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OVERVIEW

The Journal of International Criminal Law (*JICL)* is a scientific, online, peer-reviewed journal, first edited in 2020 by Prof. Dr. Heybatollah Najandimanesh, mainly focusing on international criminal law issues.

Since 2023 JICL has been co-managed by Prof. Dr. Anna Oriolo as General Editor and published semiannually in collaboration with the International and European Criminal Law Observatory (IECLO) staff.

JICL Boards are powered by academics, scholars and higher education experts from a variety of colleges, universities, and institutions from all over the world, active in the fields of criminal law and criminal justice at the international, regional, and national level.

The aims of the JICL, *inter alia*, are as follow:

- to promote international peace and justice through scientific research and pubblication;
- to foster study of international criminal law in a spirit of partnership and cooperation with the researchers from different countries;
- to encourage multi-perspectives of international criminal law; and
- to support young researchers to study and disseminate international criminal law.

Due to the serious interdependence among political sciences, philosophy, criminal law, criminology, ethics and human rights, the scopes of JICL are focused on international criminal law, but not limited to it. In particular, the Journal welcomes high-quality submissions of manuscripts, essays, editorial comments, current developments, and book reviews by scholars and practitioners from around the world addressing both traditional and emerging themes, topics such as

- the substantive and procedural aspects of international criminal law;
- the jurisprudence of international criminal courts/tribunals;
- mutual effects of public international law, international relations, and international criminal law;
- relevant case-law from national criminal jurisdictions;
- criminal law and international human rights;
- European Union or EU criminal law (which includes financial violations and transnational crimes);
- domestic policy that affects international criminal law and international criminal justice;
- new technologies and international criminal justice;
- different country-specific approaches toward international criminal law and international criminal justice;
- historical accounts that address the international, regional, and national levels; and

- holistic research that makes use of political science, sociology, criminology, philosophy of law, ethics, and other disciplines that can inform the knowledge basis for scholarly dialogue.

The dynamic evolution of international criminal law, as an area that intersects various branches and levels of law and other disciplines, requires careful examination and interpretation. The need to scrutinize the origins, nature, and purpose of international criminal law is also evident in the light of its interdisciplinary characteristics. International criminal law norms and practices are shaped by various factors that further challenge any claims about the law's distinctiveness. The crime vocabulary too may reflect interdisciplinary synergies that draw on domains that often have been separated from law, according to legal doctrine. Talk about "ecocide" is just one example of such a trend that necessitates a rigorous analysis of law *per se* as well as open-minded assessment informed by other sources, *e.g.*, political science, philosophy, and ethics. Yet other emerging developments concern international criminal justice, especially through innovative contributions to enforcement strategies and restorative justice.

The tensions that arise from a description of preferences and priorities made it appropriate to create, improve and disseminate the JICL as a platform for research and dialogue across different cultures, in particular, as a consequence of the United Nations push for universal imperatives, *e.g.*, the fight against impunity for crimes of global concern (core international crimes, transboundary crimes, and transnational organized crimes).

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Journal of International Criminal Law [Vol. 6 – Issue 1]

Does Crossfire Between Armies Killing Civilians Break the Causation in International Criminal Law? An Argument

*by Philip Lau Kwong Yui**

ABSTRACT: In wars and armed conflicts, it is not uncommon that members of opposing armies shoot at each other, leading to "crossfire" killing civilians in the process. In cases before the International Criminal Court (ICC), crossfire has been employed as a defence by lawyers of the accused to abdicate responsibilities. A prominent example is Prosecutor v. Dominic Ongwen, in which the Defence contends that there was crossfire by member of the LRA and the Ugandan army, or at least remains a possibility. Therefore, the accused cannot be held liable for certain charges such as murder. Unfortunately, in all of these ICC cases, the Courts failed to address this issue of crossfire. This Article challenges this defence and argues that crossfire does not break the chain of causation of murder under International Criminal Law (ICL). Hence, inducing a crossfire knowingly with an intent to kill civilians would constitute murder under the Rome Statute. It builds its arguments by examining 1) provisions related to the crime of murder under the Rome Statute and other ICC statutes; 2) the jurisprudence of international criminal courts and tribunals; 3) customary international law, including international humanitarian law and 4) jurisprudence of common law and civil law countries, as well as Islamic Criminal Law. The Article seeks to inspire the ICC to develop the law of causation under ICL.

KEYWORDS: Crossfire; Dominic Ongwen; Causation; Intervening Cause; Murder; International Criminal Court; International Criminal Law; Lord's Resistance Army.

I. Introduction

Picture the following scenario: There is an armed group, who named themselves the "Revengers", which has long been fighting against the government. One day, the armed group has made a plan to attack some civilian camps where the ordinary citizens of the country reside at. However, the commanders or "heads" of the Revengers plan to teach the residents of the camps a lesson, that they should not be residing in these government facilities. By their past experience, they knew that if they employ guns and machineries to shoot at these camps, there will be some members of the government army who came out to defend themselves and the civilians. As a matter of certainty, the heads of the Revengers knew that *some* civilians will be killed either by the bullets of the Revengers or the government army or both, amidst the crossfire between them, even though they do not know for certain *which* civilians will be killed

DOUBLE BLIND PEER REVIEWED ARTICLE

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in the process. Despite this, they launched an attack to shoot at the civilian camps, leading to a crossfire between the group and the army. Some civilians died under the bullets fired by the army when they were defending themselves.

A criminal trial at the International Criminal Court ensued, where the Prosecutor charged the commanders of the Revengers with murder as a crime against humanity and murder as a war crime, pursuant to Article 7(1)(a) and Article 8(2)(c)(i) of the Rome Statute respectively. The Defence's lawyers contend that the civilians were killed at the crossfire, or at least remain a *possibility*. Henceforth, the Prosecutor fails to prove beyond reasonable doubt that the civilians were killed by the accused. The accused were "innocent", so they say. Judges of the ICC found that the issue before the Chamber is one of causation, namely whether when the *mens rea* and *actus reus* were found to be present with the accused, they can be held guilty for the offence of murder in a situation of crossfire.

This Article addresses this issue, namely whether crossfire would break the chain of causation for murder under international criminal law (ICL). It uses the facts in *Prosecutor v. Dominic Ongwen* as the main case study and contend that crossfire does not cut the chain of causation, or *legal* causation, under ICL. If you intend to kill civilians and caused their death, you are *guilty* of murder in the eyes of ICL. As it will be elaborated in this Article, evidence shows clearly that the defendant Dominic Ongwen has the intent to kill civilians, and the defence of crossfire has been pleaded by the Defence lawyer in many instances where civilians were shot dead. It therefore serves as a perfect example of discussing the issue of whether a defendant can be held responsible for causing death of civilians, even if there has been crossfire between different armies and/or armed groups. Further, the ICC as a permanent international criminal court, needs to decide by itself the law of causation to iron out the wrinkles, independent from and different to other *ad hoc* criminal tribunals such as the International Criminal Tribunal for the former Yugoslavia (ICTY).

The issue of determining the responsibility of a defendant for crimes under ICL has been the subject of intense debate and scrutiny amidst academic literature. For instance, generalised theories such as that of Professor Eramus Mayr debate whether criminal responsibility under ICL should be regarded as a causal notion,[1] whereas scholars such as Javid Gadirov advocate for the use of models of probabilities in finding causation.[2] This Article, instead of advancing arguments on normative theories of causation, develops *legal* arguments on how the international criminal courts and tribunals should rule in cases involving crossfire between armies killing civilians.

The problem of opposing armies shooting at each other and killing not only members of armies but civilians is commonplace. Instances include but are not limited to, the crimes against humanity allegedly committed by the "FDLR", an anti-government armed group in the North and South Kivu Provinces of Democratic Republic of the Congo (DRC) since early 2009, which led to the prosecution in *The Prosecutor v. Bosco Ntaganda*.[3] Civilians were trapped in camps controlled by FDLR, either killed by the FDLR or killed amidst the crossfire between FDLR on the one hand and the DRC and Rwandan armies on the other.[4] Crossfire is also employed as

[1] Erasmus Mayr, *International Criminal Law, Causation and Responsibility*, 14 INTERNATIONAL CRIMINAL LAW REVIEW 855 (2014).
[2] Javid Gadirov, *Causal Responsibility in International Criminal Law*, 15 INTERNATIONAL CRIMINAL LAW REVIEW 970 (2018).
[3] ICC, The Prosecutor v. Bosco Ntaganda, ICC-01/04-02/06-36-Red, Decision on the Prosecutor's Application under Article 58, July 13, 2010), at 49-52.
[4] *Id*., at 8.

a clever defence in some ICL cases, including by the Defence lawyer in *Prosecutor v. Sefer Halilovic* and in *Prosecutor v. Dominic Ongwen*.

In *Prosecutor v. Dominic Ongwen*, the Defence raised the argument that as a matter of possibility, the civilians might have been killed in the crossfire between the Ugandan army and the Lord Resistance Army (LRA) in the civilian camps during the attacks.[5] It was an unfortunate event that the civilians were killed, not to anyone's responsibility. The Prosecution, nonetheless, failed to demonstrate that the fires were caused by the LRA and not by crossfire of tracer (stretcher) bullets or the battle light used by the Ugandan army, argued by the Defence.[6]

However, the Trial Chamber of ICC failed in *Prosecutor v. Dominic Ongwen* to address the issue of crossfire, namely whether an armed group or its commander can be held guilty for murder when civilians are killed during crossfire between members of an army and that armed group. Instead, it conveniently bypasses the issue by looking at the overwhelming evidence that Dominic Ongwen and the LRA killed civilians and did have such intent, ruling against the evidence of crossfire.[7] However, regrettably the ICC did not take the opportunity to develop and clarify the law on crossfire, leaving the issue unresolved instead. As will be covered in this Article,[8] the international criminal tribunals did not provide a sophisticated analysis on the issue of crossfire in various cases.

Domestic courts which enforce ICL face similar issue in failing to address the issue of crossfire. In the *Prosecutor's Office of Bosnia and Herzegovina v. Marko Radić and others*, the accused Dragan Šunjić was charged with Crimes against Humanity before the Court of Bosnia and Herzegovina under a domestic criminal statute.[9] Despite the fact that Šunjić was found to have forced prisoners to perform labour at the front-line, thereby exposing them to crossfire and many of them were killed.[10] The Court found Šunjić guilty of murder by such acts of exposing the civilians to crossfire, without analysing the legal issue of causation.[11]The structure of this Article is as follows: Section II of this Article provides the necessary backdrop for the case of *Prosecutor v. Dominic Ongwen*. It i) explains the rise of the Lord Resistance Army (LRA) and Dominc Ongnwe as a commander thereof; ii) breaks down the necessary elements of successfully prosecuting a crime before the International Criminal Court (ICC), whereby in this Article the crimes in issue are murder as a war crime and murder as a crime against humanity; iii) contends how an accused will be held criminally responsible for his actions or the actions of his subordinates, namely the law on modes of responsibility under the Rome Statute.

The article ventures into explicating the laws of murder and causation, including the issue of crossfire in section III. Section IV consults the Vienna Convention on the Law of Treaties (1969) to interpret the crime of murder as a war crime and crime against humanity, adopting a purposive approach thereto. In Section V, reference is made to applicable treaties and the principles and rules of international law, including customary international law of international humanitarian law to solve the puzzle of crossfire. The Article then proceeds to discuss and analyse the law of domestic courts, including common law, civil law and Islamic criminal law

[5] ICC, The Prosecutor v. Dominic Ongwen, ICC-02/04-01/15, Trial Judgment (Public Redacted) (Feb. 4, 2021), at 1445, 1745.
[6] *Id*., at 1725, 1741.
[7] *Id*., at 1476, 1492, 1733.
[8] See Section III of this Article.
[9] Appelate Chamber, The Prosecutor's Office of Bosnia and Herzegovina v. Marko Radić and others, X-KR-05/139, Second-Instance Verdict, (March 9, 2011), at 28-29.
[10] *Id*., at 274, 276, 989.
[11] *Id*., at 989.

jurisprudence, in deducing general principles of law of causation from domestic law systems of the world. In the final section, Section VII, it encourages the ICC to further develop the law on causation, and discusses the applicability of the arguments in this Article to other scenarios of war and armed conflict.

II. *Prosecutor v. Dominic Ongwen*: a Case Study

"Dominic Ongwen and his subordinate commanders ordered LRA soldiers to target everyone they find at Odek IDP camp, including civilians, and also instructed them to loot food and abduct civilians" – Trial Judgment, *Prosecutor v. Dominic Ongwen*.[12]
To set the stage in order to analyse and discuss the case *Prosecutor v. Dominic Ongwen*, this section outlines the background of the accused, Dominic Ongwen, including his status within the Lord Resistance Army, the attacks he commanded on the IDP camps and the charges brought against him. Then, it further breaks down the elements required in general for being held guilty for a crime under the ICL: namely *actus reus*, *mens rea* and modes of liability. These elements equally apply to the charges at issue, *viz*. the crime of murder.

On 4th February 2021, the Trial Chamber IX of the ICC delivered its trial judgment in the case of *The Prosecutor v. Dominic Ongwen*. With over 70 counts of charges brought against Dominic Ongwen, the Chamber found him guilty of 61 charges,[13] which are offences of crimes against humanity and war crimes.[14] This brought an end to a highly controversial case, with a trial of nearly 5 years since the confirmation of charges laid against Mr Dominic Ongwen in 2016.

A. A Brief History of the Lord Resistance Army and the Rise of Dominic Ongwen

Dominic Ongwen was formerly a member of the LRA, which has been active in Uganda since the 1980s.[15] As an essential part of the background, the LRA is an armed group in Uganda, led by Joseph Kony at the time.[16] The seed for the conflict in Uganda has a long root, of which LRA was part of. In the 1850s, armed traders and adventurers brought destructions in the land of Uganda-South Sudan border zone.[17] After Uganda's independence from British rule, the heads of state had undergone coup d'état, including the first head of state Multon Obote overthrown by his army commander Idi Amin.[18] Amin was overthrown himself in 1979, with Obote returning to power in 1980, following flawed elections.[19] Opponents of Obote such as Yoweri Museveni were unwilling to accept the election outcome, with Museveni waging a guerrilla campaign against the government with alliances from the southwest and central south of the country.[20] There were, furthermore, widespread aversion to what was perceived as

[12] *Id*., at 2920.
[13] *Id*., at 1068-1076.
[14] *Id.*
[15] *Id.,* at 1.
[16] *Id.,* at 10, 11. *See* also Professor Tim Allen (P-0422)'s report, UGA-OTP-0270-0004, Independent Background Report on the Situation in Northern Uganda, for further historical background of the LRA.
[17] Tim Allen, *Joseph Kony and the Lord's Resistance Army*, in AFRICAN HYSTORY (Oxford Research Encyclopedias, 2018), at 1-2.
[18] *Id.,* at 2.
[19] *Id*.
[20] *Id*.

northern domination.[21] Museveni with his National Resistance Army (NRA) successfully seized power in Uganda, which inspired another wave of opposition from leading figures such as Alice Auma.[22] Despite Auma's failure in her armed actions,[23] she inspired a number of groups which continued to oppose the Ugandan government, one of which being the LRA, led by Joseph Kony,[24] which is the armed group leading to the trial of *The Prosecutor v. Dominic Ongwen.* In short, the LRA pursued an objective of armed rebellion against the Government of Uganda.[25]

The protagonist of the trial, Dominic Ongwen – the accused, was abducted to join the LRA when he was no more than 11 years old.[26] He has been charged by the International Criminal Court with leading or taking part in four attacks against civilian camps in Uganda. The attacks took place against the Pajule IDP ("internally displaced persons") Camp, the Odek IDP Camp, the Lukodi IDP Camp, the Abok IDP Camp on 10th October 2003, 29th April 2004, 19th May 2004 and 8th June 2004 respectively.[27]

Was Dominic Ongwen responsible for the attacks? The chamber answered in the affirmative. First, Ongwen's position at the LRA merits explanation in understanding the roles he played with the attacks. The Chamber found that Dominic Ongwen was a battalion commander at the time pertinent to the charges, in charge of the Oka battalion of Sinia brigade on 1st July 2022.[28] As to his rank, Dominic Ongwen was promoted from the rank of captain to the rank of major on 1st July 2022.[29] His rank in the LRA further progressed over time. Joseph Kony appointed Ongwen as second-in-command of the Sinia brigade on 17th September 2003, and further promoted him to lieutenant colonel on 15th November 2004.[30] On 4th March 2004, Ongwen became brigade commander of Sinia brigade;[31] On 30th May 2004, Ongwen was promoted to the rank of colonel, and sometime in late 2004 to the rank of brigadier.[32] He was found to have led the four attacks. However, to be criminally responsible for an ICC crime, further elements must be satisfied, namely *mens rea* (also known as "material elements") and *actus reus* ("mental elements") of the crime concerned. The accused must also be liable to the crimes under the requisite modes of responsibility, which has its own *mens rea* and *actus reus* to satisfy. These will be examined each below in turn.

