Philip Parkes

Potential Legal Liability of Escalatory Nuclear Strikes

CONTEMPORARY ISSUES AS TO NUCLEAR WEAPONS AND INTERNATIONAL LAW

Professor Charles J. Moxley, Jr.

Fordham University School of Law

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Table Of Contents

Part I: Introduction

In the wake of the advisory opinion as to the Legality of the Threat or Use of Nuclear Weapons by the International Court of Justice in 1996, some nuclear states including the United States have pointed to smaller-scale nuclear weapons as examples of nuclear weapons that might potentially be used without necessarily violating international law.[1] The idea is that since the explosive and radiation-based effects of smaller nuclear weapons—often called tactical nuclear weapons—can be deployed in a more controlled manner, such weapons could potentially be used without violating international legal obligations such as the rule of distinction, which prohibits the use of weapons which cannot meaningfully distinguish between civilian and military targets.[2] Arguments justifying the use of tactical weapons solely with reference to the immediate effects of explosive impact, radiation, and other effects typically associated with the use of conventional weapons ignore the crucial reality of escalation risk.[3] Escalation risk, broadly speaking, refers to the consensus among a wide body of experts that for a variety of a reasons, the use of any nuclear weapon, including even the most low-yield nuclear weapons, carries with it the risk of inducing retaliatory and likely escalatory nuclear response strikes potentially leading to large-scale strategic nuclear warfare.[4]

While the risk of escalation associated with the use of nuclear weapons is not new,[5] the special legal consequences—if any—of escalatory uses of nuclear weapons stemming from an initial use of nuclear weapons merits further investigation.[6] The primary question is whether a

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[1] Charles J. Moxley, Jr., *Nuclear Weapons And International Law*, 142 (Draft Second Edition) (on file with Fordham Law School), 2023.

[2] Id. at 219.

[3] Id. at 769.

[4] Id.

[5] Id. at pp. 625-630.

[6] See class handout.

country which launches a nuclear weapon may be held responsible for the effects of subsequent escalatory and retaliatory nuclear strikes which result from that strike, even if the initial strike was relatively controlled notwithstanding escalation. One major issue which arises in addressing the question of liability in this context is that of causation.[7] Specifically, to hold the initial country responsible for the effects of future nuclear strikes by other countries, one must establish that the initial country caused the ultimate damage which violates international law, or at least that they induced another actor to cause it.[8] One objective of this paper is to address the restrictive vision of causation, essentially the defense of intervening cause, espoused by the U.S. Department of Defense *Law of War Manual* which stated that harm "caused by enemy action, or beyond the control of either party" need not be considered in the risk and harm analysis.[9]

A second important issue is that of the *mens rea* required to establish criminal liability, and under what circumstances this mens rea might be fulfilled in a scenario in which a tactical nuclear weapon is used.[10] What's more, the issues of causation and mens rea can be tightly interwoven.[11] Part II examines the applicable facts: the inherently escalatory nature of U.S.

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[7] Moxley, *NWIL,* 940.

[8] Id.

[9] Id.

[10] On the one hand, since Nuremberg, criminal responsibility within international law has moved decisively away from the prosecution of states, which are not regarded as having mental states, and towards the prosecution of individuals, which do have mental states, meaning that to the extent one wishes to engage in a conversation about criminal liability internationally, the mental states question is key. See: Elies van Sliedregt, *Individual Criminal Responsibility in International Law, in Oxford Monographs in International Law* 5, (2012). On the other hand, nuclear states insist that the body of law thought to govern nuclear weapons—international humanitarian law—applies primarily to states, thus allowing states to put off the *mens rea* question. For example, the *Air Force Manual on International Law* states that the law of armed conflict is primarily concerned with "nations" and "combatants", not "individuals." *See:* Moxley, *NWIL*, at 101. However, this conflicts with the practice of international criminal law, which has consistently incorporated violations of international humanitarian law into individual war crimes statutes and case law. *See ICTY statute; Rome Statute; ICTR Statute; Nuremberg Charter.*

[11] Moxley, *NWIL,* 941.

nuclear weapons policy. Part III examines the applicable law, namely, causation and *mens rea* within the context of international criminal law. Part IV applies the law of Part III to the facts of Part II.

What is argued in this paper is that causation, when pushed to the maximum, effectively collapses into and depends upon the *mens rea* analysis for meaning and definition across both principal and accessory liability.[12] *Mens rea*, meanwhile, is defined on one's awareness of risk.[13] Thus, under certain circumstances, once the act requirement for a war crime has occurred, this analysis would tend to suggest that the entirety of legal responsibility depends on the level of risk of which one is aware.[14] This would seem to place the greatest importance on risk estimates of the likelihood of escalation to unacceptable levels.[15]

Part II: Applicable Facts

This part examines the policies of the use of tactical nuclear weapons as they pertain to escalation risk, with a focus on the United States. Part A examines the specific policies of the United States and other nations. Part B examines the potential consequences of these policies. Part C attempts to provide an explanation for why these consequences are believed to be likely to follow from the use of nuclear weapons.

A. The Relevant Policies of the United States

(1) Tactical Nuclear Weapons and ICJ

In the advisory opinion issued in 1996, the International Court of Justice (ICJ) took up the question of "the Legality of the Threat or Use of Nuclear Weapons."[16] The court concluded

[12] See Part IV(C)
[13] Id.
[14] Id.
[15] Id.
[16] See Moxley, *NWIL,* Chapter 3.

that it lacked the information necessary to definitively rule out the possibility that nuclear weapons could be used legally.[17] This left open the question of what uses of nuclear weapons, if any, might be legal under international law.[18] The U.S. official military position appears to be that the legality of a use of nuclear weapons depends on the specific facts of that context, or at least that the legality depends in large part on the risk analysis conducted by officials beforehand.[19] As for the ICJ in its advisory position, the court "ostensibly assumes that the use of nuclear weapons could be held per se unlawful only if all uses would be unlawful in all circumstances."[20] The ICJ held that it lacked the information necessary to declare that any and all uses of nuclear weapons would be illegal on the grounds that the use of nuclear weapons might be legal in an extreme circumstance of self-defense.[21] While the specific implications of the ICJ have been subject to much debate,[22] the court was clear that it could not "conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a State would be at stake."[23] The ICJ's focus appeared to be on low-yield weapons:

> The reality . . . is that nuclear weapons might be used in a wide variety of circumstances with very different results in terms of likely civilian casualties. In some cases, such as the use of a low-yield nuclear weapon against warships on the High Seas or troops in sparsely populated areas, it is possible to envisage a nuclear attack which caused comparatively few civilian casualties. It is by no means the case that every use of nuclear weapons against a military objective would inevitably cause very great collateral civilian casualties.[24]

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[17] Id. at 163
[18] Id.
[19] Id.
[20] Id. at 227.
[21] Id. at 164.
[22] Id. at 168.
[23] Id. at 170.
[24] Moxley 178

Given the ICJ's hesitancy to enact a rule having the effect of unilaterally outlawing the use of nuclear weapons, the U.S. policy of basing the legality of the use of nuclear weapons "after careful consideration of all relevant factors" does not seem completely inconsistent with the ICJ's decision and emphasis on the importance of the specific "circumstances."[25] While it is not necessary for all of the activity banned by a per se rule to be illegal in itself,[26] the court, rightly or wrongly, appears to have taken that position.[27]

The thrust of the response of the United States was that the legality of the use of nuclear weapons depended heavily on the manner and context in which they were used.[28] This response emphasized the inherent controllability of nuclear weapons in terms of immediate effects such as radioactive fallout.[29] This has led commentators to conclude that the "U.S. defense of the lawfulness of the use of nuclear weapons" is "premised" at least in part "on low-yield highly accurate nuclear weapons directed at non-urban areas."[30] The US conceptual defense of low-yield nuclear weapons is part of its broader policy of willingness to use nuclear weapons alongside conventional weapons as simply another option available to win wars.[31] Combined, the United States is willing to use low-yield nuclear weapons in the context of an otherwise conventional military engagement because they believe them to be "surgically" controllable.[32]

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[25] See note 56 and accompanying text.

[26] Moxley, *NWIL,* at 227.

[27] Id.

[28] U.S. attorney John McNeill, arguing before the ICJ in the *Nuclear Weapons Advisory Case*, said that "their [Nuclear weapons'] use may be lawful or not depending upon whether and to what extent such use was prompted by another belligerent's conduct and the nature of the conduct." See Moxley, *NWIL*, at 139.

[29] Id.

[30] Id. at 143.

[31] Id. at 615.

[32] Id.

