. Finding a basis in ICL for some level of judicial exceptionalism would require giving up on its above-mentioned institution blindness in order to give way to goods exclusively protected domestically. This presupposes that not only the domestic rule of law necessitates, but that ICL actually permits treating members of the judiciary differently than other State officials.

In whichever way these seemingly contradictory positions are being reconciled, due protection for free judicial decision-making does not per se equal judicial exceptionalism. Instead, it is, to a certain extent, necessary in order to mirror the quality of the wrong of a judicial crime and does not question the fact that ICL is applied equally to all. It requires drawing a line between judicial actions, that are still lawful – albeit possibly substantially wrong – and those that are to be qualified as grave judicial misconduct necessitating more than just disciplinary measures and entailing accountability under ICL.

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<sup>12</sup> See Article 49 of the First Geneva Convention, Article 50 of the Second Geneva Convention, Article 129 of the Third Geneva Convention, Article 146 of the Fourth Geneva Convention, and Article 86 of the First Additional Protocol to these Conventions.



## 2. Accountability for what?

The above-described responsibility of the judiciary has mainly two aspects. For one, it means refraining from actively applying and enforcing laws, which in themselves contradict norms of ICL, by rendering judicial decisions. By the same token, this responsibility secondly requires investigating potential international crimes diligently and impartially regardless of who the perpetrator is, rather than turning a blind eye to them for whatever reason.<sup>13</sup>

Whilst the former dimension of this responsibility mainly comes into play in the context of state-caused acts of macro-criminality, the latter one is also relevant beyond. It owes its ever-growing significance to the increasing number of international crimes perpetrated by non-state actors the power of which has tended to grow in recent decades.

Within the framework of ICL, no such offenses as perversion or obstruction of justice by domestic judges exist.<sup>14</sup> It is most unlikely that the States party to the RS will agree upon the introduction of any additional international crimes in the near future. It is against this backdrop that ICL as it currently stands needs to be applied in the case of judicial crimes. Consequently, judicial decisions only constitute international crimes if constituting acts, which entail principal or accessory liability for the core crimes themselves.

### a) Application and Enforcement of Laws contrary to ICL

First, judges might engage in an international crime in a twofold manner. On the one hand, they might do so by applying and/or enforcing laws that are in and of themselves contrary to ICL. Alternatively, they might do so by applying and/or enforcing laws that are not *per se* contrary to ICL but where their very application and/or enforcement is contrary to ICL.

In either scenario, the mode of criminal responsibility depends on whether or not a given judicial decision is self-executing. This is the case when that decision directly and in itself establishes or alters a legal status or relationship. Hence, such a decision does not require any subsequent action of a third party in order to bring about its legal effects.

Most judicial decisions are not self-executing and require subsequent actions by third persons in order for the *actus reus* requirement of an international crime possibly to be met. A judge holding that a person be subjected to, for instance, an interrogation applying waterboarding – under the premise this being a case of torture and the judicial decision embedded in a context required under Article 7(1) RS – does not directly commit the *actus reus* of Article 7(1)(f) RS. Neither does a

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<sup>13</sup> In the following, I will not elaborate on pure omissions like the non-prosecution or non-conviction of the perpetrator of an international crime. Irrespective of judicial discretion, which would likely conflict with penalizing such an omission, the RS does not provide an all-encompassing norm penalizing omissions. Omissions only entail accountability under the RS where expressly stipulated, i.e. in Article 28 RS, and crimes incriminating the omission of a particular action such as the starvation of civilians as a method of warfare. Since no express stipulation relates to domestic judges engaging in international crimes, such an omission could only be punishable at all on the basis of Article 28. However, this norm only addresses the responsibility of a military commander or a civilian superior. By contrast, no such relationship of superiority exists between a judge and any third person. This special form of liability therefore does not permit holding domestic judges accountable.

<sup>14</sup> Article 70 RS does address offences against the due course of justice, but only those directed against the administration of international criminal justice specifically. Rather than dealing with contributions of domestic judiciaries to international crimes, this provision encompasses acts punishable for impeding or obstructing the work of the ICC itself, for instance false testimonies or forged evidence.

judge or a panel of judges of a highest domestic court setting a precedent in favour of the permissibility of waterboarding in its jurisdiction do so. Instead, only a third person's action executing either of both aforementioned judgments materialize the *actus reus* requirements.

#### **aa) Non-Self-Executing Judicial Decisions**

A judge handing down a non-self-executing decision does not physically carry out the *actus reus* elements of an international crime<sup>15</sup> – here: the waterboarding. He or she therefore does not qualify for a case of principal liability as a direct perpetrator under Article 25(3)(a) RS. Since, arguably, a judge alone or being part of a board of judges exerts a considerable level of control over the execution of his or her judgment,<sup>16</sup> a judge might still be prosecuted for principal liability.<sup>17</sup> The mode of co-perpetration jointly with the individuals directly causing the *actus reus* – those carrying out the waterboarding – is another possible mode of liability and, again, depends on the individual facts of a case. These relate to, in particular, the judge's level of control exerted as well as the additional elements required for a case of co-perpetration. If lacking the level of control necessary for principal liability, a judge might still be accessorially liable under Article 25(3)(c) RS.

#### **bb) Self-executing Judicial Decisions**

Contrarily, in a scenario where a judicial decision is self-executing, that very decision in itself might meet the *actus reus* and make for a case of principal liability as direct perpetrator. For instance, a judge declaring one individual the property of another by this very decision perpetrates the crime of enslavement. By the same token, a judge directly perpetrates the crime of apartheid when rendering a divorce decree or an annulment of marriage decree for the mere fact of the spouses being of different races.<sup>18</sup> Similarly, a judge transferring legal parenthood from parents of one group in the sense of Article 6(e) RS and to individuals of another group commits the crime of genocide as a direct perpetrator – depending on the interpretation of the term 'forcible'.<sup>19</sup> In such

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<sup>15</sup> *Lubanga* (ICC-01/04-01/06), Decision on the Confirmation of Charges, Pre-Trial Chamber I, 29 January 2007, para. 332; *Katanga et al.* (ICC-01/04-01/08), Decision on the Confirmation of Charges, Pre-Trial Chamber I, 30 September 2008, para. 488.

<sup>16</sup> Exemplarily, the German Federal Court of Justice has stated that it follows from the judicial duties under German law, that a judge, even as part of a board of judges, by definition does not qualify as an aider or abettor. Contrarily, as codified in the German Courts Constitution Act, a judge has the duty to apply the law independently, equally, and not guided by anything but the law. This is why, according to the Court, a judge solely qualifies as a direct perpetrator. See German Federal Court of Justice, Judgment, 5 StR 670/67, 30 April 1968. For similar transitional post-World War II cases in this respect, see HP Graver, *Judges against justice: On judges when the rule of law is under attack*, 2015, pp. 136–140.

<sup>17</sup> On the 'control over the crime'-standard see *Lubanga*, (ICC-01/04-01/06 A 5), Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, Appeals Chamber, 1 December 2014, paras 469–473; *G Werle*, 'Individual Criminal Responsibility in Article 25 ICC Statute' (2007) 5 *Journal of International Criminal Justice*, pp. 953–975, at p. 962.

<sup>18</sup> By contrast, the South African Apartheid 'Prohibition of Mixed Marriages Act' Act No. 55 of 1949 provided that by law, existing marriages between 'Europeans' and 'Non-Europeans' were 'void and of no effect'. Thus, no transformation act by the judiciary was needed. The same holds true for the Nazi-German 'Law for the Protection of German Blood and German Honour' of 1935. The latter, however, also provided, that a marriage in violation of this law might be brought to court by an action for annulment. Then again, such judicial decision for annulment would fall within the category of self-executing judgments as described above.

<sup>19</sup> Enforcement of such judgment would arguably meet the forcibility-element. However, not the judges themselves would physically enforce the judgment, and therefore such scenario would not qualify as one of self-executing judicial decisions.

cases, the judicial decision alone meets both criteria of physical causation of all *actus reus* elements, as well as the necessary level of control.

### **b) Non-Prosecution of International Crimes committed by Others**

Second, and unlike in the aforementioned scenario, the judicial decision might be slightly further away from the principal international crime. In this scenario, a judge refrains from convicting the perpetrator of an international crime that has been or is still being committed on an ongoing basis. A distinction needs to be drawn between this scenario, and one of a pure omission.<sup>20</sup> In the latter case, a judge merely omits to initiate an investigation or proceedings where an international crime might have been committed within his or her jurisdiction, but does not have any pre-existing link to that judge. Contrarily, in the scenario discussed in this section, a case has been brought to court already and a judge needs to render a decision. Normatively assessed, the non-conviction constitutes an action rather than an omission.