B. Elements of Committing a Crime under International Criminal Law: A Break-Down

For a person to be held responsible for committing a crime in ICL, the Rome Statute being its creation, different elements are required.

To hold one culpable for a crime, first, the court needs to find the applicable offences relevant to the acts. For the ICC, it needs to consider whether the act falls under the applicable law of the Rome Statute, namely one of genocide, crimes against humanity, war crimes or the

[21] The Prosecutor v. Dominic Ongwen, *supra* note 5, at 2.
[22] *Id.,* at 3, 4, 5.
[23] *Id.,* at 4.
[24] *Id.,* at 5.
[25] *Id.,* at 372.
[26] *Id.,* at 29.
[27] *Id.,* at 18 -19.
[28] *Id* at 350. The LRA is divided into 4 brigades: Sinia, Stockree, Gilva and Trinkle. There is an additional division called Jago starting from 2003. The brigades were divided into battalions and further into "coys", with each of the units led by a commander. *See* further The Prosecutor v. Dominic Ongwen, *supra* note 5, at 977.
[29] The Prosecutor v. Dominic Ongwen, *supra* note 5, at 1016.
[30] *Id.,* at 367.
[31] *Id*., at 369.
[32] *Id*., at 370.

crime of aggression.[33] Second, the court must find that the individual has committed both the *actus reus* (material elements) and *mens rea* (mental elements) of the crime, for one to be held guilty of the offence. It is insufficient that a person only took an action or omission without the requisite intent, and *vice versa*. Article 30 of the Rome Statute defines that one has *intent* where that person means to engage in the conduct, and he means to cause that consequence or is aware that it will occur in the ordinary course of events.

Third, the modes of liability (also known as "modes of criminal responsibility") need to be considered. Essentially, this relates to what *role* the actor(s) played for the crime, or the *modus operandi* of committing them: is it one of principal or accessorial liability, or a commission of the crime with others ("joint criminal enterprise"), or through another person ("indirect perpetration")?[34] These are only a few examples out of the large pool of modes of liability under ICL.[35] Article 25 of the Rome Statute clearly defines the modes of liability applicable under the statute. It should be noted that the modes of liability can be further broken down into its own *actus reus* (material elements) and *mens rea* (mental elements).[36]

Fourth, there must be a finding of causation, in that the act must cause the result. In the words of David Ormerod and Karl Laird,

> [w]here the definition of a crime includes a result or consequence flowing from D's conduct, it must be proved that D caused that result. An act done with intent to cause the result may be an attempt to commit the crime but it will not be the full offence unless it actually causes it.[37]

To quote Johannes Keiler, "[i]n the realm of criminal law causation plays a crucial role in the attribution of criminal liability".[38] To find causation in law, to use Hart's words, is to *ascribe* responsibility.[39]

The ICC, alongside other international criminal tribunals, do not necessarily consider or examine "causation" individually from other criminal elements such as *actus reus* and *mens rea*, or mode of liability. In *The Prosecutor v. Dominic Ongwen*, the Chamber did not consider causation independently. That said, causation in general is innate in the idea of criminal law and ICL[40], especially for murder.

The legal issue that the author attempts to address regards the issue of *causation*:

Had Dominic Ongwen and other members of the LRA *caused* the death of the civilians in the four IDP camps and whether or not they can be held responsible for it?

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[33] Rome Statute, Article 6, 7, 8 and 8 bis.

[34] For reading the different mode of responsibility under ICL, *see*, for instance, ROGER O'KEEFE, INTERNATIONAL CRIMINAL LAW (1st ed., 2015), at 166-209.

[35] Modes of liability of international crimes can be further divided into modes of liability under customary international law and treaty law such as the Rome Statute. For a short introduction, *see* O'KEEFE, *supra* note 34, at 167-168.

[36] The Chamber in the Trial Judgment of *Prosecutor v. Dominic Ongwen* did not break down the mode of liability in which Dominic Ongwen committed the crime into the two categories of *mens rea* and *actus reus* for the analysis thereof. However, traditionally under domestic and international criminal jurisprudence, the two categories of *mens rea* and *actus reus* are commonly used in the analysis of criminal offences. For instance, Professor Roger O'Keefe contends that as the most basic mode of criminal responsibility known to customary international law, an accused must satisfy both *mens rea* and *actus reus* of the crime charge to be held guilty. *See* O'KEEFE, *supra* note 34, at 168-169.

[37] DAVID ORMEROD, KARL LAIRD, SMITH, HOGAN, & ORMEROD'S TEXT, CASES, & MATERIALS ON CRIMINAL LAW (13th ed., 2020), at 38.

[38] JOHANNES KEILER, DAVID ROEF, COMPARATIVE CONCEPTS OF CRIMINAL LAW (Intersentia Ltd, 2016), at 103.

[39] H.L.A. Hart, *The Ascription of Responsibility and Rights*, 49 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY, NEW SERIES 171(1948 - 1949), at 187.

[40] *See*, e.g., Mayr, *supra* note 1 at 855.

C. Modes of Responsibility

How did Dominic Ongwen conduct the attacks and thereby commit crimes prohibited by the Rome Statute? To understand this, we need to first take a step back to explicate the modes of responsibilities thereunder.

Under the Rome Statute, Article 25(3)(a), a person can be criminally responsible for a crime under the jurisdiction of the ICC where the person commits the crime as an individual ("direct perpetration"),[41] through another person who executes the crime by subjugating their will ("indirect perpetration"),[42] or jointly with another person with an agreement or common plan of executing a crime, having control over the person(s) who execute the crimes by subjugating the will of the direct perpetrators ("indirect co-perpetration").[43]

The modes of responsibility for the four attacks must be analysed separately. Since the present article deals with the murder charge of Ongwen ("Murder"),[44] only the modes of responsibility of committing *murder* will be considered.

With the attack launched against the Pajule IDP camp, the Chamber found that Ongwen, jointly with other LRA commanders and through LRA soldiers, committed murder as a crime against humanity pursuant to Article 7(1)(a) of the Rome Statute (Count 1) and murder as a war crime Article 8(2)(c)(i) of the Statute (Count 2).[45] Similarly, for the attack on Odek IDP camp, the Chambers convicted Ongwen of both committing murder as a crime against humanity and as a war crime, jointly with Joseph Kony and other Sinia brigade leaders.[46]

Convicted of the crimes of Murder launched at Lukodi IDP camp, the mode of responsibility therefor, however, was one of indirect perpetration.[47] Likewise, for the crimes of Murder committed against the civilians found at Abok IDP camp, it was too committed through other LRA soldiers.[48]

Nonetheless, the Defence's cross-examination of witnesses indicated the possibility that some, if not all, of the civilians shot dead might have been caught in the crossfire between the Ugandan Government soldiers and the LRA fighters.[49] The Chambers, however, rejected this argument. It found that the witnesses, despite some of them raising the possibility of crossfire, no one saw that the civilians were shot dead when the Ugandan army was shooting back at the members of the LRA.[50] On the contrary, there was overwhelming evidence that the LRA members killed civilians intentionally.[51] Taking the Odek IDP Camp attack launched by the LRA as an example, Dominic Ongwen and his subordinate commanders ordered the LRA soldiers to target everyone they found at the Odek IDP camp, including civilians, and also ordered them to loot food and abduct civilians.[52] After the attack, Ongwen communicated the results of the attack via the military radio to other LRA commanders and Joseph Kony,

[41] The Prosecutor v. Dominic Ongwen, *supra* note 5, at 2782.
[42] *Id.,* at 2783-2785.
[43] *Id.,* at 2786-2788,
[44] Murder is one of the charges that is brought against Mr Ongwen in the four camps, under article 7(1)(a) as a crime against humanity and under article 8(2)(c)(i) as a war crime. ICC, The Prosecutor v. Dominic Ongwen, ICC-02/04-01/15, Document Containing the Charges, (Dec. 22, 2015), at 12.
[45] The Prosecutor v. Dominic Ongwen, *supra* note 5, at 2874.
[46] *Id.,* at 2927.
[47] *Id.,* at 2973.
[48] *Id.,* at 3020.
[49] *Id.,* at 452 n. 2877, 1477.
[50] *Id.,* at 1487, 1492.
[51] *Id.,* at 1493.
[52] *Id.,* at 2920.

reporting that his fighters successfully launched an attack on Odek IDP camp, shooting people amongst other acts.[53] On this basis, the Chamber found that Dominic Ongwen meant for civilians to be attacked during the attack on Odek IDP camp, and meant for civilians to be killed.[54]

The one hanging legal question which hence remains unresolved: where members of an armed group or army purposely induce crossfire between them leading to civilian deaths, does this still constitute murder?

III. The Law: An Overview

Has Dominic Ongwen and other members of the LRA *caused* the death of the civilians in the four IDP camps and whether or not they can be held responsible for it?[55]

To develop an argument on the law of causation in ICL, the sources of law for the ICC need to be examined. Article 21 of the Rome Statute provides for a hierarchy of law for ICC: (a) in the first place, the Court shall apply the Rome Statute, Elements of Crimes and its Rules of Procedure and Evidence; (b) in the second place, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict; and (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime. Despite the descending system of applicable law enunciated in the Rome Statute, scholars have noted that the "interrelationship of sources is more complex than Article 21's apparently rigid hierarchy implies" as "the overlap between the sources is too complex to be reduced to simple formulae, including by reference to hierarchy".[56] Hence, this Article will apply Article 21 of the Rome Statute, albeit not in a straightly hierarchical order, and reference will be made to other sources of international law.[57]

Before deciding if intentionally inducing crossfire can constitute murder under ICL, this part thus examines the crime of murder under the Rome Statute and the Elements of Crimes, providing the foundational legal framework. The section further reviews the jurisprudence of ICC in defining the *mens rea* of murder, particularly the "virtual certainty" test, which is crucial for deciding whether there is intent in complex combat situations. It ventures into providing an overview of how international criminal tribunals such as the ICTY and the ICC approached crossfire scenarios, often without directly addressing the causation issue. It critically assesses ICL's underdeveloped causation jurisprudence, such as the "substantial cause" test, highlighting existing gaps in the law.

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[53] *Id.*
[54] *Id.*
[55] KEILER, ROEF, *supra* note 38, at 103.
[56] Robert Cryer, *Royalism and the King: Article 21 of the Rome Statute and the Politics of Sources*, 12(3) NEW CRIMINAL LAW REVIEW (2009), at 390, 393–94.
[57] For instance, Article 38(1) of the Statute of the International Court of Justice is widely accepted as a provision that enumerates the "well-established sources of international law": *See* ICTY, Prosecutor v. Kupreškić et al., IT-95-16-T, Trial Judgment (Jan. 14, 2000), at 540. The ICC has also referred to case law from other international courts such as the ICJ. *See*, for example, ICC, Prosecutor v. Katanga and Ngudjolo Chui, ICC-01/04-01/07-717, Decision on the Confirmation of Charges (Sept. 30, 2008), at 238.

test, which is crucial for deciding whether there is intent in complex combat situations. The section, then, ventures into providing an overview of how other international criminal tribunals approached crossfire scenarios, often without directly addressing the causation issue. Finally, it critically assesses ICL's underdeveloped causation jurisprudence, such as the "substantial cause" test, highlighting existing gaps in the law. The case law of other international courts is often considered by the ICC, in certain cases as "indicative of a principle or rule of international law", outside the realm of Article 21.[58]

A. Definition of Murder under International Criminal Law (ICL): The Rome Statute & the Elements of Crimes

How would an accused be held guilty of murder by the ICC? Under Article 7(1)(a) of the Rome Statute, murder is a crime against humanity whereas murder is captured as a war crime under Article 8(2)(c)(i). Nonetheless, murder is not defined under Article 7 or Article 8, nor the *mens rea* and *actus reus* thereof. Reference could be made to Article 30 of the Rome Statute which defines the requisite mental element of all crimes under the Statute. To establish the *mens rea* of a crime, a person must commit the crime "with intent and knowledge".[59] For the purpose of Article 30, a person has intent where "that person means to engage in the conduct"[60] while in relation to consequence, "that person means to cause that consequence or is aware that it will occur in the ordinary course of events".[61]

In the Elements of Crimes, an ancillary document assisting in the interpretation of the Rome Statute, Article 7(1)(a)(1) defines the *actus reus* of the crime against humanity of *murder*: "The perpetrator killed one or more persons", in which "killed" means "caused death". Article 8(2)(c)(i)-1(1) also stipulates that in a war crime of murder, "[t]he perpetrator killed one or more persons".[62] But can an accused "cause" the death of the victim when the bullet that shatters his/her skull was fired by a soldier from the other side? Where does the law stand on this point? To answer the questions, we will first turn to the jurisprudence of ICL.

B. Jurisprudence of the International Criminal Court (ICC) on *Mens Rea* of Murder

"The Court may apply principles and rules of law as interpreted in its previous decisions", stipulated in Article 21(2) of the Rome Statute. Hence, we will refer to the relevant case law. The Court made additional comments to the *mens rea* of murder under the Rome Statute. The ICC has construed Article 30(2) of the Rome Statute in different cases, which provides the definition of intent applicable to all crimes under the Statute. The latest jurisprudence of the ICC in *Lubanga*[63] confirmed the view established in *Bemba*, that "the standard for the

[58] ICC, Prosecutor v. Ruto et al., ICC-01/09-01/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the ICC Statute (Jan. 23, 2012), at 289.
[59] Rome Statute of the International Criminal Court [hereinafter the "Rome Statute"], Article 30(1).
[60] Rome Statute, Article 30(2)(a).
[61] Rome Statute, Article 30(2)(b).
[62] The definition of "kill" means "cause death". The footnote under Article 8(2)(a)(i)(1) states that the term "killed" is interchangeable with the term "caused death". This footnote applies to all elements which use either of these concepts. *See* ICC, the Elements of Crimes, Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002, ICC-ASP/3/Res.1, United Nations publication, Sales No. E.03.V.2 and corrigendum, part II.B (Oct. 4, 2004), at 9.
[63] ICC, The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-3121-Red, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction (Public redacted version) (Dec. 1, 2014), at 447. Court of Appeal, R v. Ransford Delroy Nedrick, [1986] 1 WLR 1025, Decision (July 10, 1986) and Court of Appeal, R v. Woollin, [1998] 3 WLR, Decision (July 21, 1998), in support of its interpretation. These cases set out the "virtual certainty"

foreseeability of events is virtual certainty", in order to establish the *mens rea* of an accused in a murder case.[64]

The Appeals Chamber in *Lubanga* explained that in Article 30(2)(b), the verb "occur" is used with the modal verb "will", and not with "may" or "could".[65] By "virtual certainty", the Chamber meant "certainty about the future occurrence"[66] But virtual certainty is not absolute certainty, as absolute certainty of a future event can never exist, as the Chamber recognised.[67]

In *Bemba*, the Pre-Trial Chamber (PTC) III adopted a textual (literal) interpretation of Article 30, espousing that "the words '[a consequence] will occur' serve as an expression for an event that is 'inevitably' expected".[68] "[T]he words 'will occur', read together with the phrase 'in the ordinary course of events', clearly indicate that the required standard of occurrence is close to certainty".[69] By "virtual certainty", the Chamber meant "practical certainty: namely that the consequence will follow, barring an unforeseen or unexpected intervention that prevent its occurrence".[70]

The Chamber in *Bemba* has also set out elaborate tests on defining "intent" and "knowledge" under Article 30(2) and (3) of the Rome Statute. "Intent" and "knowledge" therein reflect the concept of *dolus*, "which requires the existence of a volitional as well as a cognitive element".[71] The Chamber classified *dolus* in three categories: 1. *Dolus directus* in the first degree, or direct intent; 2. *Dolus directus* in the second degree, also known as oblique intention; 3. *dolus eventualis*, known as advertent or subjective recklessness.[72] In the view of the Chamber, *dolus eventualis* or recklessness is not captured by Article 30 of the Statute,[73] whereas the first two categories are included.