(2) Intra-War Deterrence

The United States does not ignore the risk that the use of nuclear weapons will escalate into broader nuclear conflict.[33] Rather, they simply assert that escalation can be controlled through various policies which can broadly be described as the doctrine of intra-war deterrence.[34] Intra-war deterrence has been the subject of significant study as it was implemented during modern conflicts including the 1973 Arab-Israeli War and the 1991 Gulf War.[35] The prospect of Israel using nuclear weapons during the 1973 conflict was a serious concern and tested the theory of escalation control.[36] One study concluded that Israel avoided using nuclear weapons at least in part because it was able to succeed using conventional weapons alone.[37] The rate at which other countries such as the United States supplied Israel was also seen as a stress point which affected the escalation control calculus, though whether such stress amounted to "nuclear blackmail" — a theory which posits that Israel threatened to use Nuclear Weapons against its enemies if it was not properly supplied — is a different story.[38] These findings, however conclusory, suggest that some luck is involved in addition to the good judgment of senior leadership in whether nuclear weapons will be used, and that the mere existence of nuclear weapons as an integrated alternative to conventional weapons creates a heightened risk of their use.[39]

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[33] Id. at 617,

[34] Id.

[35] Dr. W. Andrew Terrill, *Escalation and Intrawar Deterrence During Limited Wars in the Middle East*, 8-43 (US Army War College Press, 2009), https://press.armywarcollege.edu/monographs/622.

[36] Id.

[37] See Id. at 86. "Israel may have … pulled back from [the nuclear] option …because of the vast improvement of Israel's battlefield situation."

[38] Id at 36.

[39] Id. at 87. "The combatants did not use WMD, but in neither conflict was this restraint an inevitable result and some luck was involved in the outcomes."

What is critical is how intra-war deterrence is thought to occur. It appears to function at least in part by utilizing stronger weapons than the enemy in order to motivate them to not use larger weapons in return. Escalation control, writes a 2020 Air Force Manual, "is the ability to increase the enemy's cost of defiance."[40] Essentially, escalation control seems to function at least in part by means of drastic escalation against the enemy, albeit utilized in a manner designed to "avoid creating incentives for further escalation."[41] Interestingly, the United States appears to have acknowledged that there is a point at which escalation risk might create legal barriers for the use of nuclear weapons. Before the ICJ, the United States appears to have acknowledged that the use of a nuclear weapon might be potentially illegal if it would "inevitably escalate into a massive strategic nuclear exchange, resulting automatically in the deliberate destruction of the population centers of opposing sides."[42]

(3) Reprisals

The United States approach to reprisals has implications for its stated desire to escalate in a controlled manner.[43] Specifically, in the event of a nuclear attack against the United States, officials have made clear that "an adversary" cannot "confidently predict only a symmetrical response," and that adversaries can instead expect a reprisal that will impose "greater costs" than the expected gain from the initial strike.[44] This is not to say that U.S. policy is blindly escalatory; to the contrary, the purpose of asymmetrical responses is to avoid perpetual tit-for-tat exchanges, which may very well be the only viable course of military action within a conflict setting.[45] The

[40] Moxley, *NWIL,* 122.
[41] Id.
[42] Id. at 144.
[43] See Id. at 619. "The evidence is overwhelming that the whole approach of escalation control is out of touch with reality."
[44] Id. at 619.
[45] Id. at 489.

point is that to the extent security requires asymmetric reprisals—and it appears that it does—the use of any nuclear weapon seems to necessarily imply a response with greater or "graduated" weapons.[46] Indeed, it is precisely in moments of confusion—where "the adversary's threat calculus is not clear, or the level and type of threat the adversary finds credible are uncertain"—that "graduated response options" are recognized as particularly "valuable."[47] What this means is that graduated responses are a way to manage and gain control of situations where the threat is uncertain; since this uncertainty is inherent in nuclear weapons,[48] a nuclear conflict seems to inherently call for graduated escalation. It is important to realize that graduated responses, within the military world, are considered conservative by some in comparison to the shock value of maximization of force.[49] For example, in the Vietnam conflict, the United States utilized a graduated system which entailed arranging

> a series of offensive actions in a stairstep progression of increasing violence, then ascend[ing] the stairs a step at a time, pausing long enough at each level to give the enemy time for reflection.[50]

During the debates of those days, it was asserted that such a policy "violates military principles" because it "sacrifices shock effect."[51] The fact that military leaders might consider graduated responses to be conservative does not negate that they are still escalatory; however, it highlights the complexity of describing such a policy as one that is "risky" from a military point of view.[52]

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[46] Id. at 618.

[47] Id. at 489

[48] See Part II(A)(B) for a discussion of the risks.

[49] Col. A. P. Sights, Jr., USAF (Ret.), *Graduated Pressure in Theory and Practice*, in Proceedings (U.S. Naval Institute, 1970), https://www.usni.org/magazines/proceedings/1970/july/graduated-pressure-theory-and-practice

[50] Idid.

[51] Ibid.

[52] For a brief overview of the tension inherent in civilian control of nuclear weapons, *see* William Lanouette, *Civilian Control Of Nuclear Weapons* (Arms Control Association, accessed 12-1-23), https://www.armscontrol.org/act/2009_5/Lanouette

Semantically, such a conclusion requires caution, since intra-war deterrence is effectively a policy of pursuing controlled escalation for the purpose of de-escalation.[53] But regardless of purpose, the reality is nuclear conflict seems to necessarily imply and require greater retaliatory nuclear conflict as a basic matter of security.[54] It appears that sound tactical supremacy may require and call for graduated responses; however, just because something is tactically sound does not mean that it is legally permissible. It is not a requirement of war crimes that something be considered tactically unsound.[55]

(4) Launch on Warning

Another potentially escalatory policy of the United States is launch on warning. Launch on warning refers to the cluster of policies which empower the United States to launch nuclear retaliatory strikes as soon as incoming strikes are detected, and before the incoming strikes actually impact.[56] While past presidents have sought to reduce reliance on launch on warning, it remains a technically viable option for the commander in chief.[57] Bruce Blair has observed that in the wake of the Cold War, incoming missiles had flight times of 12-30 minutes, giving the president a limited time window in which to act on this policy.[58]

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[53] See Part II(A)(2).

[54] Moxley, *NWIL,* at 619.

[55] United Nations, "War Crimes" in *Office on Genocide Prevention*, https://www.un.org/en/genocideprevention/war-crimes.shtml

[56] Moxley, *NWIL,* at 664.

[57] Frank N. von Hippel, *Biden should end the launch-on-warning option*, Bulletin of the Atomic Scientists (June 22, 2021), https://thebulletin.org/2021/06/biden-should-end-the-launch-on-warning-option/.

[58] Moxley, *NWIL,* at 663.

> A high degree of vigilance suffuses the entire U.S. and Russian chains of nuclear command and warning, from the bottom all the way to the top. In the warning centers, such as the hub of the U.S. early warning network in Colorado, crews labor under the pressure of tight deadlines to assess and report whether a satellite or land radar sensor indicating a possible threat to North America is real or false. Events happen almost daily, sometimes more than once daily, which trigger this assessment drill that is supposed to yield a preliminary assessment within three minutes after the arrival of the initial sensor data. Analogous drills take place under comparable deadlines in Russia. A rush of adrenalin and rote processing of checklists, often accompanied by confusion, characterize the process.[59]

As with other policies, this one ought to be understood in context. Launch on warning is designed in part to make use of nuclear weapons before they can be destroyed.[60]

Other policies which lend themselves to escalation (whether controlled or not) is that operations are pre-designed to be able to target "enemy WMD delivery systems and supporting infrastructure,"[61] and there is acknowledgement that such targeting and strikes could cause "rapid escalation."[62] The critical takeaway from these policies is not that they are inherently illegal, but that they are inherently escalatory, even if, as has been noted, their purpose is fundamentally descalatory in the long run.[63]

B. The Perceived Risks of These Policies

There is broad recognition that escalation is a serious risk.[64] Notably, among officials and experts, there is some disagreement as to the specific degree of the escalation risk. It has been characterized as:

Risk Estimate	Consequence

[59] Moxley, *NWIL*, 664
[60] Id.
[61] Id. at 666.
[62] Id. at 666
[63] Id. at 664.
[64] Id. at 625-630.