Except in a constellation of co-perpetration, no case of principal liability can be made. Accessory liability is the only possible mode to hold a judge accountable in this scenario – particularly under Article 25(3)(c) RS. Drawing guidance from the jurisprudence of the ad-hoc tribunals to the extent it reflects customary international law, no causal connection with the principal crime is required and a ‘substantial assistance’ to it sufficient in order to establish accessory liability for aiding, abetting or assisting.<sup>21</sup>

Whether or not a judicial decision amounts to such substantial assistance surely depends on the facts of a case. One might, however, differentiate at least two scenarios: one, in which the principal crime is still on-going and another, in which the principal crime has already been completed. Admittedly, this differentiation at first glance seems to relate to the notion of causation: in the first scenario, the action of the judge could in theory still be a cause for the principal crime whereas in the second scenario, it cannot. However, as stated above, ‘substantial assistance’ does not require causation of the act of assistance.

In the first scenario, the commission of the principal crime is on-going – for instance a forcible transfer of population embedded into a context required under Article 7(1) RS. A judge then acquits the principal perpetrator or otherwise concludes the investigation. This judicial decision arguably facilitates the further commission of the crime. At least regarding the subsequent elements of the on-going principal crime, that decision therefore qualifies as an act under Article 25(3)(c) RS and entails accessory liability if the facts of the case otherwise so permit.

In the second scenario, a judge acquits the principal or otherwise concludes the investigation against him or her after full or partial completion of the principal crime. The judge thereby impedes that person from being held accountable for the crime, but does not facilitate it being committed. Unlike in the example above, in this scenario, the forcible transfer of population took place in the past and has been completed. But in which way does this second sequence of events alter the above finding? It seems tempting to apply the ad-hoc tribunals’ somewhat extensive reading of aiding, abetting or assisting. They found that even an act subsequent to the completion

<sup>20</sup> On pure omissions in the RS and their exclusion from the present discussion, see fn. 13.

<sup>21</sup> See, *inter alia*, *Blaškić*, (ICTY-95-14-A) Judgment, Appeals Chamber, 29 July 2004, para. 48; *Tolimir* (ICTY-05-88/2-T), Judgment, Trial Chamber, 12 December 2012, para. 908; *Ndahimana* (ICTR-01-68-A), Judgment, Appeals Chamber, 16 December 2013, para. 149.

of the crime might entail accessory liability<sup>22</sup> – without, however, overriding the substantial assistance requirement. Applying this extensive reading, one could qualify a judge’s subsequent action as an act of assistance to the principal crime and deem it a substantial one, depending on the facts of a case. One could argue that the substantial assistance requirement is met merely because that judicial decision, delivered subsequent to the crime, adds the guise of legality to the result of the forcible population transfer. A slightly less extensive understanding could alternatively require that in order to be substantial, the judicial decision needs to actually perpetuate the result of the crime – for instance where in the absence of the judgment that transfer would have been reversed. A third reading could argue that the reliance of the perpetrator on never being held accountable by the judiciary suffices to establish the substantial assistance requirement.

The substantiality criterion notwithstanding, it is questionable whether this jurisprudence on subsequent assistance applies in ICL at all.

### 3. Challenges and Obstacles

Arguably the main reasons, why wrongful judicial conduct so rarely evokes criminal sanctions – besides the ‘guarding-the-guardians’ phenomenon<sup>23</sup> and the widespread perception among lawyers that their peers do not do any wrong – are the complex doctrinal challenges and obstacles provoked by a judge being the perpetrator. These mainly relate to the notions of *mens rea*,<sup>24</sup> mistake of law, principle of guilt, judicial immunity, and, possibly, superior orders.

In the first sub-section, I address *mens rea* regarding normative objective elements, mistake of law, guilt, and superior orders. As this study focuses on judicial involvement in international crimes irrespective of the systemic context, and thus not only those embedded in so-called authoritarian regimes without an independent judiciary, I will not take up on all defences put forward in the Justice Case. In this case, the defendants, *inter alia*, famously raised the lesser evil defence and thus implicitly the defence of duress<sup>25</sup> pertinent in comparable systems.

In the second sub-section, I elaborate on judicial immunity as a more abstract ground possibly excluding criminal responsibility.

#### a) *Mens rea*, Mistake of Law, Guilt, and Superior Orders

This section addresses the main legal problems arising, when a person faces charges under ICL for wrongly performing the judicial duty of finding the law. A judge as a defendant would most likely

<sup>22</sup> See *Blaškić*, (ICTY-95-14-A) Judgment, Appeals Chamber, 29 July 2004, para. 48; *Stanišić and Simatović* (ICTY-03-69-T), Trial Chamber, 30 May 2013, para. 1264; *Nyiramasuhuko* (ICTR-98-42-A), Appeals Chamber, 14 December 2015, para. 976.

<sup>23</sup> For further very insightful elaboration on this phenomenon, see N Garoupa / T Ginsburg, ‘Guarding the Guardians: Judicial Councils and Judicial Independence’ (2009) 57 *The American Journal of Comparative Law*, pp. 103–134.

<sup>24</sup> In the following, I will not discuss the purpose requirement as laid down in Article 25(3)(c) of the Rome Statute. While it is unclear, whether purpose in the sense of direct intent is required under customary international law, it certainly is so under the said provision. However, unlike the notion of *mens rea* regarding normative objective elements, the question of whether the purpose requirement is met in a context of aiding and abetting depends on the facts of each individual case.

<sup>25</sup> See, for instance, the arguments put forward by defence counsel of Schlegelberger, Justice Case [see fn. 3], at p. 1086.

argue that he or she lacked *mens rea*, erred about the law, or acted without guilt. Such defences could also be framed as the claims to only have applied the law, having acted under a legal duty to do so, or simply based upon the conviction of doing so lawfully.

Rendering oftentimes sensitive judicial decisions, judges should not work within a climate of fear of their own criminal responsibility. And yet, when it comes to defences pointing to the law as an absolute authority, at the very latest since *Radbruch*, the validity of such attempts to evade criminal responsibility under the auspices of what allegedly is the law are questionable. Despite the considerable challenges posed by the fact that it is judicial conduct being assessed with a view to whether it constitutes an international crime and the defendant being a judge, that judge's accountability *prima facie* cannot differ from that of other perpetrators holding different offices. Too widely acknowledging such defences raised by judges only because it is so difficult to cope with them, or because of some underlying assumption that judges (even more than high-ranking political or military leaders) 'do not intend to do any wrong' would open up a dangerous lacuna in the application and enforcement of ICL.

It should lastly be noted at the outset, that where criminal accountability of judges is at stake, the only conduct possibly triggering it is the act of legally assessing facts. Thus, one needs to take into account the specifics of the judicial decision-making process. What largely determines the scope of judicial accountability are *mens rea* regarding normative objective elements, the much-debated notion of mistake of law, and that of guilt. I will however start out with some remarks on the ever-recurring question whether or not *dolus eventualis*<sup>26</sup> suffices for establishing the *mens rea* standard applicable, and thus set the stage for the reflections on normative objective elements following thereupon.

#### aa) *Dolus Eventualis*

A first critical obstacle to holding judges accountable might be seen in the rather strict levels of *mens rea* ICL both under treaty law, and custom requires. The plain meaning of the 'intent and knowledge'-language used in its Article 30 suggests that establishing a perpetrator's *dolus eventualis* is not sufficient and falls outside the ambit of this provision.

However, even if *dolus eventualis* met the applicable *mens rea* standard, this would in many of the cases discussed here not lead to a different conclusion as to whether domestic judges are accountable under ICL. This is so because in fact, a judge handing down a judgment knows – and likely also intends – that in the ordinary course of events the content of the judgment will eventually materialize. Thus, this judge meets the intellectual element as required by a plain reading of Article 30(1) RS. Even without being aware of the precise course of events subsequent to the judgment, the abstract knowledge of acts being committed as condoned by the judgment suffices to establish even the rather narrow *mens rea* standard set forth by the RS.