> *Dolus directus* in the first degree (direct intent) requires that the suspect knows that his or her acts or omissions will bring about the material elements of the crime and carries out these acts or omissions with the purposeful will (intent) or desire to bring about those material elements of the crime.[74]

In contrast,

> *[d]olus directus* in the second degree does not require that the suspect has the actual intent or will to bring about the material elements of the crime, but that he or she is aware that those elements will be the almost inevitable outcome of his acts or omissions, i.e., the suspect 'is aware that [...] [the consequence] will occur in the ordinary course of events' (article 30(2)(b) of the Statute).[75]

In *Katanga and Ngudjolo Chui*, PTC I similarly held that the offence of murder "encompasses, first and foremost, cases of *dolus directus* of the first and second degree".[76]

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test as the *mens rea* of a murder charge, which will be further elaborated in the latter part of this memo. The Chamber also footnoted other English journal articles on "oblique intention" in English law. *See* The Prosecutor v. Thomas Lubanga Dyilo, *supra* note 65, at 160.

[64] ICC, Prosecutor v. Bemba, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo (June 15, 2009), at 362.

[65] Lubanga, *supra* note 65, at 447, 449.

[66] *Id.*, at 447.

[67] *Id.*, at 447.

[68] Prosecutor v. Bemba, *supra* note 66, at 362.

[69] *Id.*, at 362.

[70] *Id.*

[71] *Id.*, at 357.

[72] *Id.*

[73] *Id.*, at 360.

[74] *Id.*, at 358.

[75] *Id.*, at 359.

[76] ICC (Pre-Trial Chamber I), The Prosecutor v. Germain Katanga, ICC-01/04-01/07-717, Decision on the Confirmation of Charges (Sept. 30, 2008), at 423.

The Court found in *Prosecutor v. Dominic Ongwen* that there was intent on the part of the accused to kill civilians in the four IDP camps. Evidence showed that Dominic Ongwen and his subordinate commanders ordered LRA soldiers to target everyone they find at the four IDP camp (Pajule, Odek, Lukodi, Abok), including shooting civilians.[77] The Court did not classify whether the *mens rea* in the case falls into first- or second-degree intent, however. Based on the available evidence, it was shown that the accused meant for civilians to be attacked during the four attacks and for the civilians to be killed.[78]

C. Jurisprudence on Crossfire from the ICTY

> The jurisprudence of other international or hybrid tribunals is not, in principle, applicable law before the Court and may be resorted to only as a sort of persuasive authority, unless it is indicative of a principle or rule of international law.[79]

It should be noted that the case law of other international courts is often considered by the ICC, in certain cases as "indicative of a principle or rule of international law".[80] We, therefore, refer to the jurisprudence of other international courts and tribunals as a source of reference, albeit not binding to the ICC.

A similar issue of crossfire was encountered in the ICTY case *Prosecutor v. Sefer Halilovic*.[81] The case concerns the Supreme Commander Sefer Halilovic's responsibility over the Main Staff of the Army of the Republic of Bosnia and Herzegovina (ABiH)'s murdering of civilians,[82] charged with one count of murder under Article 3 of the Statute of the Tribunal, which is also part of Article 3(1)(a) of the Geneva Conventions of 1949.[83] In Uzdol, there was a crossfire between units under ABiH command and the Croatian Defence Council (HVO) during the ABiH's attack on 14 September 2993, as recognised by the Chamber.[84]

However, the Chamber found that the civilians were intentionally killed on evidence such as two victims killed in their beds, one of whom was bedridden[85]; that some victims were beaten to death with an axe-like weapon or mutilated before being killed;[86] several victims were shot at contact or close range, or in the back.[87] Considering all the evidence, the Chamber reasoned that

> not only the most reasonable, but in fact the only conclusion is that the direct perpetrators had the intention to kill or to wilfully cause serious bodily harm which they should reasonably have known might lead to the death of the victims.[88]

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[77] For the *mens rea* of Ongwen killing civilians at the Pajule IDP camp, *see* The Prosecutor v. Dominic Ongwen, *supra* note 5, at 1001; the *meas rea* of Ongwen killing civilians at Odek IP camp, *see* The Prosecutor v. Dominic Ongwen, at 1015; for *mens rea* of Ongwen killing civilians at the Lukodi IDP camp, *see* The Prosecutor v. Dominic Ongwen, *supra* note 5, at 624; finally, for the *mens rea* of Ongwen killing civilians at the Abok IDP camp, *see* The Prosecutor v. Dominic Ongwen, *supra* note 5, at 705.
[78] *Id.,* at 624, 705, 1001, 1015.
[79] The Prosecutor v. Ruto et al., *supra* note 60.
[80] *Id.*
[81] ICTY (Trial Chamber I), Prosecutor v. Halilovic, IT-01-48, Judgment (Nov. 16, 2005).
[82] *Id.,* at 1-3.
[83] ICTY (Trial Chamber III), Prosecutor v. Sefer Halilovic, IT-01-48-PT, Prosecutor's Pre-Trial Brief Pursuant to Rule 65ter (E)(i), Trial Judgment (Oct. 13, 2004), at 2.
[84] Prosecutor v. Halilovic, *supra* note 83, at 734.
[85] *Id*., at734.
[86] *Id.*
[87] *Id.*
[88] *Id.*

First, it should be noted that Sefer Halilovic was not convicted in the case as the Prosecution failed to establish beyond reasonable doubt that he has effective control of the ABiH units,[89] even though members of the units had committed murder, as analysed above. In terms of the jurisprudence on crossfire, the Chamber did not directly address the question or legal issue of crossfire in its ruling, namely besides the victims murdered by the ABiH, whether civilians killed or if killed in the crossfire between the ABiH and HVO would still constitute murder of the ABiH. But if we apply the jurisprudential logic in *Halilovic*, disregarding whether some civilians might have been killed in a crossfire, if evidence substantiates that a perpetrator killed even only one person, it would still be a murder given the existence of *mens rea* and *actus reus*. Indeed, under Article 7(1)(a)(1) and Article 8(2)(c)(i)(1) of Elements of Crime, the "perpetrator killed one or more persons" constitutes the *actus reus* of murder. Notwithstanding this, this paper seeks to establish whether Mr Ongwen would be responsible for murder for those who may have been accidentally killed by the government soldiers defending themselves.

D. Jurisprudence on Crossfire of the International Criminal Court

In the *Prosecutor v. Germain Katanga*,[90] an argument of crossfire was raised between the armed groups therein causing the death of civilians.[91] The case concerns an armed conflict between the FRPI and FNI combatants on the one hand and the UPC soldiers on the other,[92] the ICC ruled that the combatants had intentionally killed civilians,[93] taking consideration of the evidence as a whole. It was found that as the people, including the UPC combatants, were fleeing towards Waka mountain at the time, they could not have died in the crossfire.[94] The Chamber admitted that even though the UPC soldiers may have constituted a military target for the attackers, the loss of human life subsequent to the shots fired at the group of fleeing persons was excessive in relation to the military advantage that the attackers could have expected, given that the soldiers were already fleeing.[95] Other evidence pointed to the fact that unarmed civilians who reside at the Institute, taking refuge inside the camp, including women, children and elderly persons, were intentionally killed primarily by machete.[96] It was held that

> by shooting indiscriminately at fleeing persons, the Lendu and Ngiti showed scant regard for the fate of the civilians among the UPC soldiers in the mêlée and knew that their death would occur in the ordinary course of events."[97] "The Chamber finds that they thus intended to cause their death.[98]

The accused in the case, Germain Katanga was convicted by the Chambers of guilty as an accessory to the crimes committed on 24 February 2003 of murder as a crime against humanity under article 7(1)(a) and murder as a war crime under article 8(2)(c)(i) of the Rome Statute.[99]

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[89] *Id.*, at 752.
[90] ICC (Trial Chamber II), Prosecutor v. Germain Katanga, ICC-01/04-01/07, Judgment pursuant to Article 74 of the Statute (March 7, 2014).
[91] *Id.*, at 433.
[92] *Id.,* at 719.
[93] *Id.,* at 864.
[94] *Id.,* at 865.
[95] *Id.*
[96] *Id.,* at 864.
[97] *Id.,* at 865.
[98] *Id.*
[99] *Id., at* 658.

In light of the facts and ruling in *Katanga*, it serves as a useful reminder that the excessive killing of civilians, even where the opponent armies were at the scene, would constitute murder where military advantage is insignificant and the death of civilians is foreseeable in the ordinary course of events. However, the ICC still regrettably did not address the causation issue of crossfire in the case.

E. ICL Jurisprudence on the Law of Causation for Murder

Without direct precedents on the issue of crossfire from the international criminal courts or tribunals, attention can be drifted to how the international criminal courts rule on the law of causation for murder under ICL.

More recently, in 2022, the Kosovo Specialist Chamber (KSC) gave its view on the legal components of the war crime of murder in *The Prosecutor v. Salih Mustafa*.[100] The case itself concerns a non-international armed conflict in Kosovo, between the BIA Guerrilla unit (belonging to the Kosovo Liberation Army, KLA), of which the accused was the commander,[101] and on the other, forces of the Federal Republic of Yugoslavia and the Republic of Serbia.[102] The Chamber in the case faced a scenario where a victim who was arrested by members of the BIA and was held by the BIA members in captivity.[103] There were gunshot wounds caused by bullets, which the Chamber could not conclude whether shot by the BIA members or the Serbian forces.[104] However, due to the denial of medical aid to the victim and his severe mistreatment by the BIA members, of which the accused had knowledge, the victim died as a consequence.[105]

The Chamber held that to establish a conviction of murder, there must be material elements (*actus reus*) and mental elements (*mens rea*).[106] The material elements require that the actor commit an act or commission resulting in the death of a person.[107] The Chamber did not use the word "causation", but further explained that the conduct of the perpetrator does not have to be the sole cause of death of the victim, but at a minimum it must have contributed substantially thereto.[108] The acts of the BIA members such as severe mistreatment and denial of medical care to the victim constitute substantial causes of the murder of the victim, found by the Chamber, and therefore held that the material element of the war crime of murder is satisfied.[109]

Other international criminal tribunals' judgments point towards their agreement in the "substantial cause" theory in establishing a causation relationship in murder cases, that the *actus reus* need only be the substantial cause of the victim's death, but does not have to be the sole cause thereof. The ICTY has made consistent rulings in this regard. First in 1998, in *Prosecutor v. Mucic et al.* (also known as the *Čelibići* case),[110] the Chamber held that for the commission of murder and wilful killing, concrete actions as well as omissions can satisfy the *actus reus*

[100] Kosovo Specialist Chambers (Trial Panel), The Prosecutor v. Salih Mustafa, KSC-BC-2020-05, Further redacted version of Corrected version of Public redacted version of Trial Judgment (Dec. 16, 2022).
[101] *Id.,* at 22.
[102] *Id.,* at 23.
[103] *Id.*, at 691-692.
[104] *Id.,* at 689.
[105] *Id.*
[106] *Id.,* at 686.
[107] *Id.,* at 687.
[108] *Id.*
[109] *Id.*, at 689.
[110] ICTY (Trial Chamber), Prosecutor v. Mucic et al., OT-96-21-T, Judgment (Nov. 16, 1998).

element and, further, that the conduct of the perpetrator must be a substantial cause of the death of the victim.[111] After that, in the *Prosecutor v. Naser Oric*,[112] the Chamber likewise held that "[t]o establish the *actus reus* of murder, the Prosecution must prove beyond reasonable doubt that the perpetrator's conduct contributed substantially to the death of the person."[113] The case the *Prosecutor v. Kupreškić et al*. also found that the constituent elements of murder comprise the death of the victim occasioned by the acts or omissions of the accused, where the conduct of the defendant was a substantial cause of the death of the victim.[114]

Other international criminal tribunals have defined the constituent elements of murder in their own formulations, some of which do not explore causation nor the substantial cause test. The Extraordinary Chambers in the Courts of Cambodia (ECCC), in the case *Kaing Guek Eav alias Duch*, reasoned that the conduct of the perpetrator must have contributed substantially to the death of the victim.[115] However, in the case of Special Court for Sierra Leone (SCSL), *Prosecutor v. Issa Hassan Sesay*,[116] as well as the ICTR case of *The Prosecutor v. Jean-Paul Akayesu*,[117] the courts did not discuss the issue or law of causation, including the substantial cause test.

F. A Critique of the ICL Jurisprudence on Causation

Despite various international criminal tribunals' attempt to formulate the test of causation, the underlying analysis of the formulation lacks in depth and critical evaluation. For the KSC, it did not make elaborate analysis on the law or issue of causation, merely citing cases of other international criminal tribunals such as that of ICTY and ICTR in support of the substantial cause test, including *Prosecutor v. Orić* and *The Prosecutor v. Jean-Paul Akayesu*, both of which have been discussed above.

Many ICTY cases refer to the classic *Prosecutor v. Mucic et al.* judgment. If we read the supporting arguments made by the ICTY in the case, nonetheless, we discern the problem: the Court's substantial cause test is supported with a footnote commenting briefly the tests of causation of various domestic legal systems, include that of England, Australia, the United States, Canada, Norway, Germany and the Netherlands.[118] An argument can effortlessly be raised that the citation lacks in a close study of the judicial approach of these different countries, citing only one or at maximum, a few cases in support of its finding, lacking in depth and quantity. In any event, the case was decided in 1998, and we must deep track of the latest jurisprudence since then. Other ICTY cases such as *Prosecutor v. Naser Oric* and *Prosecutor v. Kupreškić et al.* also fail to review and analyse comprehensively on the law of causation, merely citing other cases in support of its employment of the substantial cause test.

Notably, the jurisprudence of other international criminal tribunals is not binding, albeit arguably persuasive, to the ICC. Due to a necessity to rule on the issue of crossfire afresh from the perspective of the ICC, we need to critically and independently review the law by referring to other sources of law under the Rome Statute.

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[111] *Id.,* at 424.
[112] ICTY (Trial Chamber II), Prosecutor v. Naser Oric, IT-03-68-T, Judgment (June 30, 2006).
[113] *Id.,* at 347.
[114] ICTY (Trial Chamber), Prosecutor v. Kupreskic et al., IT-95-16-T, Judgment (Jan. 14, 2000), at 560.
[115] ECCC, Co-Prosecutors v Kaing, 001/18-07-2007/ECCC/TC, Judgment (July 26, 2010), at 331.
[116] SCSL (Trial Chamber I), Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao, SCSL-04-15-T, Judgment (March 2, 2009), at 142.
[117] ICTR (Chamber I), Prosecutor v. Jean-Paul Akayesu, ICTR-96-4-T, Judgment (Sept. 2, 1998), at 589.
[118] Prosecutor v. Mucic et al., *supra* note 112, at 155 n. 435.

IV. The International Law of Treaty Interpretation Under the Vienna Convention on the Law of Treaties (VCLT)

It is not set in stone whether the issue of crossfire would constitute murder, reading from the plain text of the Rome Statute or studying case law as we did in Section III. Assistance is therefore required from other sources. The ICC has held that, as tools of interpretation, the Vienna Convention on the Law of Treaties (VCLT) can be applied in construing the Rome Statute.[119] In particular, applying Article 3 of the VCLT, focus shall be on literal, contextual and teleological considerations.[120] In line with Article 32 of the VCLT, the *travaux préparatoires* of the ICC Statute can be used to confirm interpretations made based on literal, contextual and teleological constructions.[121] Article 31 and 32 of the VCLT have long been recognised by the ICJ to be customary international law.[122] For the interpretation of treaties, Article 31(1) is most relevant which requires a treaty to be read "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". The task of this chapter is to employ the VCLT for the interpretation of the crime of murder and its causation, both as a war crime and a crime against humanity under the Rome Statute.