Likely if not inevitable consequence	Nuclear retaliation and uncontrolled escalation that crosses the threshold of acceptable damage to this nation[65]
Should not have confidence	Controlled Escalation[66]
There is no reason to have confidence	Controlled conflict[67]
Very easily	Ruinous to the world[68]
easily	All-out nuclear exchange[69]
no guarantee against	Unlimited escalation once the first nuclear strike occur[70]
rare	Decision makers can confidently predict the end-point of the trajectory which an initial resort to violence starts.[71]

[65] Id. at 630.
[66] Id. at 619.
[67] Id. at 620.
[68] Id. at 620.
[69] Id. at 621.
[70] Id. at 622.
[71] Id. at 631.

strong possibility	Any efforts to control escalation have a good chance of breaking down[72]
neither guaranteed nor even likely	modulation[73]
Not reliably	The rate at which the use of nuclear weapons could be expected to remain limited if used[74]

Importantly, the military itself does not deny that escalation might ensue from the use of nuclear weapons. Notably, the Air Force has acknowledged the possibility of "unintended consequences" and "the enemy's ability to escalate" in response to its own attacks.[75] Indeed, when the Air Force asserts that "the decision to use nuclear weapons is one made only after careful consideration of all relevant factors," there is little reason to doubt that the Air Force considers escalation risk, notwithstanding the U.S. arguments before the ICJ which seem to imply that the legal threshold requires virtual inevitability of resulting "automatically" in "deliberate destruction of population centers.[76] The relevant U.S. Statement is

[72] Id. at 632.
[73] Id. at 630.
[74] Id. at 622.
[75] Moxley 145, 627
[76] See note 77.

> The argument that international law prohibits, in all cases, the use of nuclear weapons appears to be premised on the incorrect assumption that every use of every type of nuclear weapon will necessarily share certain characteristics which contravene the law of armed conflict. Specifically, it appears to be assumed that any use of nuclear weapons would inevitably escalate into a massive strategic nuclear exchange, resulting automatically in the deliberate destruction of the population centers of opposing sides.[77]

The U.S. position is not that tactical nuclear weapons can be used at any time, but that risk must be measured if they are used.[78]

C. Explanations for These Risks

Three explanations as to why nuclear escalation is not controllable are "the lack of information, the pressure of time and the deadly results that would be taking place on both sides of the battle line."[79] Regarding lack of knowledge, there is broad recognition that a country which is targeted by a nuclear weapon may be forced to assume the worst if it does not know what type of nuclear weapon has been fired, and that there is reason to believe such knowledge will be elusive. Commentators have pointed out that high yield and low yield weapons utilize the same missiles for flight.[80] A group of seventeen U.S. Senators in 2019 opposing the deployment of a low-yield nuclear warhead stated that "Russia would not know whether the incoming missile would have a low-yield or high-yield weapon."[81] Remarkably, the dynamics by which Israel decided not to use nuclear weapons during the 1973 Arab-Israeli war are still not completely understood, particularly with respect to U.S. aid.[82] Theories persist that Israel was forced to blackmail the United States into providing aid by threatening to otherwise use nuclear weapons in the conflict.[83] The point is not that these theories have legitimacy, but that the fact

[77] Moxley, NWIL, at 144.
[78] Id.
[79] Id. at 625.
[80] Id. at 621.
[81] Id. at 621.
[82] Terril, *Escalation and Intrawar Deterrence During Limited Wars in the Middle East*, at 36.
[83] Id.

that they have even persisted in the discourse surrounding escalation control shows the confusion, stress and lack of complete knowledge present when decisions about nuclear weapons are being made.[84]

As discussed, launch on warning policies require decisions to be made about whether to launch a nuclear weapon in a very small time frame. "A rush of adrenalin and rote processing of checklists, often accompanied by confusion, characterize the process."[85] According to some, the president would have less than 10 minutes to make that terrible decision,[86] and some estimate that if given the order, the missiles will be launched between 5 and 15 minutes after receiving a launch order."[87]

Finally, there is the general recognition that, assuming nuclear weapons are used within the context of a war, the fog of war would create an atmosphere of duress under which making a good decision must be compressed.[88] In particular, at least as contemplated by the ICJ decision, the use of nuclear weapons would be contemplated in an extreme scenario.[89] During the 1973 Arab-Israel war, senior Israeli leadership have gone on record to describe the "anxiety never previously experienced" which "gripped" them at the darkest moments of what had become an existential struggle.[90]

The use of checklists and pre-approved training processes within the context of making a decision within the launch on warning time frame is particularly interesting in that it appears to

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[84] Id.
[85] Moxley, *NWIL,* 663.
[86] Id. at 551.
[87] Id. at 655.
[88] Id at 625.
[89] See supra Part II(A)(1).
[90] Terril, *Escalation and Intrawar Deterrence During Limited Wars in the Middle East*, at 35.

attempt to automate part of the decision-making process.[91] This process is not without risk of error.[92] In a briefing book compiled by the National Security Archive at George Washington University using FOIA materials concerning launch on warning policies, declassified documents make clear that officials knew it was "possible that no President could be sure ... that an attack was in progress or that retaliation was justified," unless confirmation of nuclear detonations was already available.[93] The U.S. government, without a specific citation, asserts that the belief that rapid launch systems are inherently destabilizing is not universally shared, since ultimately, the president has the option to delay a response or await additional information.[94]

An additional ingredient that has drawn attention as being inherently escalatory is the U.S. policy of placing the power to launch a nuclear weapon solely in the hands of the president.[95] Evidence from the 1973 Arab-Israeli indicates that one senior official's potential interest in preparing nuclear weapons was strongly opposed by other senior officials.[96] This seems to suggest a situation room of healthy debate and almost consensus-based reasoning. It is unclear whether the United States own top-heavy[97] policy of placing the power entirely within the hands of the president would allow him to fend off a discussion of nuclear weapons should the pentagon decide that this was the course of action it was going to represent. While the

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[91] See note 85 and accompanying text.

[92] The "Launch on Warning" Nuclear Strategy and Its Insider Critics, *National Security Archive at George Washington University*, (2019), https://nsarchive.gwu.edu/briefing-book/nuclear-vault/2019-06-11/launch-warning-nuclear-strategy-its-insider-critics

[93] Id.

[94] "Defense Primer: Command and Control of Nuclear Forces," *Congressional Research Service* (2022), https://sgp.fas.org/crs/natsec/IF10521.pdf

[95] Bruce Blair, *Protocol for a U.S. Nuclear Strike*, Nuclear Age Peace Foundation (2018), https://www.wagingpeace.org/protocol-u-s-nuclear-strike/.

[96] Terril, *Escalation and Intrawar Deterrence During Limited Wars in the Middle East*, at 35.

[97] Blair, *Protocol for a U.S. Nuclear Strike*.

president no doubt has a cadre of senior military advisors on his own staff with whom to debate options, the concern over "railroading" is top of mind for experts in the area.[98]

Part III: Applicable Law

This part examines the legal principles which are relevant in determining whether a country could be held responsible for the effects of subsequent nuclear escalation resulting from an initial tactical nuclear strike. Part A provides an overview of international criminal law and war crimes. Part B examines the law of causation. Part C examines the law of mens rea.

A. International Criminal Law

This part examines the structure of International Criminal Law (ICL), which is the area of international law concerned with individual criminal responsibility.[99] Section (1) explores the background and structure of ICL. Section (2) explores the act requirement of war crimes in the context of ICL. Section (3) explores different modes of liability within ICL.

(1) International Criminal Law (ICL)

Modern criminal law in the international context is focused on the prosecution of individuals.[100] As was famously affirmed by the judges sitting in Nuremberg, "Crimes against international law are committed by men, not by abstract entities."[101] International criminal law (ICL) is the body of law which deals with criminal offenses by individuals in an international context.[102] International criminal law is, in large part, defined as the body of law developed by

[98] Id.
[99] Elies van Sliedregt, *Individual Criminal Responsibility in International Law*, 5.
[100] Id.
[101] Chantal Meloni, "Individual Criminal Responsibility" (Oxford Bibliography of International Law, 2020); Kai Ambos, *Treatise on International Criminal Law: Volume I: Foundations and General Part,* 160 (Oxford, 2nd ed. 2020).
[102] Elies Van Sliedregt, *Individual Criminal Responsibility in International Law*, 5.

the tribunals or courts which can claim to have jurisdiction over international crimes.[103] These courts include the Military tribunals convened at Nuremberg and Tokyo by the agreement of the victorious allied governments to prosecute war crimes committed during the second world war; the "ad hoc" tribunals convened by the United Nations to prosecute various atrocities committed in Yugoslavia and Rwanda; the so-called "mixed" tribunals involving a collaboration between the United Nations and domestic governments; and finally, the international criminal court, a permanent court established by U.N. charter to prosecute international criminal law on an ongoing basis ("ICC").[104] The core crimes of International Criminal Law are war crimes, crimes against humanity, and genocide.[105]

(2) War Crimes

War crimes are rooted in customary international law.[106] Thus, to understand war crimes, one must understand international humanitarian law. International humanitarian law (IHL) is the body of law, arising from customary state practice and enshrined in the Geneva conventions,[107] designed to regulate the conduct of hostilities by placing rational limits on the means and method of warfare.[108] Briefly, these laws stipulate, *inter alia*, that attacks carried out against the enemy must (1) distinguish between civilians and combatants (rule of distinction), (2) be actually necessary for achieving military purposes (the rule of necessity), and (3) be proportional in

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[103] Id. at 3. "The concept of international criminal law is understood as the body of law that defines and regards those crimes that are offenses over which international courts and tribunals have jurisdiction."

