

THE DANGERS OF MEMBERSHIP: PARTICIPATION AS AN OFFENSE AND LIABILITY OF GROUP LEADERS

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I. INTRODUCTION

On September 9, 2011, the United States Court of Military Commission Review decided *United States v. Al Bahlul*, recognizing conspiracy and “criminal membership” as war crimes for the first time in the United States.¹ The court held

1. *United States v. Al Bahlul*, 820 F. Supp. 2d 1141, 1194, 1209 (USCMCR 2011). The Supreme Court had not definitively stated whether conspiracy and criminal membership, taken alone, constituted war crimes triable by military commission. *See*

that “joining al Qaeda was punishable by military commission as an offense against the law of armed conflict when committed.”² This decision has broad implications for the prosecution of terrorism in the United States, and raises the question of what constitutes “criminal membership.”

Julius Malema, the leader of the African National Congress (ANC) Youth League in South Africa, was convicted under South Africa’s “Equality Act” on September 12, 2011, of a hate crime for leading the singing of “Shoot the Boer” at ANC rallies.³ This is his second conviction for hate speech.⁴ As South Africa is a party to the International Convention on the Elimination of All Forms of Racial Discrimination (CERD),⁵ his conviction presents potential legal issues for the ANC, as CERD demands nations “prohibit organizations . . . which promote and incite racial discrimination, and . . . recognize participation in such organizations or activities as an offense punishable by law.”⁶ Because of his position as leader of the ANC Youth League,

Hamdam v. Rumsfeld, 548 U.S. 557, 612 (2006) (plurality opinion) (“[Conspiracy] may well be a crime, but it is not an offense that by the law of war may be tried by military commission.”). Congress passed, and President Bush signed, the Military Commissions Act of 2006 “in direct response to the Supreme Court decision in *Hamdan*.” *Al Bahlul*, 820 F. Supp. 2d at 1168.

2. *Al Bahlul*, 820 F. Supp. 2d at 1226–27.

3. Alan Cowell, *A.N.C. Official Convicted of Hate Speech*, N.Y. TIMES, Sept. 13, 2011, at A8, available at <http://www.nytimes.com/2011/09/13/world/africa/13southafrica.html>.

4. See *ANC’s Julius Malema Guilty of South Africa Hate Speech*, BBC NEWS (Mar. 10, 2010), <http://news.bbc.co.uk/2/hi/8567727.stm> [hereinafter *Guilty of Hate Speech*](reporting that “[a] South African judge has convicted ANC official Julius Malema of hate speech for his comments about the woman who accused President Jacob Zuma of rape.”). President Zuma was acquitted, but for Malema’s remark that the woman “had a nice time”, “[t]he Equality Court judge ordered Mr [sic] Malema to make an unconditional apology and pay 50,000 rand (\$6,700 USD) to a centre for abused women.” *Id.*

5. *Afri-Forum v. Malema* 2011 ZAEQC 2;20968/2010 at 16 para. 27 (S. Afr.), available at <http://www.saflii.org/za/cases/ZAEQC/2011/2.pdf>; International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), U.N. GAOR, 20th Sess., Supp. No. 14, U.N. Doc. A/6014, at 47 (Dec. 21, 1965) [hereinafter CERD] (signatory page), available at <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-2.en.pdf> (showing that South Africa signed CERD on Oct. 3, 1994 and ratified their signature on Dec. 10, 1998).

6. *Afri-Forum v. Malema* 2011 ZAEQC 2;20968/2010 at 16 ¶ 27; CERD, *supra* note 5, art. 4.

Malema may have exposed himself to broader liability under the provisions of CERD and South African law. His actions and conviction may potentially suffice to establish a functional purpose, if not an explicit purpose, for the group to be considered racially discriminatory, and if so, his actions and conviction may be imputed to the ANC as a whole. He may be potentially complicit in the ongoing violence in South Africa toward Afrikaner landowners.⁷

On September 13, 2011, the advocacy group the Center for Constitutional Rights filed a complaint with the International Criminal Court demanding an investigation of the Pope and other high Vatican officials for apparent complicity in covering up sexual abuse by priests worldwide.⁸ The complaint alleged:

[H]igh-level Vatican officials, including Cardinal Joseph Ratzinger, now Pope Benedict XVI, either knew and/or in some cases consciously disregarded information that showed subordinates were committing or about to commit such crimes.⁹

It is further alleged that those same officials:

[Chose] the path of secrecy and protecting their ranks over the safety and physical and mental well-being of children and vulnerable adults, families of victims and their communities [C]hurch officials have gone so far as to obstruct justice and/or destroyed evidence in national legal systems and have consistently engaged in the practice of “priest shifting,” i.e. transferring known offenders to other locations where they continued to

7. *Anger and Anxiety After Terreblanche Murder*, BBC NEWS (Apr. 4, 2010), <http://news.bbc.co.uk/2/hi/8602967.stm> [hereinafter *Anger and Anxiety*] (“There have been more than 3,000 murders of Afrikaner farmers in remote homesteads like this since the end of apartheid 16 years ago.”); *Free Speech Versus Hatred: Should a Leader of the Ruling Party Celebrate the Shooting of Boers?*, ECONOMIST, Mar. 31, 2010, at 49 [hereinafter *Free Speech Versus Hatred*], available at http://www.economist.com/node/15825764?story_id=15825764 (“Some 3,000 white farmers and their family members are reckoned to have been murdered since the advent of democracy in 1994.”).

8. Victims’ Communication Pursuant to Article 15 of the Rome Statute Requesting Investigation and Prosecution of High-level Vatican Officials for Rape and Other Forms of Sexual Violence as Crimes Against Humanity and Torture as a Crime Against Humanity, ICC File No. OTP-CR-159/11, Sept. 13, 2011, <http://s3.documentcloud.org/documents/243877/victims-communication.pdf> [hereinafter *Victims’ Communication*].

9. *Id.* at 2.

have access to children or vulnerable adults and who officials knew continued to commit rape and other acts of sexual violence.¹⁰

Under international law, these officials may be liable for the actions of members of their organizations because they are the figureheads of the Catholic Church.¹¹ Their inaction, as opposed to the possible incitement in the Malema case, may constitute sufficient complicity in the actions of their priests, particularly if there was a widespread pattern of willful ignorance or outright concealment of the offenders and crimes.

These recent cases and pleadings have directly and indirectly raised the question of how far criminal liability may be imputed when the leader or a member of a group is found guilty of a crime in which the remainder of the group may be implicated in some respect. This article will examine these cases, the current international laws governing criminal membership and imputation of liability, just how far liability does or should extend in cases such as these, and the problems of over- or under-expanding imputed liability under international law.