Whether or not Article 30(1) RS comprises *dolus eventualis* might nonetheless prove decisive in some cases relating to judicial conduct, since considering it as a sufficient standard of *mens rea*

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<sup>26</sup> While it is often misleading to use domestic legal terms in ICL, this particularly holds true in the case of legal terms, which are not only highly disputed across domestic legal orders, but even within them, and where they are to be applied as general principles of law under Article 21(3)(c) RS. *Dolus eventualis* is one such term. For simplification purposes however, I decided to use such terms not only in general, but even when it comes to *dolus eventualis*.

would drastically widen the borderline of incriminated judicial conduct. The RS, in principle and ‘unless otherwise provided’, does not consider states of mind falling short of intent and/or knowledge as qualifying for the mental element as set forth in its Article 30. Unlike Pre-Trial Chamber I of the ICC,<sup>27</sup> its Pre-Trial Chamber II in light of both the express wording and the drafting history held that the RS does not consider what in many domestic jurisdictions is referred to as *dolus eventualis* as a sufficient level of *mens rea* meeting the Article 30-standard.<sup>28</sup> This view was upheld by both Trial Chamber I and the Appeals Chamber of the ICC,<sup>29</sup> and is widely shared across ICL scholarship.<sup>30</sup> What is more, neither customary international law nor general principles of law provide a clear-cut answer as to whether or not under these sources of ICL, *dolus eventualis* meets the *mens rea* standard. Whether the ICC could apply customary international law or general principles of law expressly contradicting Article 30 RS as being treaty law is yet another sensitive question. According to some, the negotiating States in Rome had shared the position that some level of *mens rea* falling short of intent or knowledge should be included in the RS, but that they simply did not find a wording to be agreed upon. Others, contrarily, point to the fact that the very idea of incorporating *dolus eventualis* into the RS had been given up early on as the negotiating States had not intended doing so. Depending on the view taken, there might or might not be some small room for applying *dolus eventualis* in ICL as applied by the ICC.

## **bb) Mens rea regarding normative objective elements**

### **(1) Principle**

A person acts with *mens rea*, if he or she intends and/or knows that, factually, the *actus reus*-elements are being materialized as is specified in Article 30(2) and (3) RS. Article 30 RS thereby sets forth a general rule, which applies in the absence of more specific ones.

At first glance, this norm refers to all *actus reus* elements required in order to establish liability for the respective crime, whether descriptive or normative.<sup>31</sup> However, since Article 30 RS merely refers to conduct, consequence, and circumstances, I argue that it only requires intent and/or knowledge regarding descriptive objective elements, as well as the facts underlying a normative objective element.<sup>32</sup> Therefore, inversely, it does not require intent and/or knowledge regarding normative objective elements, or the normative dimension of any other objective element.<sup>33</sup>

<sup>27</sup> *Lubanga* (ICC-01/04-01/06), Decision on the Confirmation of Charges, PTC I, 29 January 2007, paras 352–353.

<sup>28</sup> *Bemba* (ICC-01/05-01/08), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, PTC II, 15 June 2009, paras. 360–369.

<sup>29</sup> *Lubanga* (ICC-01/04-01/06), Judgment pursuant to Article 74 of the Statute, TC I, 14 March 2012, para. 1011; *Lubanga* (ICC-01/04-01/06), Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, AC, 1 December 2014, paras. 447–450.

<sup>30</sup> See, *inter alia*, K Ambos, *Der Allgemeine Teil des Völkerstrafrechts. Ansätze einer Dogmatisierung*, 2nd Ed., 2003, p. 502; R Cryer in Cryer/Friman/Robinson/Wilmschurst (Eds.), *An Introduction to International Criminal Law and Procedure*, 3rd Ed., 2014, p. 383; W Schabas in W Schabas (Ed.), *The International Criminal Court – A Commentary on the Rome Statute*, 2nd Ed., 2016, p. 630; E van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*, 2003, p. 47; G Werle/F Jeßberger, *Völkerstrafrecht*, 4th Ed., 2016, pp. 230–233.

<sup>31</sup> Descriptive objective elements are also referred to as factual objective elements, while normative ones are also named legal elements. The distinctive criterion of both normative and legal objective elements is the value judgment necessary for assessing whether the element is met.

<sup>32</sup> For a comprehensive comparison of objective elements within the ambit of Article 30 RS as well as customary international law, see G Werle / F Jessberger, ‘Unless Otherwise Provided’: Article 30 of the ICC

Some scholars oppose this understanding and categorize objective elements in a different manner. According to this view, conduct, consequence, and circumstance might have a normative dimension themselves. Therefore, it contends, Article 30 RS does not allow for any conclusion on whether or not *mens rea* requires intent and/or knowledge regarding normative objective elements. Thus, according to this reading of the provision, *mens rea* needs to comprise all objective elements, including those with a normative dimension.<sup>34</sup>

## (2) Systematic reading of the RS and the Elements of Crimes

Besides the wording of that provision, the Elements of Crimes (EoC) support my view, albeit stating in paragraph 6 of their general introduction the following as to the prototypical normative objective element ‘unlawfulness’:

‘The requirement of “unlawfulness” found in the Statute or in other parts of international law, in particular international humanitarian law, is generally not specified in the elements of crimes.’

Not taking a stance on how to construe the term ‘unlawful’, the EoC neither permit any conclusion as to the relationship between *mens rea* and the very specific normative objective element of unlawfulness. However, the EoC use a coherent language in various instances, when it comes to other normative or legal objective elements contained in the RS. In these instances, the EoC require that ‘[t]he perpetrator was aware of the factual circumstances that established’<sup>35</sup> the respective normative objective element. The EoC thus indicate that *mens rea* is not required as to the normative aspect itself of an objective element.

What is more is that Article 31(1)(a),(b) RS may be understood as implicating a standard for the awareness of wrongdoing, which is more precise than the very vague terms employed in Article 32(2) RS. Article 31(1)(a),(b) RS excludes criminal responsibility in scenarios of mental diseases and states of intoxication, where they destroy

Statute and the Mental Element of Crimes under International Criminal Law (2005) 3 Journal of International Criminal Justice, pp. 35–55, at p. 42.

<sup>33</sup> A Eser in A Cassese *et al.* (Eds.): The Rome Statute of the International Criminal Court: a commentary, 2002, pp. 924–925; R Clark, The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences (2001) 12 Criminal Law Forum, pp. 291–334, at p. 322; G Werle / F Jessberger, *Völkerstrafrecht*, 4th Ed., 2016, pp. 233–234.

A different approach suggests that criminal responsibility required *mens rea* also regarding normative objective elements. Weigend implicitly suggests this view by stating regarding Article 32(2) RS, that a mistake of normative judgment justifies the exclusion of criminal responsibility. Contrarily though, this norm explicitly depends on and makes reference to the question of *mens rea* and states, that only where the mistake actually negates *mens rea*, criminal responsibility may be excluded. See T Weigend, ‘Intent, Mistake of Law, and Co-perpetration in the *Lubanga* Decision on Confirmation of Charges’ (2008) 6 Journal of International Criminal Justice, pp. 471–487, at pp. 475–476. See also M Cernusca, A Comparative Approach to Normative Elements in the Definition of International Crimes, 2018, pp. 143–145.

<sup>34</sup> KJ Heller, ‘Mistake of Legal Element, the Common Law, and Article 32 of the Rome Statute’ (2008) 6 Journal of International Criminal Justice, pp. 419–445, at p. 422; M Kelt/H von Hebel in RS Lee (Ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, 2001, p. 29.

<sup>35</sup> This language is used in 32 instances throughout the EoC, inter alia, in EoC, Crimes Against Humanity, Article 7(1)(d), para. 3 (regarding the element of lawfulness of the presence of the person or persons), or Article 7(1)(e), para. 3 (regarding the element of gravity of the conduct).

,that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law’.

This norm clarifies that the ‘*capacity to appreciate the [...] nature of [a] conduct*’ suffices just as much as the awareness of unlawfulness for not excluding criminal responsibility. *E contrario*, one might conclude, the RS does not consider awareness of unlawfulness in a technical sense a necessary condition for criminal responsibility at any rate.

Drawing from this parallelism incorporated in the RS, one could conclude that the same holds true when it comes to similar questions outside of its Article 31(1)(a),(b). If this parallelism of lawfulness of a conduct and nature of a conduct then applies to judicial laypersons, it would have to equally apply to judicial non-laypersons such as judges – the rules on mistake of law notwithstanding. This does not, however, shed any light on the wide term ‘nature’ of a conduct, which resembles domestic standards or tests such as the German test of a reasonable layperson’s<sup>36</sup> assessment.