[104] Ambos, *Treatise on International Criminal Law,* 160-253.

[105] Elies van Sliedregt, *Individual Criminal Responsibility in International Law,* 4.

[106] See Id. "Until Nuremberg international criminal law was largely unwritten law"; "War Crimes", in *United Nations Office on Genocide Prevention and the Responsibility to Protect,* https://www.un.org/en/genocideprevention/war-crimes.shtml.

[107] "War Crimes", *United Nations*, https://www.un.org/en/genocideprevention/war-crimes.shtml

[108] Elies van Sliedregt, *Individual Criminal Responsibility in International Law,* 4.

strength and magnitude to the expected military benefit to be obtained from the operation (the rule of proportionality).[109] War crimes are those violations of IHL that incur individual criminal responsibility under international law.[110] War crimes thus represent an effort to apply the customary laws of war to the prosecution of bad acts by individuals during wartime.[111]

Within international criminal law, the specific acts constituting war crimes are defined by the statute of the tribunal.[112] Each tribunal's statute takes a slightly different approach to defining the crimes. Under the ICTY, war crimes are (1) serious violations of IHL, (2) grave breaches of the Geneva conventions, or (3) violations of the laws of war.[113] Under the ICTR, war crimes consist of (1) serious violations of certain Geneva conventions as well as (2) serious violations of

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[109] Moxley, *NWIL*, Chapter 1.

[110] "War Crimes," *United Nations*, https://www.un.org/en/genocideprevention/war-crimes.shtml

[111] Elies van Sliedregt, *Individual Criminal Responsibility in International Law,* 5.

[112] In his two-volume *Treatise on International Criminal Law*, leading scholar Kai Ambos opines that an understanding of the "constituting elements" of individual criminal responsibility under ICL emerges most clearly from a historical study of the primary sources of international law, namely, the statutes and case law beginning with Nuremberg and proceeding through the ad hoc tribunals into the ICC. In spite of this historical approach, while careful to emphasize the importance of Nuremberg, in defining ***modern*** international criminal law, he includes the jurisprudence of the ad hoc tribunals and the ICC but not Nuremberg. Ambos is a leading proponent of the tabula rasa, or clean slate view of international criminal law, under which each successive iteration of international criminal law represents a latest and best version of international criminal law which should be seen as improving upon, and thus substantially though by no means completely, replacing prior iterations. This theory has understandably met with some criticism, as not all legal theorists view ICL as a historical progression marching forward and leaving all prior tribunals behind as mere artifacts of history. However, the current scholarship regarding the modes of liability with regards to the prosecution of international criminal law - and their ever important contribution to the mens rea and actus reus of international crimes - reveals that in practice, primary reference is made to the ad hoc tribunals and the ICC. While this brief argument does not render Nuremberg or Tokyo irrelevant as a matter of international criminal law - to the contrary, they remain the foundation upon which international criminal law was built - for the purposes of this paper, the focus will be on the ad hoc tribunals and the ICC. *See* Ambos, *Treatise on International Criminal Law,* 160-253.

[113] See ICTY Statute, https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf

IHL.[114] Finally, the ICC defines war crimes as "grave" breaches of the Geneva Conventions and "other serious violations of the laws and customs applicable in international armed conflict," which is a reference to IHL.[115] Thus, the ad hoc tribunals and the ICC both consider serious violations of the laws of war—which includes the rules of distinction, proportionality, and necessity—to constitute war crimes. The ICC in particular can be viewed as importing the laws of war almost wholesale into its "serious violations of IHL" approach. The ICC statute specifically lists two examples of serious violations that roughly track the principles of proportionality and distinction.[116] In summary, for the purposes of this analysis, it suffices to conclude that what leading scholars have deemed the "modern" doctrine of international criminal law considers any serious violation of IHL to be a war crime.

The meaning of "serious violation" has been the subject of some study.[117] International criminal law tribunals have ruled that a violation is serious "if they endanger protected persons (e.g. civilians, prisoners of war, the wounded and sick) or objects (e.g. civilian objects or infrastructure) or if they breach important values."[118] Some scholars have pointed to the term "serious" as referring to the need for a mens rea requirement, potentially implying that any violation of IHL with the requisite mental element is serious and therefore a per se war crime.[119]

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[114] See ICTR Statute, https://legal.un.org/avl/pdf/ha/ictr_EF.pdf

[115] See Rome Statute, https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf

[116] See discussion of Rome Statute, "War Crimes," *United Nations*, https://www.un.org/en/genocideprevention/war-crimes.shtml

[117] What are "serious violations of international humanitarian law"? *Explanatory Note for International Red Cross Committee*, https://www.icrc.org/en/doc/assets/files/2012/att-what-are-serious-violations-of-ihl-icrc.pdf

[118] Chile Eboe-Osuji, 'GRAVE BREACHES' AS WAR CRIMES: MUCH ADO ABOUT ... 'SERIOUS VIOLATIONS'?, https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/827EE9EC-5095-48C0-AB04-E38686EE9A80/283279/GRAVEBREACHESMUCHADOABOUTSERIOUSVIOLATIONS.pdf

[119] Geert-Jan Alexander Knoops, *Mens Rea at the International Criminal Court*, at 66 (Brill, 2017).

Not all violations of IHL are war crimes. That is because a violation of IHL without the requisite mens rea element is not a war crime.[120]

(3) Principal and Accessory Liability

In international criminal law, a person can be convicted of a crime as a principal or as an accessory.[121] A principal is someone who directly (or indirectly, through another person), commits a crime.[122] Within indirect principal liability, a person commits a crime through another person.[123] The other person can be either innocent or guilty of a crime themselves.[124] An accessory is someone who instigates someone else to commit a crime, or who assists in the commission of a crime.[125] In accessorial liability, both the accessory and the principal are considered criminal actors.[126] Applied in the context of nuclear weapons, holding a person responsible for the effects of escalation as a principal would mean asserting that they committed a war crime by setting in motion a chain of events which led to the effects. Holding the person responsible as an accessory would mean proving that they caused another person to commit a war crime. These differences matter because causation is conceptualized differently for different modes of liability.

B. Causation

This part examines the law of causation within international law. Section (1) examines how causation varies based on the mode of liability and how this variance affects the application of causation. Part (2) examines the problem of intervening cause by identifying three

[120] Knoops, *Mens Rea,* at 66.
[121] Sliedregt et al., *Modes of Liability in International Law*, 269 (Cambridge 2019).
[122] Id. at 17-58.
[123] Id. at 30-58.
[124] Id.
[125] Id. at 257.
[126] Id. at 257.

sub-theories by which subsequent human intervening action breaks the chain of causation. Section (3) examines theories of causation from ICL. Section (4) examines other concepts of causation from international law and other domestic systems.