In this discussion, Part I addresses the origin of criminal membership under international law. Part II discusses the cases addressed in this paper. Part III clarifies laws governing interpretation of the cases. Part IV attempts to define criminal membership and how far it extends up and down the ladder of power within a group. Finally, Part V examines liability within different types of criminal and non-criminal groups.

II. THE ORIGIN OF CRIMINAL MEMBERSHIP AND GROUP LIABILITY UNDER INTERNATIONAL LAW

The Rome Statute and other international criminal instruments, such as the International Criminal Tribunal for the Former Yugoslavia (ICTY), define criminal responsibility

10. *Id.* at 3.

11. *See* Rome Statute of the International Criminal Court art. 7(1)(g), July 17, 1998, 2187 U.N.T.S 3 [hereinafter Rome Statute] (defining rape and other related acts of sexual violence as crimes against humanity). Superiors are criminally liable for the actions of their subordinates. *Id.* art. 28(b)(i)–28(b)(iii).

broadly.¹² Article 25 of the Rome Statute lays out the standards for individual criminal responsibility, in which a person is not only liable for the acts he or she commits, but is liable if he:

- a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
- b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
- c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
- d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
 - ii) Be made in the knowledge of the intention of the group to commit the crime.¹³

The Rome Statute likewise includes a provision for incitement to genocide, when an individual “directly and publicly incites others to commit genocide.”¹⁴

Article 7 of the ICTY similarly conveys a broad definition of criminal liability. In addition to direct individual liability, a superior is criminally liable if an act was committed by a subordinate, and the superior “knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators

12. See Rome Statute, *supra* note 11, art. 25 (defining individual criminal liability). See also Updated Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) art. 7, Sept. 2009 [hereinafter ICTY], available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf.

13. Rome Statute, *supra* note 11, art. 25.

14. *Id.*

thereof.”¹⁵ Liability likewise is maintained for a subordinate acting under the orders of a superior.¹⁶

The recent trend is to apply this imputation even more broadly as a sort of preventative measure to discourage participation in illegal activities through some sort of organization.¹⁷ This trend began with the origin of the doctrines of joint criminal enterprise and command responsibility at the Nuremberg Tribunal, where both concepts were introduced to the international legal stage, creating much controversy.¹⁸ Over the past few decades, the doctrines have been expanded and refined to extend liability beyond joint criminal liability or command liability to include liability for membership in a group alone, provided that the group is of a criminal nature.¹⁹ This seems especially evident in terrorism prosecutions, but this liability may be extended to groups without explicit terroristic or criminal purposes.²⁰

15. ICTY, *supra* note 12, art. 7.

16. *Id.*

17. *Cf.* United States v. Al Bahlul, 820 F. Supp. 2d 1141, 1210–14 (USCMCR 2011) (discussing the inception of joint criminal enterprise liability at the International Tribunal for the Former Yugoslavia).

18. Shane Darcy, *Imputed Criminal Liability and the Goals of International Justice*, 20 LEIDEN J. INT'L. L. 377, 377–78 (2007), available at <http://aran.library.nuigalway.ie/xmlui/bitstream/handle/10379/2142/Darcy%20Imputed%20Criminal%20Liability.pdf?sequence=1>.

19. *Id.*

20. *Cf.* Al Bahlul, 820 F. Supp. 2d at 1214 (concluding that individual criminal liability could be premised on membership in a criminal organization and terrorism); TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, 14 NOVEMBER 1945–1 OCTOBER 1946 12 (1947), [hereinafter 1 TMWC], available at http://www.loc.gov/rr/frd/Military_Law/NT_major-war-criminals.html; Rome Statute, *supra* note 11, art. 28 (extending command responsibility to civilian commanders of non-military organizations); Catherine H. Gibson, *Testing the Legitimacy of the Joint Criminal Enterprise Doctrine in the ICTY: A Comparison of Individual Liability for Group Conduct in International and Domestic Law*, 18 DUKE J. COMP. & INT'L L. 521, 524 (2008) (noting that the ICTY requires a “plurality of persons,” who “need not be organized in a military, political, or administrative structure” for a finding of joint criminal enterprise) (quoting Prosecutor v. Vasiljevic, Case No. IT-98-32-A, Judgment, ¶ 100 (Feb. 25, 2004)).

III. THE CASES INVOLVED IN THIS INQUIRY

A. *Afri-Forum v. Malema*

Julius Malema was convicted of hate speech for the second time on September 12, 2011.²¹ The complainants, Afri-Forum and the Transvaal Agricultural Union of South Africa (TAU SA) alleged “the respondent (Malema) while addressing various public meetings had recited and/or sung and/or chanted certain words The objectionable utterances which are not in English were translated as meaning “shoot *the Boer/farmer*”, “shoot *the Boers/farmers they are rapists/robbers*.”²²

Judge C.G. Lamont ruled that the song “constituted hate speech,” and that Malema and the ANC were to be restrained from singing the song at any meeting, public or private.²³ Malema was ordered to pay for the court costs of the first three days of the trial, but otherwise the parties paid their own costs.²⁴

Malema was in violation of not only several provisions of the South African Constitution and Equality Act, but of international law as well.²⁵

21. Cowell, *supra* note 3, at A8.

22. *Afri-Forum v. Malema* 2011 ZAEQC 2;20968/2010 at 29 ¶ 49 (S. Afr.), available at <http://www.saflii.org/za/cases/ZAEQC/2011/2.pdf>.

23. *Id.* at 68.

24. *Id.*

25. See S. AFR. CONST., 1996, §§ 9, 12, 16 (prohibiting discrimination, promoting the right to freedom from violence, and carving out hate speech from free speech rights); Promotion of Equality and Prevention of Unfair Discrimination Act (“Equality Act”) 4 of 2000, as amended by Promotion of Equality and Prevention of Unfair Discrimination Amendment Act 52 of 2002 (S. Afr.) [hereinafter Equality Act], available at <http://www.justice.gov.za/legislation/acts/2000-004.pdf> (“No person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to—(a) be hurtful; (b) be harmful or to incite harm; [or] (c) promote or propagate hatred[.]”); Convention on the Prevention and Punishment of the Crime of Genocide art. 3, Dec. 9, 1948, 78 U.N.T.S. 277, available at [http://www.un.org/ga/search/view_doc.asp?symbol=a/res/260\(III\)](http://www.un.org/ga/search/view_doc.asp?symbol=a/res/260(III)) (making “[d]irect and public incitement to commit genocide” a punishable act); CERD, *supra* note 5, art. 4 (directing participating states to make participation and promotion of racial discrimination illegal for individuals, organizations, and public institutions); International Covenant on Civil and Political Rights art. 20, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR], available at