While it is questionable, whether this parallelism laid down in Article 31(1)(a),(b) RS applies outside of this provision’s scope of application, it to the least indicates once more that the RS does not require *mens rea* regarding the unlawfulness of a conduct.

The view I adopt does not implicate, that individual criminal responsibility could be established without any actual or hypothetical awareness that the conduct, by law or its nature or social significance,<sup>37</sup> is or might be wrongful. As shown, Article 31(1)(a),(b) RS acknowledges the notion of ‘nature of a conduct’ as a minimum yardstick. Besides, the RS states in its Article 32(2) that a perpetrator’s legal assessment is not entirely irrelevant, since a wrong legal assessment might exceptionally exclude criminal responsibility, while *a priori* it does not.<sup>38</sup> One of the two scenarios, in which it exceptionally does so, is one in which the mistake of law negates *mens rea*. What this provision thereby tells about *mens rea* regarding normative objective elements is that a mistake of law not automatically negates *mens rea*. Inversely put, *mens rea* in principle does not require a perpetrator to correctly assess the legal or normative aspect of an objective element – and thus can logically not be required in this respect at all.

If, contrarily, a perpetrator’s own assessment of normative objective elements was decisive of whether he or she had *mens rea*, it would become this person’s own choice, whether to be held accountable. A perpetrator could simply claim having acted following an alternative legal assessment of the normative objective element of the crime and thus lacked *mens rea*. This precisely would be the consequence of such extensive reading of *mens rea* regarding normative objective elements and make prosecution of most international crimes impossible, since they vastly employ normative objective elements or objective elements with a normative aspect. Examples include the ‘group’ as an element of genocide, ‘civilian population’ as one of crimes

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<sup>36</sup> For more details as to the various tests suggested in this regard and mostly drawn from what domestic jurisprudence in different jurisdictions has developed, see M Cernusca, *A Comparative Approach to Normative Elements in the Definition of International Crimes*, pp. 192–325.

<sup>37</sup> *Lubanga* (ICC-01/04-01/06), Decision on the Confirmation of Charges, Pre-Trial Chamber I, 29 January 2007, para. 316 citing A Eser in A Cassese et al. (Eds.): *The Rome Statute of the International Criminal Court : a commentary*, 2002, p. 961.

<sup>38</sup> The wrong assessment of a normative objective element might also relate to the defence of superior orders under Article 33 RS. See *infra* for further remarks on this notion.



against humanity and war crimes, or ‘character, gravity and scale’<sup>39</sup> of an aggression. Only the reading adopted herein is compatible with not rendering practically meaningless all international crimes containing a normative element.

At the same time, this approach does not infringe upon the notion of individual criminal responsibility as enshrined in the RS, since *mens rea* regarding all non-normative aspects including all factual circumstances underlying normative elements remains a key requirement for accountability. As far as concerns regarding the so-called consciousness of unlawfulness are being raised,<sup>40</sup> it ought to be noted that this notion *a priori* is not one of ICL. It may – and should, as Eser rightly points out – however be considered within the framework of ICL, where necessary or possible pursuant to Article 21(1)(c) RS.

### (3) Less Restrictive Rules for Judges?

I submit that as for anyone else, it too holds true for judges that *mens rea* is not required regarding normative objective elements and in this respect no privileging rules apply for judges.

In favour of less restrictive rules for judges, one could refer to the fact that judges have expert knowledge by training, and thus – unlike laypersons<sup>41</sup> – the qualification to professionally assess a normative objective element. Such approach would draw from the layperson-test applied for instance under German criminal law in case of *mens rea* regarding normative objective elements.<sup>42</sup>

On one hand, expert knowledge could implicate a considerably more restrictive reading of *mens rea*, which covers the normative element in its entirety. Such proposition would take into account the ability to profoundly and thoroughly read the law. It would also mirror the experience of a trained and practicing judge that lawfulness and unlawfulness rarely constitute a clear dichotomy. The approach would thus do justice to legal grey areas and judicial discretion.

On the other hand, expert knowledge could contrarily implicate a less restrictive interpretation of the rule. One could turn around both the expert knowledge and the dichotomy arguments. For one, judges by training have the ability to better judge than a layperson, whether or not a certain conduct is lawful. As to the second one, since judges know that lawfulness and unlawfulness rarely constitute a dichotomy, society should expect from them greatest reluctance in case of doubt over whether a conduct might constitute or contribute to an international crime.

However, neither of both modifications corresponds with the basic assumption of the RS that all perpetrators are equally responsible for their conduct under ICL. In an individual case of judicial accountability, the competent court may well take into account, whether and how a judge made use of his or her expert knowledge. Establishing alternative *mens rea* standards applying to judges specifically and in deviation of the general standards, however, contradicts the purpose of the RS and does not have a basis in the alleged extraordinary role of a judge.

<sup>39</sup> As to the ‘manifest violation of the [UN] Charter’ as foreseen in Article 8 *bis* RS, the EoC do not consider this element as one on which the perpetrator must have made a legal evaluation. To the contrary, they provide that such proof of legal evaluation by the perpetrator is not required. See EoC, War Crimes, Article 8 *bis*, paras. 2 and 4.

<sup>40</sup> A Eser in A Cassese *et al.* (Eds.): The Rome Statute of the International Criminal Court: a commentary, 2002, pp. 909–910.

<sup>41</sup> *Ibid.*, p. 925.

<sup>42</sup> C Roxin, Strafrecht Allgemeiner Teil, Band I, Grundlagen, Der Aufbau der Verbrechenslehre, 2006, p. 486.

#### (4) Exemplary Case

Testing such general terms in an individual case proves difficult, as illustrated by the following hypothetical scenario. Judges of the highest domestic court of a State establish a precedent on so-called Hypothermia<sup>43</sup> as an interrogation method in the context of an international armed conflict. They hold that Hypothermia does not constitute the war crime of torture and may lawfully be applied. Subsequently, members of that State's armed forces apply Hypothermia.

When assessing, under the premise that Hypothermia does constitute a case of torture, whether these judges are accountable for having greenlighted the war crime of torture, one of the arguably most delicate questions to put is whether their *mens rea* can be established regarding the normative objective element of torture. In the present scenario and under the approach adopted in the foregoing, it suffices that the judges comprehend, what it factually means to expose individuals to Hypothermia and that pursuant to Article 30(2)(a) RS, they had intent with regard to this specific conduct, consequences, and circumstances. It is contrarily not required that the judges were acting upon the persuasion that the to-be approved practice of Hypothermia, normatively, amounts to torture. The final say on whether or not Hypothermia, normatively, is a case of torture then is subject to a subsequent legal assessment of a court competent for international crimes.

Indeed, this approach suggests charging a judge for 'mere' judicial decision-making relating to a normative objective element and thus making a normative decision likely subject to (mis)interpretation – the defence of mistake of law notwithstanding. However, the same standard too applies to any other perpetrator making a normative assessment of facts. Where a President or members of a Parliament decide that Hypothermia can be applied, they are in a similar situation of normative decision-making and the above-described *mens rea*-standards apply regardless. Or would, for instance, Omar Al-Bashir lack *mens rea* regarding acts of torture allegedly ordered by him because he, normatively, would not consider the precise acts to constitute torture – despite knowing and intending that severe physical pain be inflicted upon individuals in a specific way? He would too have acted with *mens rea* regarding the factual circumstances of a normative objective element, but not regarding its normative dimension. And if this is so, why would a different rule apply to members of the judiciary than to officials of the executive or legislative branch?

In short, it is irrelevant, whether the legal assessment of a judge greenlighting Hypothermia corresponds with that of the court ultimately deciding whether that judge got involved in the war crime of torture. The only way a judge can in this scenario avoid being considered as having acted with *mens rea* regarding the circumstances underlying the normative objective element is to be particularly reluctant whenever engaging in a judicial decision-making process potentially relating to an international crime. In case of doubt whether Hypothermia amounts to torture and thus in case of doubt about a normative objective element to the effect that depending on its interpretation a judgment may fall within the ambit of an international crime, a judge can avoid the accountability risk. He or she can do so either by adopting an interpretation of the law, which surely does not constitute or contribute to an international crime, or by expressing his or her doubts and not handing down the judgment.

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<sup>43</sup> Hypothermia is one of various methods allegedly applied by the CIA as so-called 'enhanced interrogation technique', where the naked victim is exposed to a particularly low room temperature and cold water in order to induce a severe loss of body temperature.