(1) Causation across Principal and Accessory Liability

This section analyzes how causation varies based on the mode of liability across domestic and ICL systems. In U.S. criminal law, causation is the connection between culpable conduct and the results of such conduct.[127] Causation contains two sub-elements, actual causation and proximate causation.[128] Typically, actual causation exists where the result would not have occurred without — or but for — the defendant's behavior.[129] A variety of tests are used to establish proximate cause, among them, foreseeability of the eventual harm.[130] A major problem for proximate cause is the problem of intervening causes.[131] An intervening cause is an event that occurs in between the defendant's conduct and the result and which causes the result.[132] The chief question which arises from the problem of intervening cause is whether the intervening cause breaks the chain of causation and relieves the defendant of responsibility.[133]

There are generally two types of intervening causes. First, a dependent intervening cause (or "responsive act") is an intervening cause seen as a response to something that the defendant did.[134] Second, an independent intervening cause (or "coincidental act") is an intervening cause viewed as operating completely independently of the defendant's actions.[135] A coincidence will

[127] Wayne LaFave, *Principles of Criminal Law,* Chapter 5 (West, 2017).
[128] Id.
[129] Id.
[130] Id.
[131] Id.
[132] Id.
[133] Id.
[134] Joseph Kennedy, *A Short and Happy Guide to Criminal Law*, Chapter 15 (West, 2020).
[135] Id.

break the chain so long as it was not foreseeable. A response will break the chain only if it is abnormal and unforeseeable.[136]

Sometimes, the independence or dependence of the intervening cause—that is, who legally causes the intervening act—is not clear. One such area is human action that occurs subsequent to the defendant's action.[137] As the leading scholar of domestic U.S. criminal law has pointed out, when the intervening act is a freely chosen human action, the question of whether the intervening cause was dependent on the initial defendant's action is the entire question to be solved and conflicts with the principle of free will.[138] Free will raises the question of whether a person can truly cause another person to do something in the legal sense.[139] A solution to this problem has been to further subdivide intervening causes into a third category of "subsequent human action," and to assume that such action breaks the chain so long as it was freely chosen.[140] Mere foreseeability of result is not sufficient to maintain a chain of causation in these instances.[141]

For situations in which the intervening cause is human action or decision, the key analysis then becomes whether the decision made by the intervening human actor was freely chosen.[142] If it was, then the initial defendant can only be held responsible under a theory of accessorial liability such as instigation.[143] That is, rather than assert that a defendant caused a crime to occur, one must resort to arguing that the defendant caused someone else to commit a

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[136] LaFave, *Principles of Criminal Law,* Chapter 5.
[137] Kadish et al., *Criminal Law And Its Processes*, 626 (Wolters Kluwer, 10th ed. 2017).
[138] Id.
[139] Id.
[140] Id.
[141] Id.
[142] Id.
[143] Id.

crime. As Kadish explains, when subsequent human action is freely chosen, "the law of causation is not available to ground the responsibility of the first actor, so other doctrines must be created to hold responsible those who *instigate* [my emphasis]…a crime."[144]

Intervening cause is not a concept that has been deeply developed within ICL.[145] Because criminal actors within ICL cases have tended to operate remote from the scene of the crime, to the extent ICL has developed causation, it has mostly been within the area of accessorial liability.[146] From the discussion above, it would appear that, at least from the perspective of causation problems, and when thinking about ways to hold individuals responsible for the effects of their behavior when other human intervening acts may be involved, accessorial liability theories are basically thought of as a solution to the problem of free will.[147] In other words, they are useful precisely because they allow for the finding of criminal responsibility without having to solve the problems of free will inherent in certain intervening cause problems.

(2) Intervening Cause - Principal Liability

This section applies domestic U.S. law to the problem of intervening cause within principal liability. ICL has not deeply developed this theory,[148] potentially because it deals primarily with remote actors for which the problem of free will would frustrate attempts to develop the theory.[149] As previously summarized, there are dependent and independent

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[144] Id.

[145] See M. Cupido, *Causation in International Crimes Cases: ReConceptualizing the Causal Linkage,* 22-24 (VU University Amsterdam - Faculty of Law, Working Paper, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3641283.

[146] See Id.

[147] See note 144 and accompanying text.

[148] See Cupido, *Causation*, at 3. "Domestic law sometimes focuses on causality questions that are less prominent in the international sphere, such as the issue under which circumstances intervening circumstances and acts of third persons break the causal chain."

[149] See previous section.

intervening causes. Dependent causes generally do not break the chain of causation; however, it is not always clear whether a cause is independent or dependent. An intervening cause consisting of human action subsequent to the actions of the defendant can be regarded as dependent only if it was not freely chosen, even if it was foreseeable. This section examines the question of what it means for a decision to be freely chosen. Kadish outlines the major categories or circumstances in which a decision is not regarded as having been freely chosen: duress, lack of knowledge, and involuntariness.[150]

a. Involuntariness

A decision is not regarded as freely chosen if it is involuntary.[151] Therefore, subsequent human actions which are involuntary would not break the chain of causation. Clearly involuntary actions include epileptic seizures, responding with a bodily reflex, or sleep walking. The classic involuntary action case involved a woman who killed her sleeping daughter with an axe that she had acquired while sleepwalking. The court dismissed the charges on the grounds that criminal responsibility could not adhere to someone who was not in control of their actions.[152] A different issue arises if someone arranges in advance to do something involuntarily. This is known as contrived involuntariness. It arises where a defendant has created the conditions of their involuntariness and is aware of a risk that the involuntary condition will occur from their preparations. In these situations, courts typically deny the defense of involuntariness. For example, a defendant who killed four children in a car accident due to his epileptic seizure was denied the defense of involuntariness because the court found he was aware of the risk. However, the court clarified it would have decided otherwise if it was his first seizure, so the level of

[150] Kadish, *Criminal Law,* 625.

[151] For this section, see Claire Finkelstein, in *Criminal Law Theory: Doctrines of the General Part*, Chapter 7 (Oxford, 2005).

[152] Id.

knowledge is important. As might be surmised, contrived involuntariness is thought to be limited to those situations in which the requisite criminal *mens rea* clearly overlaps with the perceived contrived-ness.[153] In other words, pushed to its limits, causation becomes a question of *mens rea* or at least is limited by it. German law mixes *mens rea* and causation for contrived defenses of all kinds, not just involuntariness.[154]

b. Lack of Knowledge

A person is not held to have acted voluntarily as causing a crime if they do so without knowledge of the relevant facts and circumstances.

> If A asks B to use a cell phone to call a certain number, and B does so, not knowing that the cal will trigger an explosion, A caused B's act because B acted without knowledge of the relevant circumstances.[155]

This particular exception to subsequent human action appears to rely heavily on *mens rea*. Indeed, under the model penal code view of causation in the U.S., proximate cause is partially defined in terms of *mens rea*.[156] Within the MPC, the operative clause for legal causation is that legal liability cannot apply if the harm in question was "too remote or accidental in its occurrence to have a [just] bearing on the actor's liability or on the gravity of his offense."[157] In terms of defining what makes a bearing just, the MPC's proximity standard requires that the actual harm or injury be of the same kind as that intended, contemplated, or risked.[158] Thus, while remoteness is still a separate concept from mens rea, it is defined at least in part on the

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[153] Id.

[154] Id.

[155] Kadish, *Criminal Law*, 625

[156] *See:* M. Cupido, *Causation in International Crimes Cases: ReConceptualizing the Causal Linkage,* 22-24 (VU University Amsterdam - Faculty of Law, Working Paper, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3641283;

[157] Wayne LaFave, *Principles of Criminal Law: Concise Hornbook Series* (West Academic Publishing 2017), 270.

[158] David J. Karp, Causation in the Model Penal Code, 78 Columbia Law Review 1249, 1272 (1978).

"Divergence" between intention or knowledge and result.[159] Effectively, causation within the MPC is handled with reference to mental culpability, at least with regards to lack of knowledge. A person can only be legally accountable for the conduct of another person if he acts with the requisite culpability.[160]

c. Duress

A person is not regarded as acting voluntarily when under a certain level of duress.[161] Moyer involved the robbery of a gas station during which the owner of the station accidentally killed his station attendant while firing his revolver in self-defense. The jury were instructed that the accused could be held to have caused the death despite not shooting the weapon if it found that the shots were fired to frustrate the robbery. The Pennsylvania court upheld this instruction on the grounds that "the act of defending oneself is a primal human instinct and is also the right and duty of persons threatened with aggression."[162]

As with the law on involuntariness,[163] *mens rea* serves as the limit on how far the causal principle can extend in the context of duress. In Meyers, the court overruled a case in which robbers were held to have caused the death of an off-duty police officer who was killed when a fellow police officer, attempting to shoot the defendants, shot the off-duty officer instead. However, the reason was not that the robbers had not caused the death, but that they had lacked the requisite mens rea for culpability.[164]

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[159] MPC §2.03
[160] Kadish, *Criminal Law*, 626. MPC §2.06.
[161] Kadish, *Criminal Law,* 626.
[162] H.L.A. Hart and Tony Honoré, *Causation in the Law*, 331 (Oxford, 2nd ed. 1985).
[163] See supra (II)(B)(ii)(a).
[164] H.L.A. Hart, Causation in the Law, 332.