The complainants further alleged:

[T]he objectionable utterances propagated, advocated and/or communicated words based on an ethnic or social origin, culture, language and/or were words that could reasonably be construed to demonstrate a clear intention to be hurtful to particular ethnic groups and to incite or be harmful to certain ethnic groups and to promote and propagate hatred.²⁶

Judge Lamont responded to this argument with the warning that, “All genocide begins with simple exhortations which snowball . . . Words provide the stimulus for action . . . Words are powerful weapons. . . .”²⁷

Whether Malema’s actions rose past the level of hate speech to that of incitement to genocide is a thorny legal question. Susan Benesch addresses the difference using two main factors found in international treaties: “one must have specific intent to cause genocide, and . . . the incitement must be direct and public.”²⁸ However, she argues, the hazy definition provided by the treaties does not give the lawyer a clear distinction—there is more to incitement to genocide than an audience. “To commit incitement to genocide, a speaker must have authority or influence over the audience, and the audience must already be primed, or conditioned, to respond to the speaker’s words.”²⁹

In his position as ANC Youth League leader, Malema is certainly in a position of authority and influence, and his words were “direct and public.”³⁰ Young South Africans look up to him in his role as leader of the organization.³¹ Malema’s audience is likewise primed to take action on the basis of his words; violence is rife in South Africa, and a string of murders of over 3,000

<http://treaties.un.org/doc/publication/UNTS/volume%20999/v999.pdf> (“Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”).

26. *Afri-Forum v. Malema* 2011 ZAEQC 2;20968/2010 at 30 ¶ 49.

27. *Id.* at 50 ¶ 94.

28. Susan Benesch, *Vile Crime or Inalienable Right: Defining Incitement to Genocide*, 48 VA. J. INT’L L. 485, 493 (2008).

29. *Id.* at 493–94 (footnotes omitted).

30. *Id.*

31. *Who is South Africa’s Julius Malema?*, CHANNEL 4 NEWS (Sept. 5, 2010), <http://www.channel4.com/news/who-is-south-africas-julius-malema>.

Afrikaner farmers beginning in the early 1990s provides the bloody background for his listeners.³²

Malema's liability, if raised to the level of incitement to genocide, could potentially be imputed to the ANC itself. Judge Lamont found that "[o]rders must be made against [the ANC] dealing with the singing of the song as it has control over the conduct of the persons who hold rallies in its name and on its behalf."³³ Since Malema was acting under the color of the ANC, and its subsidiary party, the ANC Youth League, the ANC could potentially be liable for any and all of his criminal actions insofar as they extend under the doctrine of command responsibility.³⁴

B. United States v. Al Bahlul

In *United States v. Al Bahlul*, the United States recognized for the first time that conspiracy and "criminal membership" are war crimes.³⁵ Ali Hamza al Bahlul made propaganda films for al Qaeda, but never himself directly participated in any terrorist attacks.³⁶

After being held in Guantanamo Bay for nearly a decade, al Bahlul's life sentence was affirmed by a military appeals court, which, for the first time, recognized criminal membership as a war crime.³⁷ The Court held that "[p]roviding material support for terrorism is essentially co-perpetrator liability, analogous to membership in a criminal organization in that the essence is cooperation for criminal purposes, and akin to aiding and abetting, or complicity."³⁸

The *Al Bahlul* Court used the Convention against

32. *Anger and Anxiety*, *supra* note 7; *Free Speech Versus Hatred*, *supra* note 7.

33. *Afri-Forum v. Malema* 2011 ZAEQC 2;20968/2010 at 66–67 ¶ 118 (S. Afr.), available at <http://www.saflii.org/za/cases/ZAEQC/2011/2.pdf>.

34. See Rome Statute, *supra* note 11, art. 28 (defining situations when a commander or superior is liable for the acts of his subordinates).

35. *United States v. Al Bahlul*, 820 F. Supp. 2d 1141, 1194, 1209 (USCMCR 2011).

36. Carol Rosenberg, *Panel Upholds Al Qaida Filmmaker's Life Sentence*, MIAMI HERALD ONLINE (Sept. 9, 2011), <http://www.miamiherald.com/2011/09/09/2399378/military-court-upholds-al-qaida.html>.

37. *Id.*; *Al Bahlul*, 820 F. Supp. 2d at 1209–10.

38. *Al Bahlul*, 820 F. Supp. 2d at 1203.

Transnational Organized Crime (CTOC) in determining their definition.³⁹ The CTOC mandates that each signatory state establishes crimes for the intentional furtherance of the aims of a criminal group when: an individual takes direct action in furtherance of those group objectives, when the group itself undertakes criminal activities, and when actions are taken “in the knowledge that [an individual’s] participation will contribute to the achievement of the above-described criminal aim.”⁴⁰ The CTOC also mandates that signatory states make illegal “[o]rganizing, directing, aiding, abetting, facilitating or counselling [sic] the commission of serious crime involving an organized criminal group.”⁴¹ The Tribunal held that “Congressional adoption of this relatively broad scope of potential individual criminal liability with respect to international terrorism based, at least in part, upon membership in a criminal organization is a logical tack and evident in the plain language of the statute.”⁴²

The Court in *Al Bahlul* also quoted the Nuremberg Tribunal case of *Prosecutor v. Tadić* defining how far this liability through criminal membership reaches in the chain of responsibility for an act of war or criminal action, by saying “Any member who assisted in . . . knowing what was afoot, is guilty of the crimes committed by the unit. . . The cook in the galley of a pirate ship does not escape the yardarm merely because he himself does not brandish a cutlass.”⁴³

This decision provides an easier means of prosecuting suspected terrorists and their associates, but also provides the potential for abuse—taken too far, the prosecuting body could, in theory, claim that any link was sufficient to establish membership.⁴⁴ The Court states, however, that there is both a

39. *Id.* at 1208.

40. *Id.*; United Nations Convention Against Transnational Organized Crime art. 5, Nov. 15, 2000, 80 Stat. 271, 2237 U.N.T.S. 319 [hereinafter CTOC].

41. *Al Bahlul*, 820 F. Supp. 2d at 1208; CTOC, *supra* note 40.

42. *Al Bahlul*, 820 F. Supp. 2d at 1208–09.

43. *Id.* at 1207–08 (quoting *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, ¶ 200 (Int’l Crim. Trib. For the Former Yugoslavia Jul. 15, 1999)).