## (5) Conclusion

I submit that the case of judges being perpetrators does not deviate from the principle and thus, *mens rea* regarding a normative objective element is not required. Instead, it suffices that the judge acted with *mens rea* regarding the underlying factual conduct, consequence, and circumstances in order to establish the subjective element of the crime.

### cc) Mistake of law

#### (1) Principle

A mistake of law, by way of principle, does not exclude criminal responsibility according to Article 32(2) RS. This provision defines a mistake of law as one, where a person errs as to the question ‘whether a particular type of conduct is a crime within the jurisdiction of the Court’. Describing the mistakes covered in extremely broad terms, this provision is construed in different ways.<sup>44</sup> Whenever the mistake relates to a legal interpretation – whether regarding the jurisdiction of the Court, or regarding subsuming a conduct under the crimes comprised by the RS –, Article 32(2) considers it a mistake of law with the consequence of it being, *a priori*, irrelevant. It has been suggested to differentiate between mistakes about punishability, about unlawfulness, and about normative objective elements.<sup>45</sup> Contrarily, the wording of this provision makes very clear that, irrespective of the point of reference of the mistake, no wrong legal or normative judgment *per se* – be it regarding punishability, unlawfulness, or normative objective elements – relieves from responsibility under the RS. Such differentiation is not incorporated in the RS, neither is it plausible. It would lead to coincidental results and should therefore not be drawn. Hence, the rule laid down in Article 32(2) RS covers all cases, in which an individual errs about any legal interpretation relating to his or her conduct.

#### (2) Exception: Mistake of Law Negating *mens rea*

Exceptions to this rule only apply in two cases defined in Article 32(2) RS.<sup>46</sup> First, a mistake of law may be relevant in the event, in which it negates *mens rea* as required by the respective crime. Second, it may exclude responsibility in a case of Article 33 RS (see *infra ee.*). In this section, I focus on the first of both, which is closely intertwined with Article 30 RS – and perhaps even renders Article 32(2) RS redundant.<sup>47</sup> The decisive question is, when a mistake of law negates *mens rea*, *i.e.* what differentiates a relevant mistake of law from an irrelevant one. Some leeway for this defence

<sup>44</sup> A Eser in A Cassese *et al.* (Eds.): *The Rome Statute of the International Criminal Court : a commentary*, 2002, pp. 908–946; A Van Verseveld, *Mistake of Law*, 2012, pp. 81–100. In favour of a restrictive reading of Article 32(2) RS: *Lubanga* (ICC-01/04-01/06), Decision on the Confirmation of Charges, Pre-Trial Chamber I, 29 January 2007, paras. 305–316. For the proposition to introduce a third category of mistakes named mistake of legal element and well-known in common law jurisdictions, see KJ Heller, ‘Mistake of Legal Element, the Common Law, and Article 32 of the Rome Statute’ (2008) 6 *Journal of International Criminal Justice*, pp. 419–445. Suggesting a narrow reading of *mens rea* referring to the principle of culpability and the maxim of *nullum crimen sine lege*: M Cernusca, *A Comparative Approach to Normative Elements in the Definition of International Crimes*, 2018, pp. 142–146.

<sup>45</sup> M Cernusca, *A Comparative Approach to Normative Elements in the Definition of International Crimes*, 2018, pp. 138–146.

<sup>46</sup> This standard is not to be confounded with that of avoidability as is well-known from various domestic jurisdictions and as has been proposed at the negotiations in Rome 1998. The Conference decided against avoidability and in favour of exclusion of *mens rea* to be the standard included in the RS. See Preparatory Committee Draft Statute, UN Doc. A/CONF.183/2, 14 April 1998, pp. 56–57.

<sup>47</sup> A van Verseveld, *Mistake of law: excusing perpetrators of international crimes*, 2018, p. 85.

has for instance been identified when it comes to normative objective elements such as ‘civilian’, ‘unlawful’, or ‘fundamental rules of international law’.<sup>48</sup>

It has been argued in the previous section that the perpetrator’s *mens rea* only needs to comprise descriptive objective elements relating to conduct, consequence and circumstance of the crime in order to establish criminal responsibility, but not normative ones. Yet contrarily and somewhat surprisingly, Article 32(2) RS could be read, *arguendo*, as implicitly conferring a critical relevance to the perpetrator’s normative assessment of his or her conduct and thus normative objective elements through the backdoor. This could be so, because this provision states that a mistake of law may exclude criminal responsibility if negating *mens rea* and thereby suggests that the perpetrator’s legal assessment was relevant for establishing criminal responsibility.

At first glance, Article 32(2) RS merely states the obvious and reiterates Article 30 RS: if the perpetrator lacks *mens rea*, he or she is not criminally responsible. Beyond this, however, Article 32(2) RS could *e contrario* implicate that *mens rea* must encompass the perpetrator’s legal assessment that his or her conduct constitutes a crime under the RS. This reading opposes the understanding of *mens rea* regarding normative objective elements I adopted in the foregoing. One could argue that the gravity of the crimes at stake necessitated such a restrictive interpretation, which excludes cases where the perpetrator believed his or her conduct not to be unlawful.

This interpretation, however, does not match with object and purpose of Article 32(2) RS. Reflecting the maxim of *ignorantia legis non excusat*, this provision specifies in its first phrase that the point of reference of a mistake of law is the question, “whether a particular type of conduct is a crime” and that such a mistake, by way of principle, does not exclude criminal responsibility. The second phrase leaves it entirely open to interpretation, to what extent a wrong legal assessment of the perpetrator alters the finding on *mens rea*, which had priorly been established. In this regard, the provision merely states that a mistake of law ‘may’ exclude criminal responsibility if it ‘negates’ *mens rea*. One cannot deduce much from this except *e contrario*, that by way of principle, a mistake of law is irrelevant. Neither does this provision specify a standard for a normative or legal assessment to be mistaken enough to negate *mens rea*. Nor, oppositely put, does this provision foresee a level required in order to establish *mens rea* despite a mistake of law.

What this provision does foresee, however, is the relation of rule and exception, the rule being that a mistake of law is irrelevant. Only if exceptionally negating *mens rea*, a mistake of law may exclude responsibility. According to the maxim of *exceptiones sunt strictissimae interpretationis*, this exceptional character must be considered when interpreting this provision. Besides, the exception does not allow any deduction as to the underlying rule, *i.e.* when a mistake of law is irrelevant.

In light of the aforesaid, Article 32(2) RS does not allow an interpretation to the effect that it provides the basis for a generous plea of ignorance or error. Contrarily, the general rule set out in its first half sentence shows that, in principle, the States party did not intend this provision to allow for an abuse of such plea as a backdoor to evade responsibility for international crimes. Given this general rule, it is unclear why a plea of ignorance or error should provide this backdoor whenever the *actus reus* of an international crime implies an objective element with a normative

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<sup>48</sup> W Schabas in W Schabas (Ed.), *The International Criminal Court – A Commentary on the Rome Statute*, 2nd Ed., 2016, p. 661.

aspect. Article 32(2) RS is thus to be read narrowly in order to not contravene the systematic and doctrinal decisions of the States party laid down in Article 30 RS.

The preparatory works support this view. While initially, the Working Group on General Principles of Criminal Law and Penalties had suggested adopting a much wider defence of mistake of law, negotiating States were reluctant and pushed for narrowing the margin of application for this defence.<sup>49</sup> This led to what now is laid down in Article 32(2) RS. Earlier on, the ILC had decided not to follow their Special Rapporteur's stance on the same subject. He had suggested an unavoidability-standard for the defence of mistake of law.<sup>50</sup>

As the RS clarifies in its Article 32(2), perpetrators shall not have the chance to evade responsibility simply by asserting they had made a mistake of law. In the specific context of judicial crime, where the entire conduct at stake is a legal interpretation, the weakness of a wide reading of Article 32(2) becomes all the more obvious. If too widely granting mistake of law as a ground for excluding criminal responsibility, judges could easily avoid responsibility for international crimes with the mere claim to having believed that the normative objective element had to be construed differently. This may seem a legal policy question at first glance. However, by effectively preventing that an entire professional group of potential perpetrators be held accountable by construing a norm of the RS in a way, which does neither match its wording, nor its object and purpose would also fundamentally contradict a systematic reading in conjunction with Article 27(1) and (2) RS. Hence, no privilege to enjoy a profession-specific protection through an exceptionally wide application of mistake of law follows from the particularities of a judge being a potential perpetrator.