The ICC and other international criminal courts do not have abundant case law on the issue of causations, exactly because they would usually read the provisions of respective statutes in light of their plain and ordinary meaning. Soldiers directly shooting civilians by aiming them are, no doubt, committing murder as a war crime or alternatively as a crime against humanity.[123] In these simple cases, the Courts do not and rightly so, need not other sources in the application of the Rome Statute. As previously explained in Section III(A.), murder as a crime against humanity and war crime simply means "causing death", written explicitly in the Elements of Crimes. This is equivalent to the English approach to the law of causation, applying "common sense", which is the ordinary understanding of causation used in daily language, in determining causal issues.

However, in a "hard case" such as *The Prosecutor v. Dominic Ongwen*, the Court is entitled to and should apply Article 31(1) of VCLT in full and explore into the "object and purpose" of the crime of murder. This is because a plain and ordinary reading of it does not solve the puzzle of whether someone can murder someone else with the potential intervention of a third party, or other parties or factors. In defining such "object and purpose" of a crime, including its underlying issue of causation, the Spanish Courts' approach of objective imputation can be referred to.[124] We can ask if the purpose or scope of protection is within the violated provision, and if there are any prohibited risk intended by that provision. It should be stressed, nonetheless, that this is but one approach to finding out the object and purpose of a particular crime or provision.

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[119] ICC, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, Decision (July 24, 2006), at 33.
[120] *Id.*
[121] *Id*., at 40–41.
[122]ICJ, Territorial Dispute (Libyan Arab Jamahariya/Chad), ICJ Rep 6, Judgments (Feb. 3,1994).
[123] *See* e.g. ICTY (Trial Chamber I), Prosecutor v Sefer Halilovic, IT-01-48, Judgment, (Nov. 16, 2005).
[124] The Spanish Courts' ruling on causation is further discussed in section VI of this Article.

A. The Object and Purpose of War Crimes

In seeking to find out the "object and purpose" of the founding of war crimes, further sources need to be consulted. The Rome Statute, in its definition of war crimes, clearly provided that they mean "[g]rave breaches of the Geneva Conventions of 12 August 1949"[125] and "[o]ther serious violations of the laws and customs applicable in international armed conflict"[126] The four Geneva Conventions and international humanitarian law in general are the cornerstones of war crimes under the Rome Statute, as well as other statutes under other international criminal tribunals such as the ICTY and ICTR. According to Alexander Schwarz,

> [u]nder the law of international armed conflict including the four Geneva Conventions and its Additional Protocol I, any wilful direct attack against 'protected persons' (ie wounded and sick, shipwrecked persons, prisoners of war, civilians and inhabitants of occupied territories), not justified by military necessity (proportionality), amounts to a war crime.[127]

War crimes are clearly drafted for the protection of civilians from violence and direct effects of military operations in an armed conflict.[128] Schwarz calls this object "one of the cornerstones of international humanitarian law", as attacks may only be directed against combatants.[129]

Under Article 43 Additional Protocol I of the Geneva Conventions, applicable in international armed conflicts, all members of the armed forces of a party enjoy the legal status of a combatant, who have the right to take a direct part in hostilities and therefore to kill, harm, or destroy.[130] "In contrast, civilians have no right take a direct part in hostilities and shall, under all circumstances, be protected from military operations."[131] Hence, launching direct attacks against the civilian population or against individual civilians are, where they do not take a direct part in hostilities, considered a grave breach by Article 85 (3) (a) Additional Protocol I.[132] Furthermore, under the principle of distinction, which is found under Article 51 (4) of the Additional Protocol I, armies must at all times distinguish between civilian populations and combatants as well as between civilian objects and military objectives.[133] Consequently, indiscriminate attacks constitute war crimes in international law.

In essence the "object and purpose" of war crimes are to protect civilians from violence and direct effects of military operations in an armed conflict, and in particular intentional killing of civilians. The intentional or reckless killing of civilians, in other words, is the "mischief" that the rules of war crimes seek to remedy.[134] In light of such purpose, it should not matter that there is an involvement of a third party, or other parties, in the chain of causation. Their involvement should neither an intervening event which breaks the chain. Suppose that some soldiers X take civilians as shields to protect themselves from the shootings of soldiers Y, rendering those civilians killed in the process. Soldiers Y did not foresee this coming and therefore shot the civilians unintentionally. This would be murder on the part of soldiers X,

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[125] Rome Statute, Article 8(2)(a).
[126] Rome Statute, Article 8(2)(b).
[127] Alexander Schwarz, *War Crimes,* PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2014), at 43.
[128] *Id.,* at 44.
[129] *Id*.
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.,* at 46.
[134] The "mischief rule" is one of the rules of interpretation adopted by the English Courts. It could be employed to ascertain the object or purpose of a law. *See* GARY SLAPPER, DAVID KELLY, THE ENGLISH LEGAL SYSTEM 101 (13th edn., 2012).

provided that there are the necessary *mens rea*, the intent and knowledge that the civilians would be killed, and *actus reus*, that they be killed. It does not even matter that soldiers X did not shoot, and the third-party soldiers Y were the last persons "causing death" in the chain of causation.

B. The Object and Purpose of Crimes against Humanity

Crimes against Humanity first came into place in the Draft Code of Crimes against the Peace and Security of Mankind, drafted by the International Law Commission and adopted in 1996.[135] Guido Acquaviva and Fausto Pocar noted that Article 7 of the Rome Statute, which prescribed against crimes against humanity, adopted the definition in the ILC Draft Code with minor variations, and that it is in line with crimes against humanity as defined in the ICTY and ICTR Statutes.[136] However, the crimes against humanity have existed before such codifications. In the *Einsatzgruppen Case* before the Nuremberg Military Tribunal II in 1949, the Court has defined and discussed in depth the "crimes against humanity".[137] The Court found that the law of the crime applies without being restricted to events of war,[138] which means that unlike war crimes, it applies both in war time as well as peacetime. The Court listed murder, torture, enslavement as examples of the crimes, albeit the list itself is infinite.[139] The crimes are also not restricted to the nationals of a particular country but all mankind.[140] In theory, this means that stateless individuals can be victims of the crimes against humanity. According to the Court: "[c]rimes against humanity are acts committed in the course of wholesale and systematic violation of life and liberty."[141] The Court has also explored the interrelation between murder under crimes against humanity and murder under war crimes, that the latter can potentially inform the former on deciding issues of murder.[142] In that case, the defendants are charged with war crimes and crimes against humanity, including murder, *inter alia*.[143]

Jurisprudence from other courts also confirm that, at least concerning murder and other counts of crimes that both appear under the heading of war crimes and crimes against humanity, war crimes and crimes against humanity are interdependent concepts. In *Public Prosecutor v. Karl Hass and Erich Priebke*, the Military Tribunal of Rome in Italy recognised in *obiter dictum* that certain conduct qualifying as war crimes might also be termed crimes against humanity.[144] In the *Eichmann case* decided by the Israel Supreme Court, it was found that war crimes, genocide, and crimes against humanity are interdependent notions.[145] Moreover, with respect to murder, the ICTY stated that its elements mirror the elements of the war crime of unlawful killing, premeditated or not.[146]

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[135] Guido Acquaviva, Fausto Pocar, *Crimes against Humanity*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2008), at 12.
[136] *Id.,* at 18.
[137] The Einsatzgruppen Case, Case No. 9, United States v. Ohlendorf et al., Opinion and Judgment (April 8, 1948).
[138] *Id.,* at 496.
[139] *Id.*
[140] *Id.*
[141] *Id.,* at 497.
[142] *Id.,* at 458.
[143] *Id.,* at 410.
[144] [22 July 1997] (1998) 38 Cassazione penale 689.
[145] Israel Supreme Court, Attorney General of the Government of Israel v. Eichmann, 36 ILR 277, Judgment (May 29, 1962).
[146] ICTY, Prosecutor v. Kupreškić, ICTY-95-16-T, Judgment (Jan. 14, 2000), at 560.

This Article contends that the development of "crimes against humanity" as an international crime serves the purpose of protecting civilians from inhumane treatment, be it murder, torture, persecution or other acts, by any organs or institutes, including the government, the state and any non-governmental organs. As Dr Guido Acquaviva and Professor Fausto Pocar found, "the very concept of crimes against humanity was introduced by the victorious powers of World War II out of concern for civilians rather than for combatants".[147] Under this finding, intentionally causing the death of civilians must be held as murder. It does not matter that there is an innocent third party involved, where in the case of *Dominic Ongwen*, being the Ugandan soldiers, being forced into shooting for their self-defence and the protection of the civilian population in the camps.

Interpreting the object and purpose of the crime of murder under the Rome Statute, however, does not lead to an undisputed conclusion. One problem of deducing the "object and purpose" of the prohibition of murder under the Rome Statute or ICL in general by reading their legislative process and history is that war crimes and crimes against humanity, despite their general humanitarian purpose, is multifaceted and could be overly idealistic or literal, therefore possibly turning a blind eye to the chaos of armed conflicts and wars. The Defence would wisely plead the principle of *nullum crimen sine lege* under Article 22 of the Rome Statute, that "[i]n case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted." The quest for deciding conclusively on the issue of crossfire must not end here.

V. Application of Treaties and Principles of International Law: Section 21(1)(B) of the Rome Statute

> The Court shall apply… (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict

Reading the Rome Statute and the Elements of Crimes as we did in Section III, does not yield a simple answer for the issue of crossfire. Invoking section 21(1)(b) of the Rome Statute, can we refer to further sources of law for references?

The ICC has given its view in different cases on when would be *appropriate* to consult "applicable treaties and the principles and rules of international law". The Chamber in *Prosecutor v. Ruto et al*., reasoned that the opportune moment of "where appropriate" takes place where there is a lacuna in the Rome Statute, Elements of Crimes and its Rules of Procedure and Evidence.[148] "In other words, the Chamber should not resort to applying Article 21(l)(b), unless it has found no answer in paragraph (a)."[149] In another case, *Prosecutor v. Katanga and Ngudjolo Chui*, the Chamber commented that sources of Article 21(l)(b) would be employed "only when the statutory material fails to prescribe a legal solution".[150] The Chamber, making a finding with respect to modes of liability, remarked that the Rome Statute regulates in detail the applicable modes of liability, and hence it is unnecessary to consider whether customary international law admits or abandons some modes of liability.[151]

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[147] Acquaviva, Pocar, *supra* note 137, at 11.
[148] Prosecutor v. Ruto et al., *supra* note 60.
[149] *Id*.
[150] Prosecutor v. Katanga and Ngudjolo Chui, *supra* note 58, at 508.
[151] *Id.*

In *Prosecutor v. Lubanga*, the ICC Trial Chamber held that Article 21 of the Rome Statute requires the Chamber to first apply the Statute, Elements of Crimes and Rules of the ICC. Thereafter, if ICC legislation is not definitive on the issue, the Chamber should apply, where appropriate, principles and rules of international law.[152] The criterion "where appropriate" emphasises that judges have discretion in the use of external legal sources.[153] It is at least contestable that the Rome Statute and its interpretation by way of recourse to the VCLT do not give us a determinative answer on whether crossfire would cut the chain of causation under ICL. We need to consult further sources.

Article 21(1)(b) of the Rome Statute allows recourse to "applicable treaties" and "principles and rules of international law". We shall first address applicable treaties. What does the article mean with "applicable treaties", then? Scholars debate the meaning of the word "applicable",[154] which relates to whether one employs a wider interpretation which would include "relevant" treaties, whereas a narrower reading would encompass only "applicable" treaties.[155] Applicable treaties should include those to which the ICC is a party,[156] viz. the Negotiated Relationship Agreement between the International Criminal Court and the United Nations (2004) and the Headquarters Agreement between the International Criminal Court and the Host State (2007). However, the former agreement relates to cooperation mechanisms between the ICC and the United Nations,[157] whereas the latter relates to matters relating to or arising out of the establishment and the proper functioning of ICC in the host State.[158] Simply put, they are completely irrelevant to substantial or procedural criminal law matters.

More relevant to the law of causation would be "principles and rules of international law". Most scholars agree that principles and rules of international law include customary international law (CIL).[159] In Jean-Marie Henckaerts and Louise Doswald-Deck's seminal work Customary International Humanitarian Law,[160] four particularly relevant rules of CIL need to be mentioned. For one, murder is prohibited.[161] State practice establishes this rule as a norm of CIL applicable in both international and non-international armed conflicts.[162] Second, "[t]he parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians."[163] The

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[152] ICC, Prosecutor v. Lubanga, ICC-01/04-01/06-1049, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial (Nov. 30, 2007), at 44.
[153] MARK KLAMBERG, COMMENTARY ON THE LAW OF THE INTERNATIONAL CRIMINAL COURT (2017), at 245.
[154] Gudrun Hochmayr, *Applicable Law in Practice and Theory—Interpreting Article 21 of the ICC Statute*, 12 J.I.C.J. (2014), at 655, 666; *See* also Margaret McAuliffe deGuzman, *Article 21 – Applicable Law*, in OTTO TRIFFTERER (ED.), COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE (2nd ed. 2008), at 701, 705-706.
[155] deGuzman, *supra* note 156, at 705. Relevant treaties for the ICC are arguably the International Covenant on Civil and Political Rights and European Convention on Human Rights.
[156] As the lawyer Pellet notes, it is difficult to see how inter-governmental treaties in general would be applicable as treaty law before the ICC: *See* Alain Pellet, *Applicable Law*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY (Antonio Cassese, Paola Gaeta and John R.W.D Jones eds, 2nd ed., 2002), at 1051, 1068–69. As a fundament of public international law, treaties are only binding for those States that have ratified them.
[157] *See*, for instance, ICC, Article 3 of the Negotiated Relationship Agreement between the International Criminal Court and the United Nations, ICC-ASP/3/Res.1 (Oct 4, 2004).
[158] ICC, Article 2, ICC-BD/04-01-08 (March 1, 2008).
[159] KLAMBERG, *supra* note 155, at 246.
[160] JEAN-MARIE HENCKAERTS, LOUISE DOSWALD-DECK ET AL., CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME 1: RULES (International Committee of the Red Cross, 2005).
[161] *Id.,* at 311.
[162] *Id*.
[163] *Id.,* at 3.

rule, as the first rule, is applicable both in international and non-international armed conflicts.[164] In light of these rules, intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities are war crimes in both international and non-international armed conflicts.[165]

As a matter of CIL, furthermore, indiscriminate attacks are prohibited.[166] Indiscriminate attacks, by definition, are those: (a) which are not directed at a specific military objective; (b) which use a method or means of combat which cannot be directed at a specific military objective; or (c) which employ a method or means of combat the effects of which cannot be limited as required by international humanitarian law; and as a consequence, in each case above, are of a nature to strike military objectives and civilians or civilian objects without distinction.[167] The last pertinent rule is that it is prohibited to launch an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, that would be excessive with respect to the concrete and direct military advantage anticipated.[168] These rules also apply to both international and non-international armed conflicts.[169]

Customary international law, even though mirrors a purposive approach to the interpretation of murder defined by the Rome Statute, nevertheless, does not give a definitive guide on the issue of crossfire.

VI. General Principles of Law Derived from National Laws of the World's Legal Systems

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

The Rome Statute, Article 21(1)(c), allows the ICC to apply "general principles of law derived by the Court from national laws of legal systems of the world". Reference to case law, in Section III of this Article, does not yield conclusive answer to the issue of crossfire breaking the continuum of causation. As this section will establish, there are two general principles of law deducible from the national laws of the world's legal system in legal causation, applicable to the issue of crossfire: (a) The principle of *Novus Actus Interveniens* or Intervening Cause; and (b) the jurisprudence that the cause of death of an accused does not have to be the sole cause for his action or omission to be guilty of murder: I call this the principle of non-exclusivity of a cause.