The act of self-reservation must be reasonable to constitute an act not freely chosen due to duress.[165] The fear which drives action under duress must be objectively well grounded.[166] If it is safe to remain on board a wrecked ship, but travelers choose to abandon ship and drown, their action negatives causal connection between the criminal negligence of the captain which caused the wreck and their deaths.[167]

d. Duty

Finally, one may be regarded as acting involuntarily (or in making a decision not freely chosen) when responding to some legal duty. In Arzon, an arsonist's conviction for murder was upheld when a fire that he started contributed to the death of a firefighter by causing him to respond to the scene, even though it appears other arsonists may have lit the actual, different fire within the same building that most proximately caused the firefighter's death.[168]

(3) Causation Within ICL - Accessorial

a. Overview

As previously discussed, intervening cause is not a concept that has been deeply developed within ICL.[169] This may be because intervening cause is native to the context of principal liability,[170] and defendants with ICL—being typically remote from the scenes of their

[165] Id. at 332. "When the act done in self-preservation is 'unreasonable' it negatives causal connection."

[166] Id.

[167] Id at 333.

[168] Kadish, *Criminal Law*, 611.

[169] Cupido, *Causation,* generally.

[170] See Kadish, *Criminal Law and Its Processes*, 625 (discussing how when subsequent human action is freely chosen, "the law of causation is not available to ground the responsibility of the first actor, so other doctrines must be created to hold responsible those who ***instigate*** [my emphasis]…a crime"); *see also:* Cupido, *Causation in International Crimes Cases,* at 24 (discussing how "American law sought to address the idea that an accomplice cannot cause the principal – who acts out of free will – to commit a crime" by recourse to accomplice liability).

crimes—better fit the accessorial model.[171] In Cupido's working paper on causation within ICL, the scholar focused on co-perpetration, aiding and abetting, and common purpose liability.[172] The point is that the ICL law of causation must be viewed as applying primarily in the accessorial context, in which, as discussed, both the accessory and the principal are considered criminal actors.[173]

b. Standards

As noted by Professor Moxley and other scholars, the causation standard of "substantial contribution" dominates the accessorial modes of liability.[174] More importantly, this standard appears to have been adopted for maximum flexibility. With regards to the mode of liability of instigation, which occurs when an individual prompts "another person to perpetuate a crime…", one scholar notes that "the test provides judges with a great deal of flexibility when considering the infinite nuances of different instances of instigation."[175] Substantial contribution (or substantial effect) has been interpreted to mean greater than a marginal effect.[176] In Nahimana, as others have summarized, the ICTR court found that defendants who had made media broadcasts inciting others to violence had met the causal requirement of substantial contribution for some violence that occurred, including the deaths of several individuals who were named in the broadcasts.[177] One scholar, in summarizing the causal link, listed as examples of case law situations where the instigator:

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[171] See Cupido, *Causation in International Crimes Cases,* at 37 (discussing how "in the majority of international crimes cases, the empirical link between the accused and the crimes charged is looser and more remote")

[172] See Cupido, *Causation*, at 4-13.
[173] Sliedregt et al, *Modes of Liability in International Law*, 269 (Cambridge 2019).
[174] Id.
[175] Id. at 259.
[176] Id.
[177] Moxley, NWIL, at 942.

- "Created an environment in which crimes against" certain ethnic groups "in particular were encouraged or officially approved"
- "Openly used derogatory language" against certain ethnic groups.[178]

c. Relation to Mens Rea

One case viewed as critical to the development of the standard of causation within ICL was Perisic before the appeals chamber of ICTY.[179] Perisic was for a time the chief of the General Staff of the Yugoslav Army (VJ). He had provided military and logistical support to militant groups which went on to commit atrocities in Yugoslavia. After a conviction at the trial level, Perisic's judgment was overturned on appeal. The appeals court reasoned that Perisic could only be guilty of providing assistance if it had been "specifically directed" towards the crimes charged, and notably, it defined specifically directed as "endorsing" the crimes which the militant group ended up committing.[180] Scholars have argued that this standard of specific direction was an explicit attempt to enhance the requisite causation standard by reference to mental culpability.[181] In other words, scholars have viewed this case as attempting to blend mens rea and causation, or at least to utilize mens rea calculus in making the causation decision. As the appeals chamber in Perisic noted, "proof of specific direction"—which was seemingly phrased as a causation factor—"will often be found in evidence that may also be illustrative of mens rea."[182] What is noteworthy is that the "specific direction" formulation was rapidly and resoundingly rejected by other courts which explicitly called out the Perisic court as seeking to incorporate notions of mens rea into the causal analysis.[183] In Sainovic, the appeals court concluded that the

[178] Sliedregt et al., *Modes of Liability,* at 271.
[179] See Cupido, *Causation*, 8-15.
[180] Id.
[181] Id.
[182] Id.
[183] Id.

Perisic court had been in "direct and material conflict with prevailing jurisprudence on the *actus reus*" of the relevant crimes, indicating that it viewed the "specific direction" standard as being part of the act requirement but nevertheless improperly incorporating mental elements into it.[184] In Taylor, the court stressed that "substantial contribution" is sufficient to describe the causation requirement. As analyzed by one scholar:

> In other words, the distinction between criminal and non-criminal assistance does not depend on the nature of the contribution (neutral or unlawful), or the proximity/remoteness of the accused, but [simply] ***on his influence on the crimes charged***.[185]

The point is less that proximate cause is not an operative part of causation within ICL—although the point has been made that one need not be proximate in order to influence someone else—and more so that ICL courts appear to have sought to keep mens rea and causation separate.

The Nahimana case illustrates the complexity of the overall criminal responsibility analysis within the context of instigation. Nahimana was accused of inciting violence against ethnic groups by propagating certain incendiary radio content.[186] The court noted that there was no requirement that causation be "direct", a conclusion that dovetails with Cupido's analysis that proximity is not a requirement for substantial contribution causation under ICL. One scholar, citing to a different form of liability explored in Nahimana, but arguing that it may be utilized in the instigation context, writes that in deciding such situations, courts may look at the cultural, historical and political context in which the instigating acts take place.[187] In Semanza, for example, the court noted the accused was "widely viewed as an important and influential personality."[188] This analysis suggests that substantial contribution calls upon courts to conduct a

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[184] Id.
[185] Id.
[186] Moxley, *NWIL*, at 942.
[187] Sliedregt et al., *Modes of Liability,* at 281.
[188] Id.

pragmatic assessment of what seems to be driving major events. In Semanza, the court cited the defendant's wealth, connections to the political community, and the fact that speeches were delivered in the presence of military leaders."[189]

In the most comprehensive attempt at analyzing causation within ICL, Cupido has concluded that while courts have paid lip service to a technical distinction between mens rea and causation analysis, perhaps precisely because causation remains a simple and pragmatic assessment, much of the work in ultimately coming to a conclusion about responsibility rests on *mens rea*.[190] Therefore, while courts may as a technical matter separate mens rea and causation analysis, that should not and has not prevented scholars from concluding that, in actuality, what may be rightfully viewed as causation problems are simply resolved by means of recourse to *mens rea* calculations.[191] In the context of ICL, where actors are often remote accessories,[192] by definition this means that mens rea will take a dominant role in determining responsibility. As another scholar writes,

> '[i]n practice, (...) knowledge and purpose may well override exaggerate[d] concerns about establishing an objective link or about proving that an ancillary and neutral business contribution did in fact increase the risk of core crimes being eventually committed'.[193]

The Ministries case before the IMT at Nuremberg involved two bankers, Puhl and Rasche, accused of war crimes and crimes against humanity. Puhl was convicted because he was

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[189] Id.

[190] See Cupido, *Causation*, arguing that "Perceiving actus reus and mens rea in a hydraulic relation is specifically useful for appraising neutral (business) conduct, where the causal contribution may be difficult to establish."

[191] See Cupdio, *Causation*, writing that "the critique that the ICTY's 'specific direction' requirement for aiding and abetting falsely conflated causality and intent should be dismissed."

[192] See Cupido, *Causation*, at 37 writing that "in the majority of international crimes cases, the empirical link between the accused and the crimes charged is looser and more remote."