At the same time, 73 years after *Radbruch's* essay well known among lawyers, it is hard to imagine that a judge actually believes the domestic written law to be the last word on what is "law" and therefore to strictly be applied. The same holds true for precedents of highest domestic courts. It is the responsibility of each and every judge to reflect, whether applying precedents or the written law would implicate grave injustice.<sup>51</sup> Indeed, both are binding in one way or another within domestic legal orders. However, it is not of historic singularity that a government abused high courts and their precedents or the written law as instruments, for instance against societal groups or perceived enemies. The same holds true for incidental grave injustice in overall rule-of-law-abiding States. The phenomenon of high court precedents or the written law being degraded to elements of oppression, persecution or human rights abuses is well known to the public across the world. Hence, a judge claiming ignorance of this phenomenon and arguing a mistake of law for having believed a prior precedent or the written law to be utterly final, conclusive and binding irrespective of potentially flagrant violations of ICL can therefore not reasonably be granted this defence.

Even if, *arguendo*, *mens rea* regarding normative objective elements were required, the conclusion drawn above persists. In this regard, reference can be made to the differentiation known from

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<sup>49</sup> Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands, A/AC.249/1998/L.13, 1998, pp. 60–61.

<sup>50</sup> Fifth report on the draft Code of Offences against the Peace and Security of Mankind, by Doudou Thiam, Special Rapporteur, A/CN.4/404, 1987, p. 14.

<sup>51</sup> A Barak, *The Judge in a Democracy*, pp. 67 and 142.

general criminal law between crimes *mala in se* and *mala prohibita* drawn by some scholars.<sup>52</sup> The first category refers to crimes, the conduct of which is so grave and reprehensible in itself, that no legislator needs to incriminate it, because any reasonable person no matter their origin, education, religion, and so forth recognizes the wrongfulness of that conduct. Contrarily, the second category refers to conduct, which, if it were not for a normative decision by a legislator, would not be wrongful. As both terms by their own wording reveal, the distinction between crimes *mala in se* and *mala prohibita* is made based on an objective standard, rather than on the perpetrator's own perspective.

If drawing this distinction at all, one would conclude that most, if not all,<sup>53</sup> international crimes belong to the first of both categories. This is so since ICL aims at ensuring the most serious crimes of concern to the international community do not go unpunished, as pointed out in the preamble of the RS. These crimes range from mass killings to displacing civilians, from large-scale sexual violence to apartheid – all clearly *mala in se*. Few potential exceptions, if any, might be identified, where the criminality of the conduct may not be obvious to all. Article 8(2)(a)(iv), (v), and (vi) RS could possibly be considered three of them. These deviations from the principle, however, cannot alter the rule: the atrocities the RS deals with can only be qualified as *mala in se*. In the same vein, already the Supreme Court for the British Zone in post-World War II Germany found it was not required that a perpetrator was aware of acting unlawfully. To the contrary, given the seriousness of the crimes the Court let suffice the objective, hypothetical possibility that the perpetrator could have recognized the unlawfulness of his or her conduct.<sup>54</sup>

Lastly, Article 32(2) RS, by its object and purpose, does not protect perpetrators who, without having positive knowledge, comprehend that their conduct may or may not be unlawful, and, despite the doubt, take the risk of acting unlawfully. This provision furthermore does not protect perpetrators, who are entirely ignorant as to the unlawfulness of their conduct. This is so, since as stated above, *mens rea* regarding normative objective elements and the legal assessment of the entire *actus reus* are, *a priori*, not a prerequisite of criminal responsibility under Article 30 RS. What the notion of mistake of law does however protect, follows from the fact that it mirrors a similar idea as the maxim of *nulla poena sine culpa* and the concept of blameworthiness. Mistake of law refers to exceptional cases, where the perpetrator acted with *mens rea* as to the *actus reus*, but was positively convinced of the fact that his or her conduct was lawful.

Article 32(2) RS therefore protects perpetrators who are mistakenly convinced to act lawfully in the rare case that this mistake negates *mens rea*, and not those who are ignorant or indifferent. Whether or not this differentiation is justified – granting this defence to those only who are mistakenly convinced of the lawfulness is a legal policy decision made by States parties in the attempt to do justice to the principle of guilt in cases, where *mens rea* is exceptionally negated. Article 32(2) RS furthermore bears the risk of provoking the problematic *Überzeugungstäter-*

<sup>52</sup> A Cassese, *International Criminal Law*, 2008, p. 294; A van Verseveld, *Mistake of law: excusing perpetrators of international crimes*, 2018, p. 86.

<sup>53</sup> Contrarily, Ambos argues that for two reasons, a characterization as *malum in se* of all international crimes is inaccurate. First, he contends that not all international crimes envisaged by the RS are evidently unlawful, particularly not all war crimes. Second, he points to the implication of applying such standard potentially interfering with the defence of mistake of law. See K Ambos, *Der Allgemeine Teil des Völkerstrafrechts. Ansätze einer Dogmatisierung*, 2003, p. 817 *et seq.*; A van Verseveld, *Mistake of law: excusing perpetrators of international crimes*, 2018, p. 86.

<sup>54</sup> K Ambos, *Der Allgemeine Teil des Völkerstrafrechts. Ansätze einer Dogmatisierung*, 2nd Ed., 2003, p. 223.

defence, which has been prominently, but unsuccessfully argued in the Nuremberg trials. However, the risk of abusively invoking this defence does not and, from a legal policy point of view, should not determine its scope of application.

The foregoing does by no means implicate an extension of existing *mens rea* standards in the RS and to introduce accountability for recklessness or negligence – which it *de lege lata* does not contain. Given that mistake of law only gains relevance once *mens rea* has priorly been established based on the mental relationship between the perpetrator and his or her conduct, consequences, and circumstances, this line of argument merely limits a defence without widening existing *mens rea* standards.

### (3) Conclusion

It has been shown that a mistake of law rarely amounts to a valid defence.<sup>55</sup> It is, however, not impossible to exceed the high threshold of negating *mens rea* laid down in Article 32(2) RS. PTC I of the ICC took a similar position on the scope of mistake of law being extremely narrow.<sup>56</sup>

#### dd) Principle of Guilt

The principle of guilt underlies the RS, but is not specifically named in it. Not even its Part 3 on General Principles of Criminal Law mentions this principle once. When it comes to judges as perpetrators of an international crime, questions of culpability are closely intertwined with those regarding *mens rea* and mistake of law. The main differentiating feature of the principle of guilt however is its normative dimension of culpability and blameworthiness.<sup>57</sup> Blaming someone for a crime, in principle, requires the perpetrator's awareness of a wrongdoing.

This is why according to some, the above-adopted interpretations of *mens rea* and mistake of law, or of legal element respectively, are far too restrictive and violate the principle of individual guilt.<sup>58</sup> In this respect, however, it is worth looking at the stance the RS takes in its Article 33(2). This provision stipulates that orders to commit genocide or crimes against humanity are manifestly unlawful by definition. It thereby alludes to the RS taking the following position: any reasonable person, no matter whether military or civilian, must know or must have known that a genocide or a crime against humanity is unlawful. Differently put, nobody can claim not having known about the unlawfulness of these crimes to the effect of negating *mens rea* or excluding guilt. This holds true even if a person is entirely unaware of the existence of these crimes and executes an order to that effect. Article 33(2) RS mirrors the normative decision to restrict the otherwise applicable guilt principle for giving way to the extraordinary character of crimes within the ambit of the RS. As this provision exemplarily shows, the RS does not attribute absolute primacy to the principle of guilt.

<sup>55</sup> A Eser in A Cassese et al. (Eds.), *The Rome Statute of the International Criminal Court: A Commentary*, 2002, p. 934; O Triffterer in O Triffterer/K Ambos (Eds.), *Commentary on the Rome Statute of the ICC*, 3rd Ed., 2016, p. 569.

<sup>56</sup> *Lubanga* (ICC-01/04-01/06), Decision on the Confirmation of Charges, Pre-Trial Chamber I, 29 January 2007, paras. 305–316.

<sup>57</sup> A Eser in A Cassese et al. (Eds.): *The Rome Statute of the International Criminal Court : a commentary*, 2002, p. 903.

<sup>58</sup> K Ambos, *Der Allgemeine Teil des Völkerstrafrechts. Ansätze einer Dogmatisierung*, 2nd Ed., 2003, pp. 818–819; KJ Heller, 'Mistake of Legal Element, the Common Law, and Article 32 of the Rome Statute' (2008) 6 *Journal of International Criminal Justice*, pp. 419–445, at p. 445.