This comprehensive survey of national laws demonstrates broad support for holding perpetrators liable despite complex causal chains in combat situations. By identifying these general principles, the section provides robust grounds for the ICC to develop its causation jurisprudence in crossfire cases. The comparative analysis, in addition, emphasises the importance of drawing on diverse legal traditions to resolve novel ICL questions, setting up the conclusion's synthesis of all examined sources.

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[164] *Id*.
[165] For armed conflicts, Article 8(2)(b)(i) of the Rome Statute is applicable, whereas Article 8(2)(e)(i) thereof is applicable in non-international armed conflicts.
[166] HENCKAERTS, *supra* note 162, at 39.
[167] *Id.,* at 40.
[168] *Id.,* at 46.
[169] *Id.,* at 40, 46.

Before diving into the municipal criminal law of nations, a close reading of Article 21(1)(c) is required to ensure that the clause itself is triggered – allowing us to invoke these general principles. Consideration first has to be given to what constitutes "failing that". Mark Klamberg regards this as where the ICC cannot find a solution to a legal question in its own internal sources of law or in the applicable treaties and the principles and rules of international law, then it may seek for the solution in general principles of law derived from national laws of legal systems of the world.[170] The Court should have wide discretion to define what constitutes "failing that", akin to the choice of word 'where appropriate' in Article 21(1)(b) of the Rome Statute where the Court has a wide margin of appreciation.

Second, as Margaret M. deGuzman commented, Article 21(1)(c) does not direct the ICC judges to apply the national laws of any particular State directly, but rather to apply principles underlying the laws of "the legal systems of the world".[171] Previous practice at the ICTY has recognised the necessity to examine the laws of both common law and civil law countries, in consulting the "general principles of law recognized by civilized nations".[172]

Judges McDonald and Vohrah of the ICTY in their Joint Separate Opinion in *Prosecutor v. Erdemovic*, noted that this did not require a comprehensive survey of the legal rules of all domestic systems but rather an analysis of those jurisdictions that were practically accessible to the court to deduce the general principles underlying the specific rules of those jurisdictions.[173] Not without its criticisms, it is impracticable, if not impossible that the Court conduct a universal survey to find commonality across all the countries' criminal systems, given the time, resources, time constraint and knowledge of the Court.[174]

Scholars such as Alain Pellet made the remark that the inquiry into domestic criminal laws as a source of law should include the principal legal systems of the world, including at least representatives from civil law countries and common law countries, and probably some Islamic law countries.[175] Recent practice at the ICC reveals that in some cases, the Prosecutors analyse both sources of civil law, common law countries, and some Islamic countries.[176] For the purpose of completeness, this Article will analyse the criminal jurisprudence of causation of countries of common law origin, civil law countries and Islamic criminal law.

In the case *Prosecutor v. Erdemovic*, two of the ICTY judges made the following statements regarding their tasks:

> [O]ur approach will necessarily not involve a direct comparison of the specific rules of each of the world's legal systems, but will instead involve a survey of those jurisdictions whose jurisprudence is, as a practical matter, accessible to us in an effort to discern a general trend, policy or principle underlying the concrete rules of that jurisdiction which comports with the object and purpose of the establishment of the International Tribunal.[177]

This Article follows this approach in delineating whether there are general trend, policy or principle underlying the various countries' criminal law of causation, especially that which sheds light on the issue of crossfire.

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[170] KLAMBERG, *supra* note 155, at 247.
[171] deGuzman, *supra* note 156, at 709.
[172] ICTY, Prosecutor v. Erdemovic, IT-96-22-A, Judgment, Appeals Chamber (Oct. 7, 1997), para 57, at 40.
[173] ICTY, Prosecutor v. Erdemovic, IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, (Oct. 7, 1997) at 41–55, 57-58.
[174] *Id.*, at 133.
[175] Pellet, *supra* note 158, at 1073–74.
[176] ICC, Situation in the Democratic Republic of Congo, ICC-01/04-168, Appeals Chamber, Judgment (July 13, 2006).
[177] ICTY, Prosecutor v. Erdemovic, IT-96-22-A, Judgement, *supra* note 174, at para. 57.

A. The English Jurisprudence — Criminal Law of Causation

General principles of law of legal systems of the world include the laws of the State where the crime was committed and the laws of the State of which the defendant is a national.[178] In *The Prosecutor v. Dominic Ongwen*, the accused Ongnwen was born in Uganda,[179] hence subject to the law thereof. The charges were, again, about crimes committed in the four IDP camps in 2003 to 2004 in different regions of Uganda.[180] One of the applicable national laws is therefore the laws of Uganda. Uganda is a former colony of the United Kingdom, and despite its independence in 1962, the English Common Law remains a source of law of the state.[181] The English Courts have uniquely developed jurisprudence on the issue of legal causation in a scenario of crossfire causing death, which merits close examination.

In determining causation in crimes, a common approach of the English Courts is that issues of causation are to be answered by the application of common sense.[182] Unlike some other jurisdictions such as the U.S. and Germany, the English Court do not apply unified theories in determining issues of causation. However, the common sense approach to causation is by no means determining causal issues intuitively. As H.L.A. Hart explains

> [c]ommon sense is not a matter of inexplicable or arbitrary assertions, and the causal notions which it employs, though flexible and complex and subtly influenced by context, can be shown to rest, at least in part, on statable principles; though the ordinary man who uses them may not, without assistance, be able to make them explicit.[183]

It worths to be noted that Hart attempts to theorise the common sense approach to causation. The definition of "cause" under the approach is the human action by which a person produces some desired effect by the manipulation of an object in the environment, an interference in the natural course of events which *makes a difference* in the way these develop.[184] "[T]he first stages of this process consist of movements of our own body or parts of it, and consequently movement of things or parts of the things which we manipulate".[185]

1. English Case Law on Criminal Causation: *R v Pagett*

In the case *Regina v. David Keith Pagett*,[186] the accused took the victim with his shotgun round the victim's waist and used her as a shield.[187] The police officers came to the scene, shouted to the accused to stand still, but the accused fired his shotgun.[188] This led to the officers firing back instinctively, killing the victim.[189] The accused was charged with murder and alternatively manslaughter, *inter alia*. The Court of Appeal dismissed the appeal of the accused, upholding

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[178] ICC, Prosecutor v. Lubanga, *supra* note 155, at 710
[179] ICC, The Prosecutor v. Dominic Ongwen, *supra* note 6, at 26.
[180] *Id.*, at 34.
[181] Henry Onoria, *Uganda* in INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS: INCORPORATION, TRANSFORMATION, AND PERSUASION (Dinah Shelton ed., 2012), at 594-619.
[182] ORMEROD, *supra* note 37, at 52. See also United Kingdom House of Lords, Environmental Agency (formerly National Rivers Authority) v. Empress Car Co. (Abertillery) Ltd, 1 All ER 481, HL., Appeals Chamber, Judgement (Feb. 5, 1998).
[183] HERBERT L.A. HART, TONY HONORE, CAUSATION IN THE LAW (2002), at 26.
[184] *Id.*, at 29.
[185] *Id.*, at 29, 30.
[186] England and Wales Court of Appeals, Regina v. David Keith Pagett, 76 Cr. App. R. 279, Judgement (Feb. 3, 1983).
[187] *Id.*, at 280, 282.
[188] *Id.*, at 282.
[189] *Id.*

his conviction of manslaughter by the jury. It must be noted that in this case, the jury was satisfied that the accused caused the victim's death, as the *actus reus* of manslaughter and murder is the same in the case.[190] However, under the directions of the trial judge,[191] the jury did not find the necessary *mens rea* of the accused in the particular circumstances of the case to commit murder. In other words, the jury did not find that the accused *knew* or *foresaw* that it was probable that his unlawful acts would result in the victim's death or in really serious bodily harm to her. This is different to the facts in *The Prosecutor v. Dominic Ongwen*, where the Chambers found that Dominic Ongwen had the intention to kill civilians on multiple fronts.

The Court of Appeal quoted the view of Professor Smith and Hogan's Criminal Law that "[c]ausation is a question of both fact and law".[192] To establish the crime of murder, the act of the accused has to be a *causa sine qua non* of the death of the victim,[193] but it need not be the sole cause or even the main cause of the victim's death.[194] It is sufficient that his act contributed significantly to that result.[195] Hence in *Dominic Ongwen*, while the immediate and main cause of the death of victims caught in crossfire and struck by bullets, even if they were fired by the UPDF, these shots were the inevitable consequence of the LRA attack to which the UPDF soldiers were responding. Those attacks, ordered by Dominic Ongwen, was clearly a *causa sine qua non* of those deaths.

The causation, however, would break if there is a *novus actus interveniens*, namely the intervention of a third party which would relieve the accused of criminal responsibility.[196] The question was therefore if the police constables in shooting the accused back instinctively could be considered as such. In the *ratio decidendi* of the Court which dismissed the second ground of appeal, it was held that 'a reasonable act performed for the purpose of self-preservation, being of course itself an act caused by the accused's own act, does not operate as a *novus actus interveniens*.[197] The Court cited *R v. Pitts*[198] and *R v. Curley*[199] in which the victim acted in a reasonable attempt to escape the violence of the defendant and died which was caused by the act of the accused.[200] It was held that there is no distinction in principle between an attempt to escape the consequences of the accused' acts in those cases, and a response which takes the form of self-defence in the present case, which was involuntary.[201]

On dismissing the third ground of appeal, the Court followed *Hyam v. DPP*[202] that the test of murder is "a subjective test of what was the state of mind of the accused".[203] For a murder to stand, the act must "aimed at someone" and must be an act committed with one of the following (subjective) intentions: 1. The intention to cause death; 2. The intention to cause grievous bodily harm; 3. "Where the defendant knows that there is a serious risk that death or grievous bodily harm will ensue from his acts, and commits those acts deliberately and without lawful excuse, the intention to expose a potential victim to that risk as the result of those acts […]".[204] The

[190] *Id.*, at 291.
[191] *Id.*, at 284.
[192] *Id.*, at 287.
[193] *Id.*, at 288.
[194] *Id.*, at 284.
[195] *Id.*
[196] *Id.*, at 290.
[197] *Id.*, at 289.
[198] R. v. Pitts (1842) C&M 284.
[199] R. v. Curley (1909) 2 Cr App R 96.
[200] England and Wales Court of Appeals, *supra* note 188, at 289.
[201] *Id.*
[202] United Kingdom House of Lords, Hyam v. DPP, AC 55, Appeals Chamber, Judgement (Mar. 21, 1974).
[203] *Id.*, at 292.
[204] *Id.*

Court stated that for the accused murder conviction to stand, the jury only have to be satisfied that either the appellant fired at the police officers and thereby caused them to fire back, or that "he used Gail Kinchen as a shield by force and against her will".[205]

Applying the test in *Pagett* to the *Ongwen* case, it is submitted that there is no *novus actus interveniens* which breaks the chain of causation between the shooting of the LRA fighters and the death of civilians. The government soldiers were not just firing back in reasonable self-defence, but they were there at the camps to defend the civilians from harms. Their self-defence in shooting back is also a reasonably foreseeable event.

2. *R v. Gnango*: Supreme Court's Decision on Issues of Crossfire

Another English case that can be referred to is *R v. Gnango*.[206] The case involves a man covered with a bandana (*Bandana Man*). He pulled out a gun in a car park and shot at the appellant. The appellant returned the fire, crouched down behind a red Polo, and shot two or three shots over the roof of the car.[207] As a consequence of the shooting between them, an innocent passer-by was killed.[208] Both were convicted of murder, and the Supreme Court dismissed the appeal. The case concerns the correctness of the judge's direction of the jury at the Court of Appeal, under doctrines of common law such as transferred malice and parasitic accessory liability which are not relevant to the current case.[209]

Especially worth noting and relevant to the present analysis is Lord Clarke's *obiter dictum* on causation in *Gnango*. Judge Clarke remarked that once the respondent became aware that Bandana Man had a gun and was willing to use it, "it was undoubtedly foreseeable that, if the respondent continued shooting at Bandana Man, he would shoot back with intent to kill him or cause serious harm".[210] Therefore, "it was open to the jury to conclude that the respondent's firing at Bandana Man was a cause of the latter shooting back".[211] As Atli Stannard analysed it, the approach can be broken down into three steps:

> (i) D1's actions (shooting at D2) were a foreseeable consequence of D2's actions- be they telling D1 to come to the shoot-out or shooting at D1; (ii) D2's actions were therefore an operative clause of V's harm; (iii) D1's response, being caused by D2, was not therefore a *novus actus interveniens*.[212]

The foreseeability test for *mens rea* in Lord Clarke's remark can be put aside first, as the test will be analysed in the next chapter. But importantly, under the test, D1's action, which is caused by D2, would not be an intervening act that excuses D2's responsibility. It is submitted that the same applies to the *Ongwen* case.

In *Gnango*, Lord Clarke also cited Lord Wright's remark on causation in *The Oropesa*.[213]

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[205] *Id.*, at 291.
[206] Supreme Court of the United Kingdom, R. v. Gnango, [2011] UKSC 59, Judgement (Dec. 14, 2011).
[207] *Id.*, at 7.
[208] *Id.*, at 8.
[209] The doctrine of "transferred malice" is only applicable under the Common law. The doctrine dictates that "[w]here a defendant intends to kill or cause serious injury to one victim, V1, but accidentally kills another, V2, he will be guilty of the murder of V2." *Id.*, at 16. It is extremely doubtful, if not impossible, to apply this doctrine under the Rome Statute, where the ICC explicitly ruled that the test for *mens rea* is virtual certainty.
[210] *Id.*, at 89.
[211] *Id.*
[212] Atli Stannard, *Securing a Conviction in "Crossfire" Killings: Legal Precision Vs. Policy*, JOURNAL OF COMMONWHEALT CRIMINAL LAW 299 (2011).
[213] England and Wales Court of Appeal, The Oropesa, [1943] 1 All ER 211, Judgement (Dec. 17, 1942) at 32.

> To break the chain of causation it must be shown that there is something which I will call ultroneous, something unwarrantable, a new cause which disturbs the sequence of events, something which can be described as either unreasonable or extraneous or extrinsic. I doubt whether the law can be stated more precisely than that.[214]

On the facts of the case, two steam vessels, *the Manchester Regiment ('M.R.')* and *the Oropesa* ('*O.*') came into collision due to the fault of the latter.[215] The master of *M.R.* launched a lifeboat with sixteen men on board, but it capsized and nine of the men were drowned. The Court of Appeal held that the accident and the people's death were caused by O's negligence and thus there was no break in the chain of causation.[216] In the words of the Court, "[t]here was an unbroken sequence of cause and effect between the negligence which caused the Oropesa to collide with the Manchester Regiment, and their action, which was dictated by the exigencies of the position."[217]

Furthermore, other comments made by the Law Lords in *Gnango* merit consideration. In the joint opinion of Lord Philips and Lord Judge (with whom Lord Wilson agrees), one piece of their remarks is worth being quoted in full:

> On the jury's verdict the defendant and Bandana Man had chosen to indulge in a gunfight in a public place, each intending to kill or cause serious injury to the other, in circumstances where there was a foreseeable risk that this result would be suffered by an innocent bystander. It was a matter of fortuity which of the two fired what proved to be the fatal shot. In other circumstances it might have been impossible to deduce which of the two had done so. In these circumstances it seems to us to accord with the demands of justice rather than to conflict with them that the two gunmen should each be liable for Miss Pniewska's murder.[218]

In *Prosecutor v. Dominic Ongwen*, it is likewise a matter of fortuity how many civilians will be killed *even if* some were shot dead by bullets from the other side (and not by the perpetrators LRA directly), even though it is certain that civilians will be killed as a result. Moreover, Lord Brown in *Gnango* made a warning that regardless of whether the appellant be held liable for the victim's murder in either in accessory terms or as a principal, "A's liability for C's murder seems to me clear and I would regard our criminal law as seriously defective were it otherwise". The international criminal legal system would suffer from such serious defectiveness if killers make the conscious decision to take the risk to engage in massive shooting, foreseeable in the ordinary course of events, and victims die as a result; at the same time, other parties at the scene exercise their legitimate rights of self-defence and protection of civilians by shooting back the killers. The people who initiate the shooting, who expect the other parties to return fire, must be held guilty of murder if they foresee the death of the victims will occur in the ordinary course of events.