44. See Robert Chesney, *The CMCR Decision in Al-Bahlul: Peter Margulies Examines the Relevance of the Nuremberg Membership Prosecutions*, LAWFARE

mens rea and *scienter* requirement for the offense.⁴⁵ Intent and knowledge are difficult elements to establish, as they require a certain amount of guesswork—only the accused can know for sure what was inside his mind. If liability extends to the cook on a pirate ship, does it also extend to the cook who *appears* to know he was on a pirate ship, but in reality had no idea?⁴⁶ Can this new broadening of war crimes be used to cast a net over anyone who has ever rented an apartment to a suspected terrorist, or sold him electronic equipment, under the guise that they must have known his affiliation and purpose? The breadth of the definition of membership implied by *Al Bahlul* has both empowering and disturbing implications for the United States, and for the world in terms of the crime of criminal membership and its application to terrorism and war crimes.

C. Victims' Communication Pursuant to Article 15 of the Rome Statute Requesting Investigation and Prosecution of High-level Vatican Officials for Rape and Other Forms of Sexual Violence as Crimes Against Humanity and Torture as a Crime Against Humanity

On September 13, 2011, two advocacy groups, the Center for Constitutional Rights and the Survivors Network of Those Abused by Priests, filed a complaint (Victims' Communication) alleging that Pope Benedict XVI and other high Vatican officials were guilty of crimes against humanity for their roles in covering up systematic and long-term abuses of children by Catholic priests, and urging the Court to investigate.⁴⁷ The proposed investigation will have an international scope, as the Church is accused of not just simply moving abusive priests

(Sept. 14, 2011, 10:56 PM), <http://www.lawfareblog.com/2011/09/the-cmcr-decision-in-al-bahlul-peter-margulies-examines-the-relevance-of-the-nuremberg-membership-prosecutions/> (describing the CMCR's "dangerous flirtation" and association with Nuremberg membership prosecution cases).

45. See *Al Bahlul*, 820 F. Supp. 2d at 1203.

46. See *id.* at 1207–08 (referring to the cook on the pirate ship example used in *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment (Int'l Crim. Trib. For the Former Yugoslavia Jul. 15, 1999)).

47. Victims' Communication, *supra* note 8; Laurie Goodstein, *Abuse Victims Ask Court to Prosecute the Vatican*, N.Y. TIMES, Sept. 14, 2011, at A15, available at <http://www.nytimes.com/2011/09/14/world/europe/14vatican.html>.

from one parish to another, but moving them from one country to another with full knowledge of the priests' actions.⁴⁸ Pamela Spees, a lawyer with the Center for Constitutional Rights, stated that "[n]ational jurisdictions can't really get their arms around this Prosecuting individual instances of child molestation or sexual assault has not gotten at the larger systemic problem here. Accountability is the goal, and the ICC makes the most sense, given that it's a global problem."⁴⁹

The Victims' Communication has requested that the ICC look into high-level Vatican officials on the basis of Article 15 of the Rome Statute and requested that the ICC prosecutor launch a *proprio motu* investigation of the Pope and other high Vatican officials.⁵⁰ In support of their claim, and to address the jurisdictional restrictions of the ICC, they allege that the attacks are *both* widespread *and* systematic, while only one of those elements is necessary for the threshold element of a crime against humanity.⁵¹ Additionally, to satisfy the jurisdictional requirements, the Victims' Communication alleges that the actions of priests and the Vatican officials covering them up are attacks, in that attacks do not need to be military in nature, and are "characterized by a 'course of conduct involving the multiple commission of acts referred to in article 7(1).'"⁵²

There is, however, a great deal of uncertainty as to whether the ICC can or will act on these allegations. There is a real

48. Goodstein, *supra* note 47.

49. *Id.*

50. Victims' Communication, *supra* note 8, at 2.

51. *Id.* at 61–62 (stating that "the attack need be *either* widespread *or* systematic"). It is widespread because of "the large-scale nature of the attack and the number of resulting victims, and the cover-up efforts are systematic because it was "organized and followed a consistent pattern;" and the acts constitute a "pattern of crimes, in the sense of non-accidental repetition of similar criminal conduct on a regular basis." *Id.* at 62 (quoting Situation in the Republic of Kenya, Case No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶ 95 (March 31, 2010); Situation in the Democratic Republic of the Congo in the Case of Prosecutor v. Katanga and Chui, Case No. ICC-01/04-01-04, Decision on the Confirmation of the Charges, ¶ 394 (Sept. 30, 2008).

52. Victims' Communication, *supra* note 8, at 63–64 (quoting Situation in the Republic of Kenya, No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶ 95 (March 31, 2010)).

jurisdictional issue because the Vatican is not a signatory of the ICC Charter.⁵³ The Rome Statute limits the jurisdiction of the ICC to “the most serious crimes of concern to the international community as a whole The crime of genocide; Crimes against humanity; War crimes; The crime of aggression.”⁵⁴ The Statute defines a crime against humanity as acts of murder, extermination, enslavement, deportation, imprisonment, torture, rape and other sexual violence, persecution, enforced disappearances, apartheid, and “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”⁵⁵ The caveat to this definition, however, is that the actions must be undertaken “as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”⁵⁶ This definition raises a jurisdictional issue, as well as a *scienter* issue, and the question is whether the actions of the priests alleged in this case rise to the level of a “widespread or systematic attack.”⁵⁷

There is also a serious question as to whether these actions (or inactions) constitute crimes against humanity at all.⁵⁸ Crimes against humanity are properly defined as “acts that are committed as part of a widespread or systematic attack directed against a civilian population.”⁵⁹ It also requires the attacks be carried out as part of an “organizational policy.”⁶⁰

In this case, the claims alleged are less of a directed or knowing attack and more of an organizational policy, which, while still morally objectionable, does not rise to the level of a crime against humanity and likely does not grant jurisdiction in the case to the ICC.⁶¹ The case raises other questions, however,

53. Goodstein, *supra* note 47.

54. Rome Statute, *supra* note 11, art. 5.

55. *Id.* art. 7.

56. *Id.*

57. *Id.*; Goodstein, *supra* note 47.

58. Goodstein, *supra* note 47.

59. *Id.*; Rome Statute, *supra* note 11, art. 7.

60. Rome Statute, *supra* note 11, art. 7 (describing an attack as the commission of acts organized to further “state or organizational polic[ies]”).

61. Goodstein, *supra* note 47; Rome Statute, *supra* note 11, art. 7; Victims’

such as when does the inaction of a figurehead or group leader, as opposed to the overt action in the Malema case, rise to the level of attaching criminal liability, and to what extent do the actions of underlings impute liability to the heads of the organization?

IV. INTERNATIONAL LAWS GOVERNING CRIMINAL MEMBERSHIP AND GROUP LIABILITY

A. *The International Covenant on Civil and Political Rights*

The International Covenant on Civil and Political Rights (ICCPR) is one of the most important governing documents for the determination of human rights and the definitions of violations of those rights. The ICCPR, however, leaves little power in the hands of the Human Rights Committee, whose only authorized powers under the ICCPR are to monitor claims of violations and mediate disputes and issue a report to the United Nations General Assembly if those disputes are not resolved.⁶² Most relevant to this analysis are ICCPR Articles 7, 19, 20, 21, and 22.