[193] Christoph Burchard, *Ancillary and Neutral Business Contributions to 'Corporate-Political Core Crime'*, 8 J. INT'l CRIM. Just. 919 (2010).

viewed as "going beyond" his professional role. Even though he had "no part in the actual extermination of Jews", he gave "directions" as to how the funding of these operations should be handled, ordering that they be kept secret.[194] Rasche, on the other hand, was viewed as merely providing funding in the matter and never becoming a "partner in the enterprise."[195] The emphasis on the level of involvement and the note of secrecy in the case of Puhl may indicate that culpability played a role in driving home the causation analysis. Indeed, scholars have noted in other bodies of law such as the ICC a "flight into subjectivity and individual motive" to resolve difficult questions of causation.[196] As Cupido had suggested in the hydraulic conception, "an accessory's knowledge about his or her 'purpose to facilitate a core crime counterbalances the objective versatility of the facilitative act."[197] This is seen as potential originating at Nuremberg, where, in the Flick case, a business organization was held responsible for assisting Nazi organizations because it "knowingly…contributes to the support thereof."[198]

(4) Causation Within Other International Bodies

Two other sources of international law concerning causation are the International Commission of Jurists and the International Law Commission, working groups convened to summarize major principles of international law.[199] The International Commission of Jurists throws cold water on the idea that proximity of the defendant is not a relevant criterion in the context of international criminal responsibility. The International Commission of Jurists has stated that liability "is more likely when a corporate actor provides more direct assistance or is more closely involved in the commission of the criminal act, for example by specifically

[194] Id. at 930.
[195] Id.
[196] Id. at 938.
[197] Id. at 938.
[198] Id. at 936.
[199] See https://legal.un.org/ilc/ and https://www.icj.org

tailoring products to assist perpetrators of crime."[200] Conversely, "the more indirect the assistance of the company is to the crime, the more difficult it will be to establish that the company officials knew that this assistance was being provided."[201]

The ILC, which focuses primarily on state responsibility, has been similarly vague in what it has chosen to clarify in terms of causation. Causation is a necessary element of the breach when the primary obligation in question either directly or indirectly requires the existence of such a link.[202] In the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), the articles are silent on how precisely causation should operate.[203] Some have argued that the specific causation rules vary based on the legal context—that is, the substantive rules defining what is prohibited—in which they are applied.[204] However, some case law has emerged. In Mastromatteo, a man was killed as part of a robbery carried out by persons granted temporary leave from an Italian prison, and the question of Italy's responsibility arose. The European Court of Human Rights (ECtHR), noting that but-for causation did not suffice, Italy

[200] International Commission of Jurists, Corporate Complicity and Legal Accountability, *Report of the International Commission of Jurists,* at 37, https://www.icj.org/wp-content/uploads/2012/06/Vol.2-Corporate-legal-accountability-thematic-report-2008.pdf .

[201] Id.

[202] Ilias Plakokefalos, *Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity*, 26 The European Journal of International Law (2015), at 481.

[203] See: Alice Ollino, *A "Missed" Secondary Rule? Causation in the Breach of Preventive and Due Diligence Obligations*, in Secondary Rules of Primary Importance in International Law: Attribution, Causality, Evidence, and Standards of Review (Oxford, 2022). "Nothing is said about cases where the injury occurred due to the state's wrongful conduct combined with other circumstances, such as a fortuitous event or the action (or omission) of third parties, like states or individuals acting on their own."

[204] See Id. at 110. "Establishing this is a matter for the interpretation and application of the primary rules engaged in the given case."

was spared responsibility on the grounds that the authorities could have neither "reasonably foreseen nor predicted the event."[205] Other standards include:

> a "sufficient nexus" between state omission and the harmful event; when it was within the capacity of the state to "have a significant influence on the course of the event leading to the violation"; or when the state through its action "could have had a real prospect of altering the outcome or mitigating the harm."[206]

	U.S. Law	ICL	Other International Sources
Principal Liability	Freely Chosen: Duress, Lack of Knowledge, Involuntary	x	x
Accessory Liability	x	Substantial Contribution	Proximity, foreseeability or Substantial Contribution

C. Mens Rea

This part examines the relevant doctrine of mens rea. It proceeds in three parts. First, it provides an overview of how mens rea is structured and determined within ICL. Second, it examines the mens rea standard under principal liability. Finally, it examines the mens rea standard under accessory liability.

(1) Preliminary Overview

The ad hoc tribunals developed applicable *mens rea* standards through case law based on the mode of liability, with exceptions for specific categories or crimes.[207] The ICC created a

[205] See Ollino, *Missed Rule*, 117.
[206] See Ollino, *Missed Rule*, at 118.
[207] Knoop, *Mens Rea*, at 13.

statutory *mens rea* that established a uniform general standard for mens rea, however, this standard can be modified based on the mode of liability, the category of crime, or the type of crime within the category.[208]

(2) Ad Hoc

Under the ad hoc tribunals, the required mens rea is that the perpetrator acted with the intent to commit the crime or with the awareness of the substantial likelihood that the crime would occur as a consequence of his/her conduct.[209] Knowledge of the substantial likelihood has been defined in different ways. The general acceptance is that it means a "awareness of probability."[210]

The ad hoc tribunals also accept the standard of *doulis eventualis* for *mens rea* under commission. *Doulis eventualis* is a mental state under which the perpetrator is aware that the actions were most likely to lead to that result but nevertheless willingly took the risk. *Doulis eventualis* is considered slightly above the mental state of recklessness.[211]

Some case law has been explicit that it means a probability of more likely than not, at least for instigation under accessorial liability. The court in Oric held that the *mens rea* for instigation required, as part of intent, acceptance. Defining acceptance the court held that the instigator "even if neither aiming at nor wishing so, must at least accept that the crime be committed," and that the instigator, when aware that the commission of the crime will more likely than not result from his conduct, may be regarded as accepting its occurrence."[212] Between

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[208] Id. at 39.

[209] Elies van Sliedregt et al., *Modes of Liability in International Criminal Law,* (Cambridge 2019).

[210] Knoops, *Mens Rea*, at 15.

[211] Sliedregt et al., *Modes of Liability,* at 27.

[212] Id. at 272.

the Oric ruling and the general view that substantial likelihood means probable, it would appear that 51%—or, probable—is the appropriate measure for this standard.

(3) ICC

The ICC adopts a stricter standard than doulis eventualis.[213] Under the ICC, the general statutory mens rea requirement applies. The statutory requirement consists of the requirements of intent and knowledge, where intent can be defined in terms of awareness. Intent is defined as "meaning" to engage in conduct or as possessing an awareness that a specific consequence will occur in the ordinary course of events. "Knowledge" means awareness that…a consequence will occur in the ordinary course of events.[214] Thus, at minimum, the general statutory requirement for commission under the ICC is an awareness that a specific consequence will occur in the ordinary course of events. The ordinary course of events means virtually inevitable.[215]

(3) U.S. Position

As discussed, U.S. arguments before the ICJ seem to imply that the legal threshold requires virtual inevitability of resulting "automatically" in "deliberate destruction of population centers.[216] This seems to align closely with the ICC standard, though with perhaps a higher standard than a normal war crime for the consequence which the U.S. sees as necessary to make a strike illegal.[217]

Minimum Standards for Mens Rea	
Court	**Mens Rea**
Ad Hoc	Awareness of substantial likelihood

[213] Sliedregt et al., *Modes of Liability,* at 277.
[214] Id.
[215] Id.
[216] Supra, Note 23
[217] For a discussion of War Crimes, see Part III(A)(2).

	leading to War Crime
ICC	Awareness of Virtual inevitability leading to War Crime
US Position	Awareness of Virtual inevitability leading to Deliberate Destruction of Population Centers

Part IV: Application of Facts to Law

This part examines whether considering the inherently escalatory nature of U.S. nuclear policy, and considering the relevant law of causation and *mens rea*, U.S. actors who decide to launch a tactical nuclear weapon could be held responsible for the effects of subsequent escalatory nuclear strikes fired by other nations, assuming such subsequent nuclear strikes constitute a war crime under ICL.[218] There are two main legal hurdles examined in this paper: the causation requirement[219] and the mens rea requirement.[220] Part A applies the facts to causation. Part B applies the facts to *mens rea*. Part C applies the facts to both mens rea and causation in concert, and concludes the paper.

A. Application of The Facts of U.S. Nuclear Policy to Causation

(1) Principal Liability

Under principal liability, the main causation question is whether the subsequent strikes are viewed as freely chosen,[221] which can be analyzed by asking whether the subsequent strike

[218] Although the substantive requirements of War Crimes were not a specific focus of this paper, they are an important consideration, as evidenced by the U.S. statement before the ICJ which seemed to imply that they viewed escalation as creating legal risks only where it involved destruction of population centers, which seems to sit above the minimum requirements for a substantive war crime. Compare Part III(A)(2), the War Crimes discussion, with note 78 and accompanying text, the U.S. statement before the ICJ.