In Professor David Ormerod's essay[219] which commented on the *Gnango* case at its Court of Appeal stage, *Pagett* was also discussed. "The decision in *Pagett* seems to be heavily dependent on the acts being those of police officers fulfilling a duty",[220] he remarked. It is contended that in *Ongwen*, the government soldiers are precisely fulfilling their duties of protecting the civilians. The purpose of the IDP Camps under the guardianship of soldiers is exactly for the protection of civilians. Hence, their action of firing back the LRA must not be

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[214] *Id.*, at 39.
[215] *Id.*, at 37.
[216] *Id.*, at 32, 37.
[217] *Id.*, at 37.
[218] *Id.*, at 61.
[219] Tom Rees, David Ormerod, *Joint Enterprise: 'R. v. Gnango'*, 2 CRIMINAL LAW REVIEW 151 (2011).
[220] *Id.*, at 157.

taken to be a willing act which cuts the chain of causation between the LRA's attack and the death of civilians.

3. Potential Objection of No Intent to Harm a Specific Person

In a case of genuine crossfire happening between two or more groups of armed groups or army, the Defence Devil's Advocate may potentially raise the argument that the accused did not intend to kill *specific* civilians. The accused might not even know how many and which civilians will be killed, if any. But this is not a tenable argument at all. First, Article 30 of the Rome Statute does not require that the requisite *mens rea* to be the intent to kill specific persons. It only requires that a person commits the crimes in the Statute with intent and knowledge, in that they mean to engage in the conduct, and "that person means to cause that consequence or is aware that it will occur in the ordinary course of events." A person will have *knowledge* where he is aware "that a circumstance exists or a consequence will occur in the ordinary course of events". Second, to use the example given in the English case *R v. Hancock and Shankland*, a terrorist who places a bomb causing injury,[221] or worse, death, to someone in the vicinity or someone who attempts to defuse it, it is untenable to say that they did not commit murder since they did not aim at a specific person, but in the knowledge that it will cause death to someone as a matter of virtual certainty.

B. The Principle of Non-Exclusivity of a Cause: The Cause of Death Does not have to be the Sole Cause

In determining the issue of causation, different jurisdictions have developed and adopted a wide range of distinct tests and law. A common principle on the law of causation can be deduced from both common law and civil law countries: the act of the accused which caused the result, be it death or otherwise, need not be the *exclusive* cause, or the sole cause, in the chain of events. This is what the author calls the "non-exclusivity of causes" principle. The principle is not only accepted by the English Courts, but as a common law principle, is adopted in Canada,[222] Australia[223] and New Zealand.[224] The current chapter further explicates this principle by studying the laws of other civil law countries, namely Germany, Spain, Japan and the Netherlands.

1. Germany

Academics appear to have different views on the prevailing approach adopted by the German Courts on determining issues of causation in criminal law. On the one hand, H.L.A. Hart, Tony Honore and Paul K. Ryu found that the Criminal Courts in Germany have been adopting the

[221] United Kingdom House of Lords, R v. Hancock and Shankland, [1986] AC 455, Appeals Chamber, Judgement (Feb. 27, 1986), at 465.
[222] Supreme Court of Canada, Smithers v R, [1978] 1 SCR 506, Judgement (May 17, 1977), at 519. See also Terry Skolnik, *Causation, Fault, and Fairness in the Criminal Law*, 65 (1) McGill Law Journal 1 (2019).
[223] Australia's Supreme Court of Victoria approved the English Court of Appeal's approach to the non-exclusivity of causes adopted in *R v Pagett* (1983) 76 CAR 279. See Victoria Supreme Court, R v McLachlan, [1999] VSC 516, Judgement (Aug. 25, 1999), para. 5.
[224] "The law relating to criminal causation is well-settled. It is a fundamental requirement for liability that a defendant's conduct must contribute in some material way to the consequence alleged. That conduct need not be the sole cause of the consequence – but the contribution must be significant." Victoria State Court of Appeal, Hudson v R, (2013) 26 CRNZ 657, Judgment (Dec. 9, 2013), para. 27.

"theory of conditions" to be the test applied by German Criminal Courts.[225] "The theory of conditions, described in the last chapter, has been accepted by the criminal courts of Germany and several other countries for the last hundred years."[226] On the other hand, academics such as Markus Dubber, Tatjana Hörnle and Michael Bohlander stated that German legal commentators and the Courts either subscribe to the theory of adequate causation ("*Adaquanztheorie*") or the approach of objective ascription ("*objektive Zurechnung*").[227]

The contemporary academics' view on German jurisprudence on criminal causation are more inclined towards objective ascription.[228] It should be noted that, despite its importance and prominence in the academia of Hart and Honore's work on the law of causation, it was published in the 1950s. Bohlander observes,

> [t]he courts do formally still adhere to the *Äquivalenztheorie*, but have admitted a number of normative correctives within that framework which in substance means that they are moving towards a form of *Adäquanztheorie*, which is the prevailing approach in civil law, or a version of objective ascription.[229]

Further, in the German majority view on the doctrine of causation, is that all relevant causes are equal in causal value (*Äquivalenztheorie*).[230] This means that a fact amongst several need not be the sole or even main cause of a result: it is sufficient that it is one of the number of causes.[231]

a. The Theory of Condition

Tarnowski has provided an effective definition of the theory of condition:

> The theory of condition takes as its starting point the proposition that all *conditions* of a consequence, which cannot be eliminated in thought without eliminating the consequence also, are equivalent and therefore each single one of these necessary conditions can be regarded as a *cause* of the consequence.[232]

The theory was classically formulated by von Liszt, and adopted by both the Reichsgericht and Bundesgerichtshof: "A cause of a criminally relevant effect is every condition which cannot be assumed absent without failure of the effect."[233] Professor Ryu suggested that the theory is similar, if not equivalent, to the *sine qua non* or 'but for' test of the American common law.[234]

In one case, the accused left a wine bottle containing a solution of arsenic on the window-sill and left the house, although she should have foreseen that her husband who was addicted to drinking might taste it.[235] The husband died due to this, and the accused was convicted of negligent killing.[236] The Court held that "without her act of putting in position and leaving the bottle of poison, the husband of the accused would not have been killed, hence the occurrence

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[225] HART, HONORE, *supra* note 184, at 465. See further Paul K. Ryu, *Causation in Criminal Law*, 106 (6) UNIVERSITY OF PENNSYLVANIA LAW REVIEW 773 (1958).
[226] Ryu, *supra* note 227, at 465.
[227] MICHAEL BOHLANDER, PRINCIPLES OF GERMAN CRIMINAL LAW (2009), at 47.
[228] *See* also MARKUS D. DUBBER, TATJANA HORNLE, CRIMINAL LAW: A COMPARATIVE APPROACH (2014), at 291.
[229] BOHLANDER, *supra* note 228, at 47.
[230] *Id.*, at 47.
[231] BGHSt 39, 137, cited in BOHLANDER, *supra* note 229, at 47.
[232] HART, HONORE, supra note 184, at 444.
[233] *S v. H* (II Strafsenat), Sept. 28, 1951, 1 Entscheidungen des Bundesgerichtshofes in Strafaschen (BGHSt), cited in Ryu, *supra* note 227, at 787.
[234] Ryu, *supra* note 227, at 787.
[235] RGSt 1 (1880) at 373, 374, cited in HART, HONORE, *supra* note 184, at 444.
[236] *Id.*

of the whole consequence was conditioned by this conduct on her part and therefore her conduct was fully *causal*."[237]

An exploration of two other cases would provide the reader with a more clear picture of how the Courts could apply the test.[238] In *S. v. W.*, the police constable stopped and ordered the accused, who drove a truck at night without proper lights in violation of traffic regulations, to drive to the next gas station and told him that he would follow him with his police car.[239] Before placing the police car behind the truck, the constable removed the red light which was intended to warn approaching cars.[240] At this short interval between removal of the light and placing the police car, another truck drove into that of the accused and crashed.[241] The Bundesgerichtshof held that the act of the police did not break the chain of causation between the illegal driving and the death caused by the collision.[242] The Court further held that the accused should have foreseen that he might be stopped by a police car and that the danger would therefore be increased.[243] The Court said that the actual course of the accident, was by no means outside any probability.[244]

In *S. v. D.*, the Court held that the accused who fell on a motorway while drunk caused the death of his rescuer hit by a negligently driven car, although the rescuer had at the time of the incident completed his rescue and was standing on the motorway pondering what further help can be done for the accused.[245] According to the Court, causation was established in the case, as the Court found that the defendant should have foreseen both the act of the rescuer and the presence of negligent drivers on the motorway.[246] However, the Court denied his guilt as he could not have foreseen the peculiar combination of the two factors.[247]

If we apply the theory of condition to determine the liability of an armed group in the killing of civilians in a crossfire in a scenario such as that of *Prosecutor v. Dominic Ongwen*, their shooting of the soldiers is definitely a *sine qua non* of the death of civilians, without which the effect would not have been brought about. Furthermore, they should have foreseen or they could foresee the killing of civilians in the crossfire, given their previous experience fighting with the Ugandan army and the proximity of the location between the army and civilians.

The theory of condition has many logical imperfections, most prominent of which are the problems that arise under additional and alternative causation and intervening cause. In cases of additional causation, where A and B simultaneously shoot C in the fatal part of the body, one of them or even both could be held not guilty under the theory if *elimination* is taken as the test of whether an act is a condition.[248] We can eliminate A or B's shooting and the other's shooting can still cause the same fatal effect, in other words, the other person's additional shooting does not have any additional effect on the result. But this is certainty absurd. Also, if one takes the theory of conditions literally, there are no reason why voluntary interventions, or *novus actus*

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[237] *Id*.
[238] According to Professor Ryu, the Courts in these cases apply the theory of condition, even though they seek to limit responsibility within the context of guilt. *See* Ryu, *supra* note 227, at 794.
[239] *S. v. W.* (III. Strafsenat), Oct 1, 1953, 4 B.G.H.S 360.
[240] *Id*.
[241] *Id*.
[242] *Id*.
[243] *Id*.
[244] *Id*.
[245] *S. v. D.* (II Ferienstrafsenat), Aug. 29, 1952, 3 B.G.H.S. 62, cited in Ryu, *supra* note 227, at 795.
[246] *Id*.
[247] *Id*.
[248] HART, HONORE, *supra* note 184, at 455.

interveniens, can break the chain of causation,[249] since the original act is still a condition in the process.[250] Furthermore, the theory of condition is only adopted in some civil law countries,[251] which should not be taken *ipso facto* as a general principle of law. But from the theory, we can adduce the principle that the cause of a consequence does not have to be the sole cause in the process.

b. The Theory of Adequate Cause

Academics have analysed that the theory of adequate cause is a generalising theory, contrary to individualising theories such as the theory of condition.[252] Generalising theories differ from individualising theories in that they select a particular condition as the cause of an event because it is of a kind which is connected with such events by a *generalisation* (in general) or of regular sequence.[253] In contrast, according to Hart and Honore, most individualising theories were satisfied that a condition is the cause of an event where it "contributed" more of the "energy" needed to "produce" the event if it contributed more of the energy than any other condition.[254] The individualising theories find causation on a case-by-case basis.

The theory of adequate cause suggests that a condition is a cause of an event where conditions of that type generally, in light of experience, produce effects of that nature.

> In order that a condition may qualify as a "cause" it is not sufficient that it produced that result in the concrete case, but it is further required that in all cases abstractly possible such result would probably follow in accordance with a judgment, passed on the basis of general laws of nature.[255]

To determine if a condition constitutes a cause, two types of knowledge are required: knowledge of the particular facts and knowledge of the pertinent general laws of nature.[256]

A German civil court decision can help us comprehend how the theory is applied in practice. The owner of two lighters sued a contractor for breach of contract, wherein the lighters were to be towed from Cuxhaven to Nordenham on the 28th October 1909, on which day the weather was fine.[257] The contractor began to tow on the 28th, but returned to port despite the owner's objection.[258] They began to tow on the 29th but a storm broke out and they suffered great damage, even though on the day the weather forecast was favourable.[259] The Court ruled, on appeal, that the delay by the contractor was the adequate cause of the damage. The Court stated that the damage need not be foreseeable. It is sufficient that the "objective probability of a consequence of the sort that occurred was generally increased or favoured" by the breach.[260] On the facts of the case, the delay had increased the risk of loss as at the end of October, it was more likely that the weather will hold for a journey of six hours begun in good weather than it

[249] *Id.*, at 459.
[250] *Id*.
[251] *Id*.
[252] *Id*., at 465.
[253] *Id*.
[254] *Id*.
[255] Ryu, *supra* note 227, at 791.
[256] *Id.*, at 791, 792.
[257] RGZ 81 (1913), 359, cited in HART, HONORE, *supra* note 184, at 478.
[258] *Id*.
[259] *Id*.
[260] *Id*.

will hold on the following day, even if the weather forecast was 'favourable'.[261] It was found that storm was not unusual for the time of year.[262]

The test suffers from many potential logical flaws, explored in depth by Hart and Honore's *Causation in the Law*.[263] Despite this, under the theory of adequate cause, logically the cause does not have to be the sole cause of an effect.

c. The Theory of Objective Imputation (objektive Zurechnung)

The theory of *objektive Zurechnung*, translated as objective or normative imputation,[264] prescribes that causation has to be interpreted or determined in light of the underlying normative standards and the purpose of the law in question.[265] "Causation is one aspect of the fundamental question of whether the result of a crime was realised by a legally disapproved conduct."[266] The German criminal law professor Murmann takes the example of the offence of murder to explain this. In a murder case, the victim's clothing would not be a relevant factor considering the fact that human life is the protected legal interest of the crime.[267] However, the exact time of death can be considered relevant as it relates directly to that interest.[268] "Therefore, the relevant question is whether a human action is a necessary element for the particular time of death."[269] The theory leaves room for determining the exact underlying purpose of an offence, which depends on a case-by-case basis, but does not suffer from the same logical flaws or inconsistencies as some other theories of causation.

In the *Leather Spray Case*, the German Federal Court of Justice found that causality in German criminal law involves a 2-stage test: Stage one involves a hypothetical test that closely resembles the common law "but-for" test for factual causation: if one were to eliminate the act in question from the course of the event, would the result have still occurred? If the answer is in the affirmative, then the act was not the cause of the result; if the answer is no, causality is established.[270] For stage two, German criminal law next inquires whether the result should be attributed to the offender.[271]

2. Spain

According to *Criminal Law in Spain*,[272] co-authored by Professor Bachmaier and Dr Garcia, the former an academic teaching criminal law in Spain and the latter a former judge at the Criminal Chamber at the Spanish Supreme Court, the Spanish criminal courts currently apply a hybrid of theory of adequate causation, the theory of conditions, the theory of relevance of conditions and the theory of objective imputation. Courts take the theory of condition or *conditio sine qua non* as a starting point to investigate culpability.[273] The authors admit that the theory is useful

[261] *Id*.
[262] *Id.*, at 479.
[263] *Id.*, at 478- 497.
[264] BOHLANDER, *supra* note 229, at 47.
[265] Uwe Murmann, *Problems of Causation with Regard to (Potential) Actions of Multiple Protagonists*, 12 (2) JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 283 (2014), at 284.
[266] *Id.*, at 286.
[267] *Id.*, at 287.
[268] *Id*.
[269] *Id*.
[270] DUBBER, *supra* note 230, at 300
[271] *Id.*
[272] LORENA BACHMAIER WINTER, ANTONIO DEL MORAL GARCIA, CRIMINAL LAW IN SPAIN (2012), at 78.
[273] *Id*.

to exclude causation, i.e. where someone has not caused something, but is insufficient to confirm it.[274] As to the theory of relevance of condition ("*Relevanztheorie*"), it prescribes that the pertinent penal laws, in defining various crimes, give a hint to what conditions should be deemed *relevant* as causes.[275] The authors, however, did not supply concrete cases where the tests and theories are applied.