Article 7 of the ICCPR provides that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”⁶³

Article 19 of the ICCPR addresses the rights to freedom of thought and expression, and in which circumstances those rights may be restricted.⁶⁴

Article 19 works closely in tandem with Article 20, which provides, in relevant part, that “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by

Communication, *supra* note 8, at 61–69 (alleging why jurisdiction applies).

62. ICCPR, *supra* note 25, art 41–42; U.N. High Commissioner for Human Rights, Civil and Political Rights: The Human Rights Committee Fact Sheet, 14–15 (May 2005), <http://www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf>.

63. ICCPR, *supra* note 25, art. 7. Sexual molestation falls under the definition of “inhuman or degrading treatment.” *Torture, Inhuman or Degrading Treatment*, HUMAN RIGHTS EDUC. ASSOC., available at http://www.hrea.org/index.php?doc_id=265.

64. ICCPR, *supra* note 25, art. 19.

law.”⁶⁵ These two provisions emphasize that while freedom of speech is to be encouraged and promoted under the ICCPR, certain speech may be restricted in applicable circumstances, particularly in regard to incitement.⁶⁶ The ICCPR does not limit this incitement provision to genocide, but extends it to discrimination and hostility as well.⁶⁷

Article 21 of the ICCPR guarantees the “right of peaceful assembly,” and, similar to Article 19, limits restrictions on this right to “those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.”⁶⁸ Just as Articles 19 and 20 work together, Article 21 works in concert with Article 22, which covers freedom of association.

The fundamental freedom of association is a central principal of both U.S. and international human rights legislation, and as such, should require a serious and incontrovertible public interest to be subverted.⁶⁹ This is why the question of criminal membership creates so many complex questions for the domestic and international legal communities—how serious must the public interest be to infringe on the rights to association, assembly, and free speech; at what point do those exercising their rights cross the line from legal right to criminal behavior; and at what level of association do the members of those groups become liable themselves?

B. International Convention on the Elimination of All Forms of Racial Discrimination

Also applicable to this analysis is the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). The Convention defines “racial

65. *Id.* art. 20.

66. *Id.* arts. 19–20.

67. *Id.* art. 20.

68. *Id.* arts. 19, 21.

69. See U.S. CONST. amend. I (providing for “the right of the people peaceably to assemble”). See, e.g., ICCPR, *supra* note 25, art. 21 (recognizing “[t]he right of peaceful assembly”).

discrimination” as:

[A]ny distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.⁷⁰

Signatory countries are bound by its provisions and must take steps towards, among other things, “eliminating racial discrimination in all its forms and promoting understanding among all races”⁷¹ This provision is not limited to government actions.⁷²

Signatory states must additionally “prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by *any persons, group or organization*.”⁷³ Further, under Article 4, States must, in part, “condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin”⁷⁴

C. Rome Statute of the International Criminal Court

While Articles 7 and 25 of the Rome Statute have been partially discussed above, there are other provisions of the statute applicable to this analysis, and the ones mentioned deserve a deeper investigation.

Article 7 defines “crime[s] against humanity” (as listed as an offense in Article 5 of the Rome Statute) and includes the necessary element of “a widespread or systematic attack directed against any civilian population, with knowledge of the attack . . . pursuant to or in furtherance of a State or organizational policy to commit such attack.”⁷⁵

70. CERD, *supra* note 5, art. 1.

71. *Id.* art. 2.

72. *See id.* (requiring States to prohibit “racial discrimination by any persons, group or organization”).

73. *Id.* (emphasis added).

74. *Id.* art. 4.

75. Rome Statute, *supra* note 11, arts. 5, 7.

Article 15 allows the ICC Prosecutor to: “initiate investigations *ex proprio motu* on the basis of information on crimes within the jurisdiction of the Court.”⁷⁶ Following the initiation of an investigation, “[i]f the Prosecutor concludes that there is a reasonable basis to proceed, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected.”⁷⁷ The Pre-Trial Chamber then determines whether “there is a reasonable basis to proceed with an investigation,” and if the Court has jurisdiction, the Pre-Trial Chamber will “authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.”⁷⁸

Article 25 of the Rome Statute defines individual criminal responsibility, as discussed above.⁷⁹ The Article also grants jurisdiction to the Court over “natural persons” when a person is “individually” and “criminally responsible” for a crime under the provisions of Article 25.⁸⁰

Article 28 of the Rome Statute is also relevant to this investigation, as it deals with the responsibility of commanders and other superiors for actions of their subordinates.⁸¹ In addition to the individual liability provisions of Article 25, a military commander:

[S]hall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

i) That military commander or person either knew or,

76. *Id.* art. 15; BLACK’S LAW DICTIONARY 662 (9th ed. 2009) (“*ex proprio motu*” translates to “of one’s own accord,” and is essentially a sua sponte determination).

77. Rome Statute, *supra* note 11, art. 15. Additionally, “[v]ictims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.” *Id.*

78. *Id.*

79. *Id.* art. 25.

80. *Id.*

81. *Id.* art. 28.

owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

- ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.⁸²

While the above section applies explicitly to military commanders, the Article continues by laying out liability provisions for non-military superior-subordinate relationships.⁸³

Article 30 of the Rome Statute is crucial to the questions raised here, as it deals with the *scienter* and *mens rea* elements of criminal responsibility and criminal membership.⁸⁴ Criminal liability only arises under the Rome Statute if the acts “are committed with intent and knowledge.”⁸⁵ Under this provision, intent exists when: “(a) In relation to conduct, that person means to engage in the conduct; [and] (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.”⁸⁶

Article 30 defines “knowledge” as “awareness that a circumstance exists or a consequence will occur in the ordinary course of events.”⁸⁷ The Rome Statute, does not, however, address or define what constitutes evidence of knowledge or intent.⁸⁸ This omission only serves to heighten the questions surrounding the *scienter* and *mens rea* elements necessary to establish criminal liability and particularly criminal membership liability.

D. The Charter of the International Military Tribunal at Nuremburg (London Charter) and the Trials of Major War

82. *Id.*

83. *Id.*

84. *Id.* art. 30.