[219] See Part III(B)

[220] See Part III(C)

[221] For the conceptual underpinnings of why intervening cause problems occur exclusively within the context of principal liability, see Part III(B)(1).

was involuntary, made under duress, made with sufficient knowledge, or made out of duty. Under this rule, the U.S. would be responsible for subsequent escalatory effects only if none of the above categories applied.

a. Involuntary

Under the theory of contrived involuntariness, courts typically deny the defense of involuntariness and thus preserve the causal chain back to the initial aggressor where the defendant has created the conditions of their involuntariness and is aware of a risk that the involuntary condition will occur from their preparations.[222] Broadly speaking, the U.S. or Russian policy of launch on warning could be viewed as a way in which the U.S. (or any other country with this policy) has created conditions in which the use of any nuclear weapon could likely or inevitably lead to mass nuclear war.[223]

b. Duress

Under the theory of duress, courts have maintained the causal link back to the initial defendant where the subsequent human action is driven by "primal human instinct" when "threatened by aggression."[224] Based on our understanding of the intense fog of war generated by the kinds of conflicts in which nuclear weapons use has been contemplated,[225] it seems reasonable to think that any country, faced with what might be the first use of a nuclear weapon since World War II, would be under severe duress and the threat of aggression.[226]

c. Lack of Knowledge

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[222] See Part III(B)(2)(a)
[223] See Part II(A)(4)
[224] See Part Part III(B)(2)(c);
[225] See discussion of 1973 Arab-Israel War in Part II(A)(2); see also discussion of Advisory Opinion in Part II(A)(1).
[226] See also Part II(C).

Under the theory of lack of knowledge, which primarily operates under the realm of *mens rea*, but has been conceptualized as sounding within intervening cause doctrine, an intervening cause that takes the form of a subsequent human actor does not break the chain of causation if the actor is unaware of the relevant facts.[227] As outlined in previous sections, a lack of knowledge is a significant reason why experts are concerned that tactical nuclear warfare cannot be controlled.[228] In particular, it has been expressed that the target of a tactical nuclear strike would not be able to know whether the attack was tactical in nature, the single most important piece of knowledge in terms of calibrating one's response.[229]

d. Duty

Finally, a subsequent human actor can be regarded as not freely choosing their action if they are responding out of duty.[230] If a country views it as their duty to respond to a tactical strike with a larger strike—and based on even the most elementary understanding of reprisals, this is very plausible[231]—they cannot be regarded as an intervening cause relieving the initial striking country of responsibility.

(2) Accessory Liability

Under accessorial liability, the relevant criterion for causation is substantial contribution, though other international legal sources have pointed to proximity and foreseeability as other relevant frameworks.[232]

Substantial contribution is pragmatic and simple in theory, but it may prove more complex in application. It has been interpreted to mean simply a level of influence greater than a

[227] See Part III(B)(2)(b).
[228] See Part II(C).
[229] Id.
[230] See Part III(B)(2)(d).
[231] See Part II(A)(3).
[232] See Part III(B)(3).

marginal effect, yet in the case law surveyed, none of the instigators could fairly be described as neutral.[233] In one case, the instigator is held responsible for violence which his broadcasts had fairly been interpreted as desiring. In other cases, instigators were held responsible when their communications targeted specific ethnic groups. The underlying sense of the culpability or neutrality of the instigator drives home the extreme importance of the ICL jurisprudence's efforts to keep mens rea and causation separate.[234] As risky as U.S. policy may be, it would be difficult to argue that U.S. policy makers, in launching a tactical nuclear weapon precisely because they believe it can be controlled, resemble instigators making broadcasts that lead to results which, in all fairness, it could be said that they truly wanted.[235] Given current risk estimates, it seems plausible that retaliatory nuclear strikes would be considered foreseeable.[236]

B. Application of The Facts of U.S. Nuclear Policy to Mens Rea

Under the ad hoc tribunals, the minimum mens rea standard is an awareness of the substantial likelihood that a crime would occur as a consequence of one's conduct,[237] where knowledge of the substantial likelihood can mean "awareness of probability,"[238] doulis eventualis (the knowing taking of a risk that is above recklessness), or more likely than not. At the ICC, the minimum general statutory requirement for causation under the ICC is an awareness that a specific consequence will be a virtually inevitable consequence of one's actions.[239] Thus, as a whole, the application of facts to mens rea involves assessing how different risk assessments fair within the mens rea framework of ICC and the ad hoc tribunals. Below, a preliminary assessment

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[233] See Part III(B)(3)
[234] See notes 202-203.
[235] See Part III(B)(3)
[236] See Part II(B)
[237] Elies van Sliedregt et al., *Modes of Liability in International Criminal Law,* (Cambridge 2019).
[238] See Part III(C)
[239] Id.

is performed in which each estimate from previous in this paper is analyzed for whether it would succeed under each of the surveyed standards. Please note that the bolded columns are entirely my own assessment and can obviously be debated. This is obviously a question of significant complexity.

Risk Estimate	Consequence	**MLTN (Ad Hoc)**	**Virtual Inevitability (ICC)**
Likely if not inevitable consequence	Nuclear retaliation and uncontrolled escalation that crosses the threshold of acceptable damage to this nation[240]	Possibly	Yes
Should not have confidence	Controlled Escalation[241]	Unclear	Unclear
There is no reason to have confidence	Controlled conflict[242]	Unclear	Unclear
Very easily	Ruinous to the world[243]	Unclear	Unclear
easily	All-out nuclear	Unclear	Unclear

[240] Moxley, *NWIL*, at 630.
[241] Id. at 619.
[242] Id. at 620.
[243] Id. at 620.

	exchange[244]		
no guarantee against	Unlimited escalation once the first nuclear strike occur[245]	No	No
rare	Decision makers can confidently predict the end-point of the trajectory which an initial resort to violence starts.[246]	Unclear	Maybe
strong possibility	Any efforts to control escalation have a good chance of breaking down[247]		Maybe
neither guaranteed nor even likely	modulation[248]	No	Possibly
Not reliably	The rate at which the use of nuclear weapons could be expected to remain limited if used[249]	No	Possibly

[244] Id. at 621.
[245] Id. at 622.
[246] Id. at 631.
[247] Id. at 632.
[248] Id. at 630.
[249] Id. at 622.

C. Application to Mens Rea and Causation in Concert

Although ICL law (accessorial liability, substantial contribution) as well as U.S. domestic law (principal liability, intervening cause) distinguish between mens rea and causation as a technical matter, in practice, mens rea appears to make a significant contribution to what could be called causation problems in precisely the situations where causation is weakest.[250] That implies that, at a certain point, in practice causation may collapse into mens rea considerations.

Thus, performing a very rough analysis in which it is assumed that the causation issues of subsequent escalatory strikes cannot be resolved by preexisting doctrine–and, given the potential for a nuclear war to overwhelm existing legal frameworks, this does not seem like a difficult assumption[251]–the ultimate lynch pin for legal liability (assuming that a subsequent escalatory strike fulfills the act requirements for a war crime) may be mens rea. This, as discussed, is simply an assessment of the level of risk that the initial actor knew themselves to be taking in launching the nuclear weapon.[252]

That legal liability might be predicted on an objective assessment of the risk of which the initial actor was aware has at least one driving implication: if it were credibly established that no nuclear weapon could be launched without creating either the more likely than not or virtually inevitable consequence of a war crime, the use of nuclear weapons would be per se illegal due to escalation risk. Under one view of the ICJ's advisory opinion and its views on the assumptions underpinning per se rules, anything short of this puts us back where we started: with the

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[250] For the case law covering ICL's desire to keep *mens rea* and causation separate, see note 146 and accompanying discussion of Perisic. For analysis of why, in practice, the two overlap, see notes 151 and 154 and accompanying text. For discussion regarding how mens rea serves as a limiting check on causation within principal liability and the problem of intervening cause, see notes 119 and 131 and accompanying text.

[251] For a discussion of ICJ advisory opinion and the contemplated circumstances under which nuclear weapons might be used, see note 15 and accompanying text.

[252] See Part III(C)

knowledge that we won't know whether a nuclear strike was illegal due to escalation risk until after the fact, when the specific circumstances can be sifted and weighed.[253] Depending on one's view of the ability of the military to control escalation, this may be an entirely reasonable conclusion. Or, perhaps the appearance of credible willingness to utilize nuclear weapons is the cost of their existence, and all of nuclear weapons policy and training is bluff. Either way, the conclusion of this paper is that there is reason to believe that under current law, the limits of our ability to forecast probabilities could be determinative of the escalation legality question.

In sum, the thesis of this paper is that in the context of international criminal law, causation, when pushed to the max, collapses into mens rea across both domestic and international systems; that a nuclear situation no doubt will push causation to the max, and therefore that the real legal hinge is mens rea; and that on balance, further study of risk estimates is needed to understand whether a per se ban of the use of nuclear weapons can be elicited from the legal liability which may attach to escalation subsequent to the use of a tactical nuclear weapon.

[253] See note 14 and accompanying text.