The authors note that in the current Spanish jurisprudence, the theory of objective imputation has been applied without reservation and as a complementing formula of other theories mentioned above,[276] and the Courts held that the theory of objective imputation is the most appropriate to solve causation problems.[277] "The theory of objective imputation relies on the possibility of attributing causation of a result to the conduct of a subject when where exists a relationship of risk between the conduct and the result."[278] There are two criteria to attribute causation under the theory: First, the creation of a prohibited risk under the relevant law and second, the generation of a result within the purpose or scope of protection of the violated provision.[279] When either of these criteria fail, causation will not stand. What are prohibited and unprohibited risks must be judged on a case-by-case basis. In addition, where the result is outside the scope of protection of the provision, i.e. "when the provision was not aimed at avoiding that class of result", objective imputation is excluded.[280] The authors gave two examples where they argue that an application of the objective imputation test would not find causation between the events: 1) Negligent causation of a suicide, where a gun was left where a person with depression could access it; 2) Consequences so indirect that they cannot be considered to be in the mind of the legislator, for instance, death due to a shock suffered when hearing of the criminal death of a close person.[281]

It has already been submitted that these theories, i.e. the theory of condition, the theory of adequate causation and objective imputation do not logically require the perpetrator of a crime to be the *sole* cause of the crime. The same applies to the theory of relevance of condition: the condition in question has to be relevant to the prohibited offence of the provision in question, but it does not have to be the sole cause of the crime.

3. Japan

In *The Handbook of Comparative Criminal Law*, the author has pointed out that the Japanese law on causation is a hybrid test adopting several theories, largely influenced by German scholarship.[282] All of these theories are premised on finding that "but for" the act the harm would not have occurred, i.e. the act is a *conditio sine qua non* of the harm.[283] Nevertheless, the Courts find that the application of the test must be pursued with a second determination or value judgment about the criminality of the act in terms of both the constituent elements of the crime at issue and its societal context.[284] Two tests are applied by the Japanese Courts for this purpose.

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[274] *Id.*, at 124.
[275] Ryu, *supra* note 227, at 793.
[276] BACHMAIER WINTER, DEL MORAL GARCIA, *supra* note 273, at 78, para. 125.
[277] STS 19 Oct. 2000 and STS 7 June. 2002, cited in WINTER & GARCIA, *supra* note 274, at 125.
[278] *Id.*
[279] *Id.*, at 78, 79.
[280] *Id.*, at 79, para. 126.
[281] *Id.*
[282] THE HANDBOOK OF COMPARATIVE CRIMINAL LAW (Kevin J. Heller, Markus D. Dubber eds., 2011), at 393-413.
[283] *Id.*
[284] *Id.*

First, it is the "prerequisite" (*jōken*) principle, which focuses on the constituent elements of the crime in terms of both the illegality of the act and the culpability of the actor.[285] The author John O Hailey remarked that in cases where lack of foreseeability would have exonerated the accused, the courts more frequently impose criminal liability through what scholars view as the application of the prerequisite theory.[286] This appears to be making value judgments with respect to culpability in terms of their view of the "common sense of society" (*shakai tsūnen*).[287]

The second test is the theory of adequate causation based on German scholarship, as explained above. The author found that theoretical differences do not seem to matter in most cases as "[t]he requisite causation may be found to exist under both theories despite intervening actions by other persons or natural occurrences".[288] Where the Japanese Courts found causation and liability by applying the aforementioned tests, in spite of intervening actions involving other persons, undoubtedly its jurisprudence dictates that the perpetrator of a crime does not have to be the *sole* cause of an offence or harm.

In a 1967 decision by the Supreme Court in Japan, the Court expressly referred to the adequacy theory and found that, contrary to the lower courts, no causation was established on the ground that the accused could not possibly have foreseen that his negligence would lead to the victim's death.[289]

4. The Netherlands

In the Netherlands, the decisive test for determining issues of causation in criminal law is the "reasonable attribution" test.[290] By applying the test, judges determine whether the result can be reasonably attributed to the offender's conduct.[291] According to Johannes Keiler, "[b]y adopting the theory of reasonable attribution the Dutch penal system has abandoned the view that causality is a metaphysical concept and has adopted the view that the establishment of a causal link in criminal law entails a normative judgment."[292] The test allows Courts to assume that the offender's conduct need not be the *sole* cause of the occurred result.[293] In a recent Dutch Supreme Court decision, it was held that where the defendant together with others assaulted the victim by punching and stomping on the victim's face in a pub, the question of causation between the accused's (and his partners') violent conduct and the injuries suffered by the victim has to be determined by "utilising the criterion of whether the injuries can *reasonably*, as a result of the violent conduct, be attributed to the defendant and his partners".[294]

We can deduce from these findings, it is submitted, that the accused's action need not be the sole cause in the chain of causation to find him guilty of crimes such as murder.

C. The Principle of Novus Actus Interveniens or Intervening Cause

[285] *Id*.
[286] *Id*.
[287] *Id*.
[288] *Id*.
[289] *Id*.
[290] KEILER, ROEF, *supra* note 39, at 110.
[291] *Id*.
[292] *Id*.
[293] *Id*.
[294] Dutch Supreme Court, NJ 2007, 49, Judgement (Nov. 28, 2006), paras. 3.4, 3.5., cited in KEILER, ROEF, *supra* note 39, at 111.

Establishing the principle that a criminal conduct does not have to be the sole cause of the result it produces for an accused to be guilty of the offence, we move onto the next consideration of the Courts: they must consider if there are any intervening acts by third parties which break the chain of causation between the act or omission and the consequence. It is, as this Article suggests, a reasonable consideration to have for the international criminal courts in deciding as the final stage of the test in criminal causation.

The common law doctrine of *novus actus interveniens* has been widely adopted by the Courts not only in England and Wales, but also Australia, New Zealand, Canada in deciding criminal cases.[295] In Australian case *R v. Hallet*, for instance, the defendant struck the victim in the head on the beach and left the unconscious victim behind, who was subsequently drowned in the incoming tide.[296] The Court found that the victim's death was the result of an ordinary operation of natural forces and convicted the defendant of murder.[297] In other words, there is no intervening cause in the case. Furthermore, the doctrine *novus actus interveniens* also finds its counterpart in some civil law countries such as Germany, the Netherlands and Spain.

1. Germany

In Germany, Courts have held in different cases how free, deliberate and informed third-party interventions could break the chain of causation. "The rule is that as long as the conduct of D is still operating as a cause of the intervener's acts, even if these are made intentionally and on a free, deliberate and informed basis, there will be no *novus actus* breaking the chain."[298] Only if the act of the accused has no more influence on the result will there be a lack of causality.[299] This differs from the English approach to *novus actus interveniens*, which holds that free, deliberate and informed third-party intervention would break the chain of causation.

In the following cases, German Courts found that there is no intervening cause breaking the chain of causation: 1) death of a rescuer as a consequence of arson;[300] 2) refusal by the victim to have an operation after an accident;[301] 3) improper use of products by the victim;[302] 4) provocation of the victim leading to lethal outcome, even if D was then acting in a state of self-defence[303]. In contrast, in the case where the defendant tried to import drugs, which were then stolen and imported by another, the Federal Court of Justice (BGHSt) held that there was no causality between the two acts.[304]

In one judgment of the German Supreme Court, the idea of an intervening cause was extensively discussed. The case concerns a man who had a verbal dispute with his wife, in the course of which the man, weighing 128 kg, sat forcefully on the ribcage of his wife who was lying on her back.[305] The wife suffered 18 rib fractures, almost suffocated as the defendant sat

[295] Eric Colvin, *Causation in Criminal Law*, 1 (2) BOND LAW REVIEW 253 (1989).
[296] Supreme Court of South Australia, R v. Hallet, [1969] SASR 141, Judgement cited in K. Arenson, *Thabo Meli revisited: the pernicious effects of results-driven decisions*, 77 THE JOURNAL OF CRIMINAL LAW 41 (2013). See also KEILER, ROEF, *supra* note 39, at 115.
[297] Supreme Court of South Australia, *supra* note 298, at 41-55.
[298] BOHLANDER, *supra* note 228, at 48.
[299] *Id*.
[300] Sch/Sch-Lenckner/Eisele, Vorbem. §§ 13 ff, Mn. 76, cited in KEILER, ROEF, *supra* note 39, at 48.
[301] BGHSt 39, 324, cited in KEILER, ROEF, *supra* note 39, at 48.
[302] OLG Celle NJW 2001, 2816, cited in KEILER, ROEF, *supra* note 39, at 48.
[303] "The Leather Spray Case", BGHSt 37, 112, cited in KEILER, ROEF, *supra* note 39, at 48.
[304] BGHSt 38, 32, cited in KEILER, ROEF, *supra* note 39, at 48.
[305] German Supreme Court, NStZ 2009, 92, Judgement (July 8, 2008), cited in KEILER, ROEF, *supra* note 39, at 121.

for almost two minutes on her.[306] She later died due to a wrong treatment by the doctor.[307] The Court of Lower Instance found the defendant guilty of infliction of bodily harm causing death.[308] On appeal, the Supreme Court held that the causal link between the assault and the death must be carefully considered. It needs to consider which treatment would have been required after a diligent diagnosis carried out *de lege artis*, and the fact that the victim did not consult the doctor over her fractures after the 2nd May.[309] In other words, wrongful treatment by the doctor and the victim's inaction regarding her deteriorating conditions could, in certain cases, act as an intervening cause breaking the chain of causation.

2. The Netherlands

The Dutch Supreme Court had also considered whether there was an intervening cause which broke the chain of causation in a homicide case. In the case, the defendant intentionally fired a shot at the victim, which hit him in the neck and caused paraplegia and pneumonia that led to his death.[310] The Defence pled that the victim's death was due to pneumonia, and it would have been possible for her to survive had she received treatment.[311] However, the Court of Appeal found that the victim had lost the feeling and control of her arms and legs.[312] Furthermore, she would have suffered from permanent incontinence and be reliant on artificial respiration in order to live.[313] The Court of Appeal found her remaining life expectancy to be ten years at best.[314] On appeal, the Supreme Court upheld the finding of the Court of Appeal, that the victim's death was a result of the defendant's conduct.[315] Even though the victim forewent treatment, it does not cut the chain of causation of attributing the death to the action of the defendant. In the words of the Court:

> [w]ith this finding the Court of Appeal has expressed the view that the defendant brought into existence the circumstances which prompted the victim to forego medical treatment and that this decision, in the causal chain of events, was not of such a quality that the death of the victim could any longer be reasonably attributed to the defendant's conduct.[316]

3. Spain

The Spanish criminal courts currently apply the theory of objective imputation in deciding issues of causation. The theory itself will be explained in Chapter VIII. In *Criminal Law in Spain*, the co-authors, an academic and a former Supreme Court judge have stated that "there will be no objective imputation if other non-foreseeable co-causes that are outside the risk attributable to the action *intervene*", for instance, where a victim injured with violence dies when an ambulance which takes him to hospital is involved in an accident.[317] It is suggested

[306] *Id*.
[307] *Id*.
[308] *Id*.
[309] *Id*.
[310] Dutch Supreme Court, NJ 1997, 563, Judgement (June 25, 1996) cited in KEILER, ROEF, *supra* note 39, at 118.
[311] *Id*.
[312] *Id*.
[313] *Id*.
[314] *Id*.
[315] *Id*.
[316] *Id*. at 119.
[317] BACHMAIER WINTER, DEL MORAL GARCIA, *supra* note 274, at 126.

that this is the same test as *novus actus interveniens*, even the Spanish courts do not directly cite the Latin legal doctrine.

4. Self-Defence Makes No Intervening Cause

It can be discerned that *novus actus interveniens* is a general principle of law practised by the principal legal systems of the world, from both civil and common law countries. The Ugandan army's shooting back to the LRA fighters could not be considered as a *novus actus interveniens.* It is not a free, deliberate or informed third party intervention. Their action of shooting back, like that in the English case *R v Pagett*, was involuntary. It was conducted for the reasonable purpose of self-defence and the defence of civilians. It was not "ultroneous, something unwarrantable, a new cause which disturbs the sequence of events, something which can be described as either unreasonable or extraneous or extrinsic", the test for *novus actus interveniens* adopted in the English case *The Oropesa*.

International criminal courts accept various defences. Article 31(1)(c) of the Rome Statute provides self-defence as a ground of excluding responsibility, stating that a person shall not bear criminal responsibility if, at the time of the person's conduct,

> [t]he person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected.

The use of force in self-defence under Rome Statute is subject to the objective requirements of necessity, reasonableness and proportionality. Where the Ugandan army if acted reasonably in its self-defence, alongside other principles of international criminal law, its shooting back should constitute no novus actus interveniens. It is a foreseeable and reasonable action on the part of members of the Ugandan army.

D. Islamic Criminal Law

Authors suggest that the ICC should pay heed to Islamic law, besides common law and civil law systems, in deducing general principles of domestic law of the world. The present chapter analyses certain general principles of Islamic Criminal Law, and found that the principle of non-exclusivity of causes and principle of novus actus interveniens are both present in Islamic Criminal Law.

Islamic law, also known as Sharia Law, is practised in some Middle East countries, some of which have Islam as their state religion. Islamic law is generally defined as "God's eternal and immutable will for humanity".[318] This ideal Islamic law finds is narrated in the Quran and Mohammed's example (*Sunna*) and developed by jurisprudence (*Fiqh*). However, numerous interpretations of sharia can be found in laws, scholarly literature, the media and in popular perceptions.[319] In this respect, there are many interpretations of Sharia Law. This chapter examines Islamic Criminal Law separately from other common law and civil law jurisprudence, due to its unique system. This gives rise to the need to study its different major doctrines which may not appear immediately relevant, but the examination of which gives better context and understanding of it.

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[318] JAN M. OTTO, SHARIA AND NATIONAL LAW IN MUSLIM COUNTRIES: TENSIONS AND OPPORTUNITIES FOR DUTCH AND EU FOREIGN POLICY (2008), at 7.

[319] See, for instance, *id.*, at 7-10, providing a background to the different interpretations of Sharia law.

In terms of Islamic criminal law, its sources consist of the following: (i) The Holy Book: Quaran; (ii) Sunnah: Prophet's Rulings; (iii) Ijma: Consensus of opinion of Muslim scholars; (iv) Qiyas: Analogy; (v) Istihsan: Equity; (vi) Masalih al-Mursalah: Public interest.[320] Bearing a third place in the constitution of the source of Islamic criminal law, Muslim jurists play an important role in the interpretation and development thereof, whose opinion are *Fiqh*.[321] Notably, there is no doctrine of *stare decisis* in Islamic criminal law, contrary to the Common law.[322]

Since Quaran and the Prophet's Rulings bear the fundamental consistence of Islamic criminal law, it remains an important source of law in many Muslim countries. These countries can be roughly classified into ones which still practise classic Islamic criminal law, such as Saudi Arabia and Iran; whereas other countries adopt a hybrid system, allowing Islamic law to play a dominant role and influence certain areas of national law, while enacted national constitution and codified certain areas of civil and criminal law, modelled after European or Indian codes.[323] Countries such as Pakistan, Afghanistan, Egypt, Morocco, Malaysia, Nigeria, Sudan and Indonesia can all be classified into this category.[324] By way of a further example, Egypt, adopted Article 2 in its constitution in 1971 which states that "the Islamic Shariah principles are the important principles of legislation".[325] A new constitution was passed in 2011 and a recent Article 219 was added, which provides that available evidence and its primary and doctrinal rules and sources are included in Islamic Shariah principles by People of tradition and consensus schools.[326]

For Islamic countries with hybrid systems, it can be seen that their national laws comprise of a complex web of laws and rules, extracted from Islamic law and other sources and influences. For the purpose of this Article, it suffices to say that some Islamic countries, at the very least, still practise Islamic criminal law in its classic formulation. Interpreting the Islamic criminal law would allow us to derive general principles of some, if not all, domestic criminal systems.