85. *Id.*

86. *Id.*

87. *Id.*

88. *See id.*

Criminals Before the International Military Tribunal

The Charter of the International Military Tribunal at Nuremburg (commonly known as the “London Charter”) explicitly lays out provisions relating to criminal liability for membership in a criminal organization.⁸⁹ Article 9 of the London Charter provides, in relevant part, that “[a]t the trial of any individual member of any group or organization[,] the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization.”⁹⁰

Not only could organizations be declared criminal under the London Charter, but individuals could be held criminally liable for their membership in such a criminal organization under Article 10 as well:

In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military, or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned.⁹¹

Further, and most crucially to this analysis, the Tribunal defined the scope of membership liability:

In effect, therefore, a member of an organisation which the Tribunal has declared to be criminal may be subsequently convicted of the crime of membership and be punished for that crime by death A criminal organisation is analogous to a criminal conspiracy in that the essence of both is cooperation for criminal purposes. There must be a group bound together and organised for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the Charter. Since the declaration with respect to the organisations and groups will, as has been pointed out, fix the criminality of its members,

89. Theodor Meron, *Reflections on the Prosecution of War Crimes by International Tribunals*, 100 AM. J. INT’L L. 551, 569 (2006); 1 TMWC, *supra* note 20, at 12.

90. 1 TMWC, *supra* note 20, at 12.

91. *Id.*

that definition should exclude persons who had no knowledge of the criminal purposes or acts of the organisation and those who were drafted by the State for membership, unless they were personally implicated in the commission of acts declared criminal by Article 6 of the Charter as members of the organisation. Membership alone is not enough to come within the scope of these declarations.⁹²

The Charter also indicates that there is a *per se* standard for determining when an organization is criminal: “[a]n organization which on a large scale is responsible for [acts such as war crimes, genocide, and crimes against humanity] can be nothing else than criminal.”⁹³

V. DEFINING CRIMINAL MEMBERSHIP AND THE EXTENT OF ITS APPLICATION THROUGH THE CHAIN OF POWER

A. *Distinguishing Criminal and Non-Criminal Groups*

The first step in examining potential criminal liability for membership in a group is to determine whether the organization is criminal or non-criminal.⁹⁴ There are three main elements to examine in this analysis: the explicit purpose of the group, any actions or statements evidencing the implied purpose of the group, and the *mens rea* element of intent.⁹⁵ Barring a situation so extreme that the organization’s actions reach the level of the London Charter’s *per se* criminal organization standard discussed *supra*, perhaps the most important element in determining whether a group is “criminal” is the explicit purpose of that group.⁹⁶

Under the definition as provided by the London Charter,

92. United States v. Al Bahlul, 820 F. Supp. 2d 1141, 1204 (USCMCR 2011) (quoting 1 TMWC, *supra* note 20, at 256).

93. *Id.* at 1206.

94. *Id.* at 1203 (discussing how the London Charter gave the International Military Tribunal the power to declare that an organization was criminal and then look at each member and determine their criminal liability).

95. *See id.* at 1204.

96. *See* 1 TMWC, *supra* note 20, at 256 (explaining that without this first determination of whether an organization is criminal or not, the process of determining individual criminal liability cannot commence).

and relied on in *Al Bahlul*, the group must be “bound together and organized for a common purpose . . . [and] formed or used in connection with the commission of crimes denounced by the Charter.”⁹⁷ It is not necessarily enough, then, for an organization or its governing members to commit a crime—the organization itself must be either formed explicitly for the purpose of committing a crime, or used in furtherance of the commissions of crimes.⁹⁸

For example, the explicit purpose of the Catholic Church is not to abuse young boys, but to guide its members’ spiritual development.⁹⁹ However, there is a greater argument that the Vatican could constitute a criminal group in light of the Victims’ Communication as the claim is that the organization itself was used in furtherance of the crimes of its members by covering up the accusations and shifting priests who were known pedophiles from diocese to diocese and even country to country, using the extensive, worldwide network that the Catholic Church has established.¹⁰⁰

Likewise, this definition would seem to exempt the ANC Youth League from wider liability for Malema’s actions—the group was not formed with the purpose of committing hate speech or incitement to genocide, and the group was not *used* (beyond the need for an audience) to commit the crime.¹⁰¹ In other words, the group was not essential to the crime, or vice versa. The explicit purpose of the ANC Youth League is not to commit hate speech, nor to commit any other crime.¹⁰² In fact,

97. *Al Bahlul*, 820 F. Supp. 2d at 1204 (quoting 1 TMWC, *supra* note 20, at 256).

98. 1 TMWC, *supra* note 20, at 256.

99. See Paddy Banville, *The Heart of Catholicism*, THE IRISH CATHOLIC (Sept. 29, 2011), <http://www.irishcatholic.ie/content/heart-catholicism-fr-paddy-banville> (“The primary purpose of Catholicism is the spiritual life, the facilitation of communion between the human person and the Divine Person.”).

100. See Victims’ Communication, *supra* note 8, at 2 (noting widespread cover ups of pedophilia and policies that allowed this behavior to continue without reprimand).

101. See *ANC Youth League Constitution, as Amended and Adopted by the 23rd National Congress*, AFRICAN NAT’L CONG. YOUTH LEAGUE, 2–3 (April 2008), available at <http://www.ancyl.org.za/docs/const/2008/constitution2010b.pdf> [hereinafter *ANC Youth League Constitution*] (listing the aims and goals of the organization, none of which include criminal activity).

102. See *id.* at 8–9 (“All ANCYL members are obliged to . . . [c]ombat all forms of

according to the ANC Youth League Constitution in effect at the time of Malema's speeches, the purpose of the organization is the exact opposite of inciting hatred—it is to, among other provisions, “[s]trive to rally the youth of our country to support and unite behind the [ANC Youth League] and actively participate in the struggle to create a non-racial, non-sexist, united, democratic and prosperous society.”¹⁰³

However, Malema's actions, and the seeming support of the membership of the ANC Youth League, call into question the express purpose of the ANC Youth League.¹⁰⁴ Under the provisions of CERD, Malema's actions and conviction (and by extension, the actions of the members of the ANC Youth League who participated in the singing of “Shoot the Boer” at rallies) could potentially be sufficient to establish the ANC Youth League as an illegal organization “which promote[s] and incite[s] racial discrimination.”¹⁰⁵ If so, then participation in the ANC Youth League itself, in any capacity—organizational or otherwise—could be held as a crime under CERD and the applicable provisions of the South African Constitution and the Equality Act.¹⁰⁶ This apparent divide between the group's express purpose and its actions lead in to the second element necessary to distinguish the purpose of a group.

Beyond the explicit purpose of a group, there is evidence of a group's function in the actions or statements of the organization

tribalism, regionalism, nepotism, and other forms of discrimination . . .”).