Where a judge lacks awareness of unlawfulness, because he or she applied the law according to his or her own legal persuasion contrary to ICL, and where *mens rea* is established, while mistake of law does not negate it, one could consider that judge to act without guilt. However, doing so would run counter to the stance of the RS on *mens rea* regarding normative objective elements and mistake of law, if such a scenario led to negating criminal responsibility through excluding guilt, if all other conditions are met.

The principle of guilt hence does not pose a distinct challenge to holding judges accountable.

### ee) The Written Law as a ‘Superior Order’?

Drawing from the principle as laid down in Article 33(1) RS, one could make another argument in favour of exempting domestic judges from accountability.

This norm states that having acted according to a governmental or superior order does not exclude criminal responsibility. Only exceptionally this defence is admissible, if the three conditions are cumulatively met. First, the person had a legal obligation to obey the order. Second, she had no knowledge of its unlawfulness. And third, the order was not manifestly unlawful. Inversely read, this norm effectively states an obligation to disobey such an order in two scenarios: first, when a person has positive knowledge of its unlawfulness or, second, even if a person lacks positive knowledge under the condition that the order is manifestly unlawful. In addition, Article 33(2) RS specifies that such defence is generally inadmissible in cases of genocide or crimes against humanity, since orders to commit these crimes are deemed manifestly unlawful *per se*.

Regarding domestic judges as potential perpetrators, the written law a judge applies could be read as being tantamount to the order of a government or of a superior or prescriptions of law as envisaged by Article 33(1) RS. One could read this norm as follows: the fact that an international crime has been committed by a judge in application of a legal norm shall not relieve that judge from criminal responsibility, unless all three conditions are met. The legal obligation to obey the ‘order’ would then be the domestic provision binding the domestic judge to apply domestic law. In case of doubt, it might implicitly or explicitly require the judge to apply, for instance, the most prevalent reading of the law, or a precedent of the highest domestic court.

Such understanding matches perfectly with the test suggested by *Radbruch*<sup>59</sup> insofar as it implicitly reiterates, that no legal norm is final and imperative without exception. As to him, an exception not only can, but must be made, if strictly applying a legal norm would cause inhumane and unbearable consequences, and thus so-called ‘unlaw’. If this is the case, a judge has, so the argument goes, the duty to leave that norm unapplied, and decide the case based on natural law. *Radbruch* argues, the ‘law’ not only abstractly is a much wider concept than radical positivists would argue, but also on the applied level ought to be found anew in every single case taking into account much more than just written legal norms.

Applying this provision is not an analogy conflicting with *nullum crimen sine lege stricta* as Article 33(1) RS does not incriminate a conduct. It only states that a person is not relieved of her already established criminal responsibility, unless all three conditions are met. Drawing this analogy simply provides an additional defence. The arguably most decisive question in the

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<sup>59</sup> G Radbruch, *Gesetzliches Unrecht und übergesetzliches Recht* (1946) 1 *Süddeutsche Juristen-Zeitung*, pp. 105-108, at p. 105.



scenario of domestic judges is, how to interpret Article 33(1)(c) RS – a question, which is closely intertwined with that of the threshold of ‘wrongness’ a judicial decision needs for entailing criminal responsibility.

### **b) Judicial Immunity – a General Exemption from Accountability?**

Another obstacle to holding judges accountable is their privilege in most domestic jurisdictions to *a priori* be exempt from criminal liability for judicial acts or, as the Anglo-American doctrine puts it, judicial immunity. The main question it raises is whether and if so, how this notion drawn from domestic legal systems applies in ICL at all. This implicates the questions how it relates to the immunities addressed in Article 27(1) or (2) RS, and whether it might apply via Article 31(3) in conjunction with Article 21 RS. Pertaining more to public international law, judicial immunity might conflict with the immunity of State officials if, instead of an international court, a domestic court prosecutes a domestic judge of a different State for international crimes.

#### **aa) Concept of Judicial Immunity drawn from Domestic Jurisdictions**

Understanding judicial immunity and its role in ICL requires taking a closer look at this notion on the domestic level. As an abstract concept, it is widely acknowledged in one way or another throughout many domestic jurisdictions and implicitly by the NMT.<sup>60</sup> It aims at safeguarding judicial independence and serves impartial justice and the domestic rule of law.

Doctrinally, this privilege could either be considered as a matter of procedural law or, more precisely, an immunity from jurisdiction as suggested by the Anglo-American term ‘judicial immunity’ and as has the NMT done in the Justice Case. Or, it could be considered with the continental European approach as a matter of substantive law or, *i.e.* an exemption *sui generis* owed to the special role of a judge within a system abiding by the rule of law. Thus, in domestic legal systems, this privilege may be read either as a question of procedural law, or as one of substantive law.

#### **bb) Judicial Immunity and Article 27 RS**

Judicial immunity might contradict Article 27 RS. This norm consists of two distinct provisions. While Article 27(1) precludes official capacity being invoked as a defence, Article 27(2) precludes immunities or special procedural rules – primarily, but not only those derived from State immunity – being invoked as barring the jurisdiction of the ICC.

Article 27(1) phrase 1 RS states the principle: official capacity of any kind is irrelevant and does by no means exempt any person from responsibility under the RS. This wording, one could argue, comprehensively precludes any defence of official capacity and thus necessarily includes domestic judges. Another reading could point more to phrase 2, which states to whom phrase 1 ‘in particular’ applies. Despite being non-exhaustive, phrase 2 seems to imply that, primarily, official capacity within the executive and the legislative branch are encompassed, not within the judicial branch. The *travaux préparatoires* do not shed any light on this question. Thus, Article 27(1) RS possibly leaves some space for judicial immunity.

<sup>60</sup> *Justice Case*, pp. 1024–1025.

If, contrarily, judicial immunity is perceived as a notion of procedural law, Article 27(2) RS might apply. It provides that neither immunities, nor special procedural rules bar the ICC from exercising its jurisdiction. Understanding judicial immunity as one of them would consequently not affect the jurisdiction of the ICC and thus not exempt judges.

Having said that, one could argue that Article 27(2) RS by its object and purpose primarily addresses personal immunities derived from State immunity and thus international law. This norm could be read as a waiver of States party to the RS of their right to such immunities vis-à-vis the ICC.<sup>61</sup> Judicial immunity, however, is neither an individual right of a State, nor does considering it tantamount to immunities derived from State immunity provide a sound rationale. These special personal, diplomatic or consular immunities apply in reciprocal respect of the sovereign equality of States and for the functioning of their international affairs and diplomatic relations. In contrast thereto, the doctrinal foundation of judicial immunity is profoundly distinct from that of the international law immunities primarily addressed in Article 27(2) RS. However, Article 27(2) RS explicitly refers not only to immunities and special procedural rules under international law, but also under national law. It therefore does not matter where the doctrinal basis of judicial immunity lies. The all-encompassing wording as well as the purpose of Article 27(2) RS leaves no space for ambiguity: nobody shall be granted special protection from prosecution for international crimes based on official capacity.

### **cc) Judicial Immunity and Article 31(3) in conjunction with Article 21 RS**

If, contrarily, understanding the privilege of judicial immunity as one of substantive law, Article 31(3) in conjunction with Article 21 RS might apply. Article 31(3) RS provides, that unwritten grounds for excluding criminal responsibility may be considered, if the applicable law as defined in Article 21 permits. This are primarily the RS, the EoC, and the Rules of Procedure and Evidence, Article 21(1)(a); secondarily general and humanitarian international law, Article 21(1)(b); and thirdly, failing any rule found applicable among the first two categories, general principles of law derived from national legal systems of the world, Article 21(1)(c).

Rather than an immunity in the technical sense, one could argue, judicial immunity is a privilege drawing its *raison d'être* from the fact that the borderline between the due exercise of the judicial profession and what goes beyond it is so hard to determine on an abstract level. Therefore, reach and limits of this privilege could only be assessed based on a review of an individual case, and judicial immunity not deemed a notion of procedural law to be applied notwithstanding the specifics of an individual case.