This section summarises and analyses Islamic criminal law based on literature of it written or translated in English, in the forms of both textbooks and articles accessible to English readers. Research into Islamic law is noted in academic literature to be difficult, due to the fact that Islamic law and cases are not widely translated into English.[327] This is also the reason why the International Criminal Court and other international criminal tribunals may have difficulty embracing Islamic criminal law into its jurisprudence, amongst other reasons.[328]

Under Islamic criminal law, the majority of jurists divide 'murder' into three categories, namely intentional murder (*Qatl-al-amd*), quasi-intentional murder (*Qatl-Shibh-al-amd*) and murder by mistake (*Qatl-al-Khata*).[329] Intentional murder is most relevant, which is akin to the requirement of both *actus reus* and *mens rea* under the Rome Statute.

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[320] Mohammad Ibn Ibrahim Ibn Jubeir, *Criminal Law in Islam: Basic Sources and General Principles* in CRIMINAL LAW IN ISLAM AND THE MUSLIM WORLD (Tahir Mahmood *et al* eds., 1996) at 42.
[321] OTTO, *supra* note 320, at 9. See also *id.*, at 46.
[322] Hajed A. Alotaibi, *The challenges of execution of Islamic criminal law in developing Muslim Countries: An analysis based on Islamic principles and existing legal system*, 7 (1) COGENT SOCIAL SCIENCES 133 (2021).
[323] OTTO, *supra* note 320, at 8.
[324] *Id*.
[325] Alotaibi, *supra* note 324, at 6.
[326] *Id.*, at 6-7.
[327] Alotaibi, *supra* note 324, at 2.
[328] See, for example, Mohamed E. Badar, *Islamic Law (Shari'a) and the Jurisdiction of the International Criminal Court*, 24 (2) LEIDEN JOURNAL OF INTERNATIONAL LAW 411 (2011).
[329] CHOWDHURY ANWARULLAH, THE CRIMINAL LAW OF ISLAM (2006), at 55.

1. Intentional Murder under Islamic Criminal Law

Intentional murder is defined as a murder where an adult who is a sane person wilfully and with the intention of causing death makes another person the direct object of his action which is in general fatal and that person dies as a result of that action.[330] Jurists, according to Professor Anwarullah, breaks down the three essential components of intentional murder as follows: (i) The victim must be a living human being; (ii) the victim died as a result of the action of the accused and; (iii) the accused has wilful intention of causing death of the victim.[331] There is also a fourth element as the present author observes which is unique to Islamic criminal law, which is that the weapon must be one of a kind which is likely to cause death, such as a heavy stone, club or hammer, strangulation or administering poison.[332]

What about quasi-intentional murder and murder by mistake? Quasi-intentional murder, by definition under Islamic criminal law, is committed where someone intentionally makes another person the direct object of some actions, not usually fatal but intended for bodily harm, and he dies as a consequence of that action.[333] However, different from intentional murder, the weapons employed in the case of quasi-intentional murder usually would not cause death.[334]

Murder by mistake takes place where an accused, without intention to cause death or cause harm to a person, causes the death of a person either by mistake of intention or by mistake of fact.[335] Example would be where a person mistakes another person for a wild beast and kills him accidently, or where someone hits the victim unluckily while shooting at a target so that the victim dies.[336]

Similar to most, if not all, criminal law of murder, under Islamic criminal law, the accused must bear both *mens rea* and *actus reus* for committing murder in order to be found guilty. It is noteworthy that there are no general legal principles of causation developed by jurists or otherwise in Islamic criminal law, as compared to criminal laws of countries such as English law and German law as discussed. That said, we can extrapolate general principles under Islamic criminal law on our own endeavour, which are pertinent to the issue of crossfire causing death.

a. A Person with Murderous Intent Causing Death to Another is Guilty of Murder

Jurist Imam Malik finds that "if a person causes the death of another person with the intention of causing death, it will be considered intentional murder whether he has used a deadly weapon, heavy stone, wood or any other thing".[337] This is similar to the doctrine of transferred malice under English common law, analysed in section VI (A1) of this Article.

b. Death Must Result from the Act of the Accused

[330] *Id.*
[331] *Id.*
[332] *Id.*, at 57.
[333] *Id.*, at 81.
[334] *Id.*
[335] *Id.*, at 82
[336] *Id.*
[337] MALIK BIN ANAS, AL-MUDAWWANA, Vol. 3, at 108, cited in ANWARULLAH, *supra* note 331, at 58.

Another legal principle is that to establish intentional murder, the murder must be the result of a fatal act of the offender.[338] If the act concerned of the accused is not of the nature which in the ordinary course is likely to cause death, he will not be found guilty of murder.[339] Instances could be further examined to provide a better context for discussion. In one case, it is claimed that a Jewish woman offered a poisonous piece of mutton to the Prophet and he ate some of it but threw the rest after a while.[340] The Prophet had a companion named Bashir who also ate from it at the time, and later died as a result.[341] On the death of Bashir, the Prophet ordered that the woman be put to death.[342] Other examples are that setting on fire or throwing someone into deep water amount to intentional murder, where under ordinary circumstances it is not possible for the victim to survive.[343]

There are some room for debate on what "ordinary course of event" is. But with the above instances in mind, it is likely that someone who has murderous intent and causes crossfire whereby another person died consequently, that he is guilty of intentional murder under Islamic criminal law. The test, summarising from the doctrines and examples, is one of *foreseeability*: if it is foreseeable that someone will die as a consequence of the accused's action, then death could be said to follow from his act in the ordinary course of events.

c. Death Does not have to be Caused by One Single Cause

"If two or more persons jointly cause the death of any other person by taking practical part in it, all of them shall be liable to intentional murder. This is based on the decision of Hadrat Umar."[344]

In one case, in the period of Hadrat Umar, a husband of a woman went missing, and he had one son from his previous wide.[345] The woman developed illicit relationship with another man. She told her new friend to kill the young son of her missing husband. One day, they along with a servant and another person jointly killed that young son. Eventually news spread out and the governor of Yemen arrested all four of them, who confessed to the offence of intentional murder. Hadrat Umar ordered Caliph Umar to execute all of them, stated that "If all the inhabitants of San'a had joined in it, I would have executed all of them."[346]

Under this legal formulation, an accused does not have to be a sole offender, and his act does not have to be the sole cause for him to be found guilty of intentional murder.

Jurists, further, opine that "if two or more persons cause the death of another person jointly and the act of each of them is individually sufficient to cause death, all of them shall be liable to intentional murder".

In cases where the individual act which contributed to the death of the victim is not the sufficient cause or it is uncertain whether it is sufficient fatal, but the cumulative effect brings about the death, jurists have different opinion on the subject matter. For death with multiple causes which is uncertain of whose act is sufficient to cause death, in the opinion of jurist Imam Malik, all of the joint offenders are liable to intentional murder.[347] In the view of other jurists

[338] *Id*., at 57.
[339] *Id*.
[340] *Id*.
[341] *Id*.
[342] *Id*.
[343] SYED SABIQ, FIQH AL-SUNNAH, Vol. 2, at 437, cited in ANWARULLAH, *supra* note 331, at 57.
[344] ANWARULLAH, supra note 331, at 59.
[345] *Id.*
[346] *Id.*
[347] *Id.*, at 60.

such as Imam Abu Hanifah, all of them are not liable to intentional murder but are liable for the hurts caused.[348]

The accused' guilt of intentional murder also hinges upon whether there is a common plan between the joint offenders. Where there is a common plan between the offenders to commit murder, even if none of the act *per se* is sufficient individually to cause death, all of those who are directly involved in the commission of the act shall be liable to intentional murder.[349] Where two or more offenders cause hurt to a victim one after another without a common plan, they shall all be liable to quasi-intentional murder.[350]

d. There Must Not be an Intervening Cause

According to Professor Anwarullah, "[t]he victim must have died of the act of the offender without any gap sufficient for recovery or for a fatal attack by another person." This resembles the doctrine of *Novus Actus Interveniens* as discussed.

Let us consider the following scenario with reference to Islamic criminal law: What would happen in a case where A shot at B, and B shot back as a measure of self defence, in the process of which B's bullet killing an innocent passerby C ("Scenario 1")? Or where A instigated a public gun fight and B followed, both knowing full well that there will be people walking pass and would be shot dead; Eventually the bullet of B killed the passerby C, akin to the scenario of *R v. Gnango* ("Scenario 2")? Suppose that A has the *mens rea* and *actus reus* for murder, how would Islamic criminal law deal with A's responsibilities in these hard cases?

There is no common plan. The actions in the abovementioned scenarios are not contributions to causing the death, in the sense that there are individual acts which accumulated to cause the victim's death, such as beating him one after the other. In Scenario 1, B's act was fatal, but not to his fault acting in self-defence. Further, A's action is not sufficient by itself to cause the death. In Scenario 2, B's bullet caused the death of C, and A's action is not sufficient to cause death *ipso facto*.

It is submitted that under Islamic criminal law, A is guilty of intentional murder. His acts fulfil the three requisite components of intentional murder, namely that the victim must be a living human being, the victim died as a result of the action of the accused, and thirdly the accused has wilful intention of causing death of the victim. The death of C did not happen in insolation, which is caused by B's bullet under the instigation and participation of A in Scenario 1 and 2 respectively. As discussed, the cause of the death do not have to be the sole cause in Islamic criminal law. Further, A made C the direct object of his shooting by shooting at close proximity to him or in his vicinity. Even though his shooting, in both scenarios, did not hit C, but C's death did ensue from his actions. B's shots did not take place in isolation, but in the process of instigation and encouragement by A. A's act in the ordinary course of events would also cause death, as it is clear in the circumstances that B was shooting back due to A's shooting, and people usually walk by the area.

An alternative to the above interpretation would lead to a huge gap in Islamic law. A if not held guilty of intentional murder, would be also free of quasi-intentional murder. As explained, quasi-intentional murder is committed where someone intentionally makes another person the direct object of some actions not usually fatal. But subjecting C to a gun fight is fatal in nature. Consequently, A will also be held free of quasi-intentional murder. Someone is guilty of murder by where an accused has no intention to cause death or cause harm to a person.

[348] *Id.*
[349] *Id.*
[350] *Id.*

However, A has the intent to cause death to B. This goes to show the grave gap and mischief, if A is not guilty for intentional murder under Islamic criminal law.

It has been established that there are two general principles of law from different principal legal systems of the world, applicable to solve the puzzle and issue of causation in the present case: 1) the non-exclusivity of criminal causes principle (i.e. a cause does not have to be the sole cause in an offence to find an accused guilty) and 2) the principle of *novus actus interveniens*. Applying these principles to *Prosecutor v. Dominic Ongwen*, it is submitted, first, that the Ugandan soldiers' shooting back does not constitute an intervening cause in the case, as it is not a voluntary, free or deliberate course of action. It also serves as a legitimate self-defence and the purpose of defending civilians. Second, even though the shooting of the civilians was done through a second actor, the Ugandan soldiers, the first actor, i.e. the LRA fighters, are still liable for the causation under the second principle: the non-exclusivity of causes.

However, it can be discerned that different civil law and common law countries apply different tests and theories on the law of causation, from individualising theories to generalising theories. They can hardly be used to adduce further general principles. By extracting these general principles which constitute the common denominators of various civil law, common law and Islamic law jurisprudence, the ICC can develop and clarify the ICL on the law of causation.

VII. Conclusion

The English Court stated in *R. v. Maybin*

> Any assessment of legal causation should maintain focus on whether the accused should be held legally responsible for the consequences of his actions, or whether holding the accused responsible for the death would amount to punishing a moral innocent." [351]

In the English Common law, a person is guilty of an offence if all the following conditions are met: (a) there is a guilty conduct by the accused (*actus reus*); (b) there is guilty state of mind of the accused (*mens rea*); and (c) there is an absence of any valid defence. The accused's conduct, further, must have caused the consequence under the definition of the crime.[352] This is, in essence, the law of causation. As a first test for the law of causation, the Court must consider if the accused's conduct is a "but for" cause of the proscribed consequence.[353] It will ask whether "but for" the accused's act the result would have occurred.[354] Next, where the accused's conduct is potentially a relevant legal cause of the proscribed consequence, the Court can consult certain principles: which includes that the accused's conduct does not have to be the sole cause.[355] Where the accused's conduct is potentially a relevant legal cause, consideration should be had on whether there is any intervening act between the accused's conduct and the prohibited result which breaks the chain of causation.[356]

The jurisprudence in the law of causation in English law has developed considerably over the years. The English Courts have ruled on many difficult cases which involves issues in causation, The international criminal courts and tribunals, in contrast, have not developed the

[351] Supreme Court of Canada, R. v. Maybin, [2012] S.C.C. 24, Judgement (May 18, 2012).
[352] ORMEROD, *supra* note 37, at 38.
[353] *Id.*, at 39.
[354] *Id.*
[355] *Id.*
[356] *Id.*

law of causation much.[357] But it is about time. In decisions such as *Prosecutor v. Dominic Ongwen*, the International Criminal Court has cleverly avoided confronting the issue and law of causation, given that there are no witnesses seeing crossfire happening. The evidence also points towards the fact that Dominic Ongwen and members of the LRA did kill and had made plans to kill civilians at the IDP camps in Uganda. It leaves, however, the issue of whether crossfire between armed groups or army whereby civilians are killed in the process would deny an otherwise murderous act its chain of causation.

This Article contends that it would not cut the chain of causation. Where the material elements and mental elements of murder are satisfied under the Rome Statute, an armed group or army inducing or leading to a crossfire with another armed group foreseeing that it will cause death to civilians will constitute murder. This especially holds true in the case of *Prosecutor v. Dominic Ongwen*, where Ongwen made thorough plans to wilfully kill civilians at the IDP civilian camps.

The Rome Statute, Elements of Crimes and its Rules of Procedure and Evidence do not provide an answer to the issue of crossfire or causation. Jurisprudence of the international criminal courts and tribunals does not address the issue of crossfire either. However, international criminal tribunals such as the ICTY held that for causation of murder to stand, the conduct of the perpetrator must be a *substantial* cause of the death of the victim. Further, applying the purposive approach of interpretation under the VCLT, it is argued that the object and purpose of the crime of murder (both as a war crime and crime against humanity) under the Rome Statute are for the prevention of indiscriminate attack against civilians in wars and an internal armed conflict of a country. Not treating this as a conclusive finding on the issue of crossfire or causation, the article further examines customary international law and finally, general principles of law derived from domestic legal systems of the world. Generalising principles of laws from both common law countries and civil law countries, as well as Islamic Criminal Law, it deduced two essential general principles applicable in the case of *Dominic Ongwen*: that the cause of the crime does not have to be the sole cause; assessing whether there are any intervening act breaking the chain of causation, it deduced the *novus actus interveniens* principle. The shooting back of the Ugandan army is not an intervening act, despite being part of the "cause" in the death of civilians, if those are acts of reasonable self-defence. No evidence in *Dominic Ongwen* shows otherwise.

The arguments and general principles advocated in this Article should apply in other situations where international criminal law applies, such as air strikes, artillery barrages and shelling,[358] in a situation of murder or intentional killing of civilians where the material and mental elements of crimes are both present. The author also aims to inspire further discussions and debates on the subject of law of causation under International Criminal Law.

[357] *See* KLAMBERG, *supra* note 155, at 288, 576. There is a vast amount of academic literature in international criminal law that uses the word "causation" to mean "command responsibility". In Klamberg's Commentary, only the *Lubanga case* was cited on informing the readers about "causation", but the text and the case in fact discuss the question of causation between the harm done and victim reparation, and not the law of causation between the conduct and whether it leads to the consequence prescribed under the crime.

[358] These are common military tactics leading to immense civilian deaths. *See* Amnesty International, *Civilians Caught in the Crossfire as Militias Battle for Tripoli* (Oct. 22, 2019), www.amnesty.org/en/latest/press-release/2019/10/libya-civilians-caught-in-the-crossfire-as-militias-battle-for-tripoli.