103. *Id.* at 2. The Constitution has since been amended, in June 2011. *ANC Youth League Constitution, as Amended and Adopted by the 24th National Congress*, AFRICAN NAT'L CONG. YOUTH LEAGUE (June 2011), <http://www.ancyl.org.za/docs/const/2011/constitutionh.pdf>. However, since the amendment was after Malema's speeches and just months before his conviction, the prior Constitution has been cited to. *Id.* at 5. The quoted provision has not changed with the 2011 revisions. *Id.* at 5.

104. The stated aims, goals, and purpose of the organization do not include any criminal activity. *ANC Youth League Constitution*, *supra* note 101. However, because a member committed a criminal act, it calls into question whether the organization does in fact involve itself in these activities.

105. See CERD, *supra* note 5, art. 4 (“State parties . . . [s]hall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organization or activities as an offence punishable by law.”).

106. *Id.*; S. AFR. CONST., 1996, §§ 9, 12, 16; Equality Act, *supra* note 25, art. 10.

indicating its implied or functional purpose.¹⁰⁷ For example, while the ANC Youth League's explicit purpose is unity and togetherness, the actions of the group and its leader, Malema, in singing "Shoot the Boer" could be evidence of an implied purpose contrary to its express claims. In particular, the actions of a group of ANC Youth League members in singing the song outside the courthouse after the ruling was handed down¹⁰⁸ may evidence such an implied purpose. After "Judge Lamont determined that while songs like 'Shoot the Boer' were part of the fight against white minority rule, they constituted hate speech as South Africa seeks to heal its racial past," breaking into the song directly contradicts not only the ruling, but the express purpose of the ANC Youth League itself, and is potentially indicative of a criminal purpose to commit hate speech, and possibly incite violence or genocide.¹⁰⁹

The intent element is also crucial to the determination of whether a group is criminal.¹¹⁰ For an organization to be found criminal, "the group must have had an existence as a group entity, such that its members would have understood that they were participating in a collective purpose" and the "criminal objectives of the organization had to be pervasive and shared among its members."¹¹¹ A criminal organization requires more than a purpose, its then-members themselves must have both intent and knowledge of that purpose, and that knowledge must be widespread throughout the group.¹¹² While this requirement still applies to terrorist groups such as in *Al Bahlul*, it essentially clears the ANC Youth League and the Vatican, not of liability for criminal actions or membership, but of the organization itself existing as an explicitly criminal

107. *United States v. Al Bahlul*, 820 F. Supp. 2d 1141, 1204 (USCMCR 2011) (quoting 1 TMWC, *supra* note 20, at 256).

108. *See* Cowell, *supra* note 3.

109. *Id.*

110. *See* Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 113–14 (2005) (noting that members needed to participate in a collective purpose).

111. *Id.*

112. *See id.*

organization.¹¹³

B. Difficulties in Defining What Constitutes “Membership”

Beyond defining a criminal group, it is crucial to determine what constitutes “membership” in any organization, criminal or otherwise, before addressing the liability of its members. The most important question in this analysis is how much action an individual must take in order to be considered a “member” for the purposes of liability. The London Charter limited “membership” to:

[E]xclude persons who had no knowledge of the criminal purposes or acts of the organisation and those who were drafted by the State for membership, unless they were personally implicated in the commission of acts declared criminal by Article 6 of the Charter as members of the organisation. Membership alone is not enough to come within the scope of these declarations.¹¹⁴

Membership, therefore, is more than just signing up for a card or showing up to a few meetings. There are *scienter* and *mens rea* requirements for membership, as well—the member must have knowledge of the group’s purpose or action, and must have had the intent to join it willingly.¹¹⁵ If neither of those elements is satisfied, there can still be liability for membership alone if the individual directly participated in crimes.¹¹⁶

Having established the mental elements for membership, what degree of action or participation is required to establish membership? If the mental element does not exist or cannot be determined, what acts establish sufficient complicity? Article 5 of the CTOC defines participation as intentionally “organizing,

113. See *id.* But cf. Victims’ Communication, *supra* note 8, at 2 (noting Vatican officials either knew and/or consciously disregarded information that showed subordinates were committing crimes but making no mention of intent to commit crimes or widespread knowledge of those crimes); *ANC Youth League Constitution*, *supra* note 103 (listing the aims and goals of the organization, none of which include criminal activity).

114. *United States v. Al Bahlul*, 820 F. Supp. 2d 1141, 1204 (USCMCR 2011) (quoting 1 TMWC, *supra* note 20, at 256).

115. See Danner & Martinez, *supra* note 110, at 114.

116. *Id.*

directing, aiding, abetting, facilitating, or counselling [sic] the commission of serious crime involving an organized criminal group.”¹¹⁷ There is essentially no escaping the *mens rea* element of membership—the acts constituting participation, however important or incidental to the commission of the crime, necessitate intent. So the cook on the pirate ship is guilty of the acts of the pirates he feeds, but only insofar as he knows he is on a pirate ship and is willingly and intentionally aiding the pirates, no matter how minor that assistance might be.¹¹⁸

Individual action in furtherance of a criminal organization’s aims does not have to be limited to overt action or assistance in the commission of the crime.¹¹⁹ There is another category of “aiding and abetting” known as “material support.”¹²⁰ Material support necessitates the same *mens rea* and *scienter* elements of membership (intentionally and knowingly), and creates criminal liability for an individual who provides “material support or resources” to a terrorist organization.¹²¹ The term “material support or resources” means “any, property, tangible or intangible, or [any] service[.]”¹²² Property and services can effectively be anything that constitutes material support or resources. This includes “expert advice or assistance, . . . communications equipment, . . . [and] personnel (1 or more individuals who may be or include oneself)[.]”¹²³ While *Al*

117. CTOC, *supra* note 40, art. 5.

118. See generally Danner & Martinez, *supra* note 110, at 114 (stating that a member of a criminal organization can be prosecuted if they joined voluntarily and either knew that organization engaged in crime or that the person themselves participated in the crime of the organization).

119. See *Al Bahlul*, 820 F. Supp. at 1190 (“Conduct of the accused that occurs at a distance from the area of conflict or prior to the start of the conflict can still be in the context of and associated with armed conflict as long as it was closely and substantially related to the hostilities that comprised conflict.”).

120. *Id.* at 1191.

121. See *id.*

122. *Id.* at 1193 (quoting Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006), codified at 10 U.S.C. § 950v(b)(25)(B) (2006 M.C.A.) (repealed 2009)).