Being closely intertwined with questions of substantive law, this privilege is an exemption *sui generis* to be considered a ground excluding criminal responsibility under Articles 31(3), 21(1)(c) RS. Only based on the individual judicial action taken, one can assess, whether the privilege of judicial immunity applies. Thereby, domestic judges require enough leeway, and not every substantially wrong judicial decision can reasonably entail judicial liability without infringing upon the independence of the judiciary. This is to acknowledge the nature of legal argument and the fact

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<sup>61</sup> This is the understanding Jordan put forward in the dispute about its decision not to arrest and surrender Omar Al-Bashir when he was present on Jordanian territory on 29 March 2017. In its argument, Jordan referred to Article 27(2) RS as implying a waiver of State immunity – which Sudan not being a State party to the RS had never issued. For the main arguments raised in Jordan's submissions see *Bashir* (ICC-02/05-01/09), 'Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir', Pre-Trial Chamber II, 11 December 2017, paras. 14 *et seq.*

that oftentimes an ample range of norm interpretation is justifiable. In order to find an equilibrium between judicial accountability and judicial independence, that privilege should only give way to accountability, if a certain standard yet to be determined – such as a threshold of gravity or obviousness – is met.

#### **dd) Immunity *ratione materiae* of Judges in foreign Domestic Courts?**

Unlike before the ICC, immunity *ratione materiae* of domestic judges as State officials might form another obstacle to their prosecution in a domestic jurisdiction other than their own.

Whereas domestic judges do not enjoy a distinct immunity *ratione personae* under international law, every judicial decision is a sovereign act of a State and thus *a priori* protected by State immunity. Consequently, judges by acting as a State official *a priori* enjoys immunity *ratione materiae* for all acts undertaken in the exercise of their official capacity. The prosecution of a domestic judge in a foreign domestic court, in principle, conflicts with the obligation under international law to respect their immunity *ratione materiae*. However, an exception applies, where domestic judges engage in international crimes and they then do not enjoy immunity *ratione materiae*. As the debates on universal jurisdiction and international crimes exceptions to certain immunities have shown, strong arguments support such an exception to immunity *ratione materiae*. Whether one finds the view put forward by Akande and Shah<sup>62</sup> arguing in favour of a new rule of customary international law convincing, or the implied-waiver doctrine, or the non-sovereign-acts doctrine: many progressive voices back an international crimes exception to immunity *ratione materiae*. As this article does not intend to comprehensively review this debate and take a stance, it simply adopts a generally progressive understanding of immunities *ratione materiae*.

It is against this background that exposure to accountability for domestic judges not only constitutes a phenomenon in international courts and tribunals, but also in foreign domestic fora.

#### **4. Threshold of ‘Wrongness’ of a Judicial Decision to Entail Accountability**

The most decisive question is that of the threshold of ‘wrongness’ required to entail judicial accountability. Put differently: how wrong does a judicial decision need to be in order to trigger criminal liability of a judge? Assuming the existence of some sort of judicial privilege, the red line demarcating the boundary between the protection of a judge and its loss needs concise contours.

The NMT held that the judicial privilege of the defendants had its doctrinal and conceptual roots in judicial independence, which due to Nazi reshaping of power structures was inexistent when the crimes were being perpetrated.<sup>63</sup> Consequently, absent judicial independence, the Tribunal argued, the judicial privilege no longer applied.<sup>64</sup> While there is merit in this reasoning applying a systemic approach, it merely shifts the legal problem elsewhere. Rather than asking when the judicial

<sup>62</sup> Dapo Akande, Sangeeta Shah, ‘Immunities of State Officials, International Crimes, and Foreign Domestic Courts’ (2010), 21 *European Journal of International Law* 4, pp. 815–852.

<sup>63</sup> *Justice Case*, pp. 1024–1025.

<sup>64</sup> In the same vein, Graver – while solely looking at contexts of tyranny and oppression, as he put it – argues in favour of holding judges accountable, where the rule of law in any given jurisdiction is under attack as a whole and no longer prevails. Otherwise, i.e. if judges were to be held accountable too easily for their involvement in international crimes within a context of a generally rule of law-abiding system he argues, the rule of law itself is at risk. See HP Graver, *Judges against justice: On judges when the rule of law is under attack*, 2015, pp. 2–3.

privilege no longer applies, one now asks when, systemically, judicial independence ceases to exist. This dichotomy does not do justice to the underlying question. Merely shifting the problem from an individual test to a systemic one does not illuminate the boundaries between punishable and non-punishable judicial misconduct.

Instead, I submit, in order to safeguard judicial independence on one hand and establish accountability where needed on the other, such threshold needs to build upon a test of gravity or obviousness. While allowing judges a reasonable margin of free judicial decision-making, this test should rely on a comparison between the law as it actually was applied on one hand and the range within which it could legitimately have been applied on the other. When found to be obviously outside the scope of a legitimate reading of the law and in violation of ICL, such judicial decision could entail criminal responsibility.

While concepts of gravity or obviousness by definition are not clear-cut, this test relates to Article 33(1)(c) and (2) RS. This provision primarily addresses legal laypersons and establishes a particularly high threshold by requiring manifest unlawfulness. By contrast, in the case of judges – given their expert knowledge – society should expect a considerably higher sensitivity towards the complexity of the term ‘law’ and awareness of it going far beyond the written law as such, as argued by *Radbruch* and many more. The implications of this expert knowledge may be understood differently.

On one hand, it could allow judges a better understanding of what is manifestly unlawful. Therefore, it is one option to interpret the manifestly-requirement much more widely and leave less room for this defence than for laypersons.

On the other hand though, this expert knowledge includes the awareness that in law, unambiguous answers are rare and could thus impede finding what is manifestly unlawful. Hence, it is another option to interpret the manifestly-requirement much more strictly and leave more room for this defence than for laypersons.

Lastly, one could argue in favour of applying the same standard for both judges and laypersons. This would match with what has been argued priorly: that judicial exceptionalism does not find a basis in the RS. Judges are thus not to be treated differently merely for being the individuals designated to apply the law, as opposed to those designated to execute military or civilian orders.

No matter which approach taken, at least in one category of cases, such threshold would quite clearly be met. Where a precedent or line of jurisprudence, for instance by the ICC, allows judges to deduce therefrom how to apply the law in the case before them. As the *acte-clair-* and *acte-éclairé-* doctrines in European Law postulate, where a legal rule is sufficiently clear and there is no doubt on how to construe it, there is no need for further clarification. The same holds true, where a relevant Court has sufficiently clearly pronounced on a legal question and rendered unnecessary a second seising of that Court with the same question. If for instance the ICC has considered waterboarding a crime against humanity or war crime, it is manifestly, obviously, or gravely wrong to find otherwise as a domestic judge and then claim this finding to fall within the margin of free judicial decision-making. This is not to assert the ICC was an extraordinary court of appeals, but an instance the findings of which are a strong indication for how to interpret ICL.

In all other categories of cases, *i.e.* those in which it is less clear how to differentiate between a decision still not entailing accountability and one that already does, it has to be answered on a

case-by-case basis, whether the threshold is met. While courts could help clarify this threshold in the future, Article 33 RS provides, as of yet, some guidance on where to draw this line.

## **5. Conclusion**

In the foregoing, I have assessed whether domestic judges might be held responsible for their professional conduct under ICL, when they engage in international crimes.

The findings of this paper are threefold. First, the issue of judicial accountability is not of a mere historical relevance limited to the Justice Case of 1947. Second, precedents for judicial crimes in modern ICL could help shape the cornerstones of judicial accountability. These are in particular the following: the threshold of where a simply wrong or ill-founded judicial decision turns into one constituting an international crime, as well as the modes of criminal accountability applicable. Third, the obstacles to judicial accountability are not of an elementary nature raising the question of *whether* such accountability exists at all. Rather, the question is *how* deal with these obstacles and thus one of *mens rea* regarding normative objective elements, mistake of law, and judicial immunity.

As any other legal framework, ICL depends on the loyalty of its guardians, and domestic judges form part of them. It is only by holding these guardians accountable whenever they contribute in one way or another to the most heinous crimes humankind has witnessed, that they can be deterred and the international rule of law fostered thereby.

## The Author



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The Kolleg-Forschungsgruppe “The International Rule of Law – Rise or Decline?” examines the role of international law in a changing global order. Can we, under the current significantly changing conditions, still observe an increasing juridification of international relations based on a universal understanding of values, or are we, to the contrary, rather facing a tendency towards an informalization or a reformalization of international law, or even an erosion of international legal norms? Would it be appropriate to revisit classical elements of international law in order to react to structural changes, which may give rise to a more polycentric or non-polar world order? Or are we simply observing a slump in the development towards an international rule of law based on a universal understanding of values?

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