123. See *id.* at 1193 (citing 18 U.S.C. § 2339A(b)). 18 U.S.C. § 2339A(b) (2006) reads:

- 1) the term ‘material support or resources’ means any property, tangible any property, tangible or intangible, or service, including currency or

Bahlul applies material support only to terrorism, the actions necessary to constitute material support are likewise sufficient to establish an action of an individual member in furtherance of a criminal organization's illegal actions.¹²⁴

VI. LIABILITY WITHIN CRIMINAL AND NON-CRIMINAL GROUPS
AND ACTIONS SUFFICIENT TO CHANGE THE STATUS OF A
GROUP

A. *Liability for Membership in a Criminal Group*

In terms of a criminal group, the liability for membership alone is dependent on the actions of the group, sufficient establishment of the membership of the individual, and the individual's knowledge of the group's actions or intent to further those criminal actions.¹²⁵ The element of group actions is the easiest to address—an organization needs to be “bound together and organized for a common purpose . . . [and] formed or used in connection with the commission of crimes denounced by the Charter.”¹²⁶ Any applicable crime under international law (or domestic law if the country recognizes the principles of criminal membership) committed by a group or its members, in which the group was used in connection with or formed with the purpose of committing the offense, is sufficient to constitute a criminal act.¹²⁷

Imputed criminal liability as a concept was born from the

monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials; (2) the term ‘training’ means instruction or teaching designed to impart a specific skill, as opposed to general knowledge; and (3) the term ‘expert advice or assistance’ means advice or assistance derived from scientific, technical or other specialized knowledge.

18 U.S.C. § 2339A(b) (2006).

124. See *Al Bahlul*, 820 F. Supp. 2d at 1203 (“[Material support] is akin to providing direct support to an ongoing criminal enterprise.”).

125. See *id.* at 1204 (citing 1 TMWC, *supra* note 20, at 256).

126. *Id.*

127. *Id.*

international legal concepts of joint criminal enterprise and superior responsibility, both of which originated, with much controversy, at the Nuremberg Tribunals.¹²⁸ While joint criminal enterprise and command responsibility are closely related concepts, the distinction between them is that:

Both joint criminal enterprise and superior responsibility involve an imputation of criminal liability to individuals for the acts of others: in the case of superior responsibility, it is for the crimes of subordinates which the superior failed to prevent or repress, while under joint criminal enterprise liability can be imposed for offences outside the scope of the agreed plan which were a 'natural and foreseeable consequence' of the execution of the plan.¹²⁹

In terms of liability, this means that for those participating in a joint criminal enterprise, they "can be held liable for crimes outside the scope of the agreed plan" whereas in terms of command responsibility, "military or civilian superiors can be held responsible for the acts of subordinates which they knew or should have known of, and which they failed to prevent or repress."¹³⁰

Essentially, under the doctrines of joint criminal enterprise and command responsibility (and now through criminal membership as well), liability can move both horizontally (from one member to another) and vertically (from a commander to his subordinates or from subordinates to a commander) throughout the organization or group.¹³¹

Establishing membership in a criminal group depends largely on the *mens rea* and *scienter* elements discussed above.¹³² However, liability for that membership alone is dependent on the law. The London Charter creates liability for

128. See Darcy, *supra* note 18, at 377–78 (explaining that joint criminal enterprise and command responsibility were created to account for the atrocities after World War II).

129. Darcy, *supra* note 18, at 381.

130. *Id.* at 377–78.

131. See *id.* at 381.

132. See *id.* at 382 (describing that different *mens rea* elements are required for different categories of criminal acts).

knowing or intentional membership in the group alone, but in reality the law is not typically applied in that way.¹³³ The vast majority of the time, the finding of liability for membership in a criminal group includes the necessary component of some act or effort, no matter how small, in furtherance of the crime, providing that act is done knowingly or willingly.¹³⁴

The burden of proving intent and knowledge in such circumstances is on the prosecution.¹³⁵ The prosecution must either be able to prove that the individual personally participated in a criminal action, or prove that he had knowledge of the organization's criminal actions and voluntarily joined the organization knowing that:

[T]he prosecution must prove that any person prosecuted for membership in a criminal organization joined the organization voluntarily and knew that the organization engaged in crimes within the jurisdiction of the London Charter. If the prosecution could not demonstrate the latter, the prosecution had to show that the defendant personally participated in such crimes. With this ruling, the [International Military Tribunal] effectively negated the procedural benefits to the prosecution that . . . would flow from the conviction of criminal organizations. In subsequent proceedings, the prosecution was now forced to bear the burden of proving each individual's voluntary and knowing participation in a group with criminal aims.¹³⁶

This principle grew out of the legal doctrine of conspiracy, which

133. *United States v. Al Bahlul*, 820 F. Supp. 2d 1141, 1204–05 (USCMCR 2011) (citing Jonathan Bush, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said*, 109 COLUM. L. REV. 1094, 1161 (2009) (“Although members of the convicted organizations ‘could be tried for criminal membership in addition to or instead of predicate acts . . . the implication was that membership charges would not be a shortcut to conviction and would certainly not be available against average complicitous Germans[.]”)).

134. *Id.* at 1204 (quoting 1 TMWC, *supra* note 20, at 256) (“Since the declaration with respect to the organizations and groups will, as has been pointed out, fix the criminality of its members, *that definition should exclude persons who had no knowledge of the criminal purposes or acts of the organization.*”).

135. Danner & Martinez, *supra* note 110, at 114.

136. *Id.* (citing TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* 558 (1992)).

was used in the Nuremburg Trials to criminalize “Crimes Against Peace,” and create liability for conspirators.¹³⁷

Notably, the list of those liable specifically displays the same vertical and horizontal levels of liability discussed above. Through this liability principle, the named Defendants are “individually responsible for their own acts and for all acts committed by any persons in the execution of such plan or conspiracy.”¹³⁸ “Thus, conspiracy constituted both a substantive crime (conspiracy to commit Crimes Against Peace) and provided a theory of liability such that each defendant could be convicted for any acts committed by others ‘in the execution of such plan or conspiracy.’”¹³⁹

B. Liability for Membership in a Non-Criminal Group Whose Leader Is Guilty of Criminal Acts that May Be Imputed to Members of the Group

More difficult to establish is liability for membership in a non-criminal group whose leader is guilty of potentially imputable criminal acts. Many of the same principles of liability for membership in a criminal organization still apply, however. Essentially, “if a person knowingly participates in a criminal activity with others, he or she will be liable for all illegal acts that are natural and probable consequences of that common purpose.”¹⁴⁰ So if a member of a non-criminal organization takes part in a criminal act with other members of the organization, he can be held liable for any acts or consequences arising out of the initial act, regardless of whether or not the organization itself is criminal. It would not necessarily, however, impute criminal liability to the non-participating members of a non-criminal group, unless one of three criteria is met:

The first two categories both required a shared intent or knowledge among all co-defendants for the offences in

137. Danner & Martinez, *supra* note 110, at 115 (quoting CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL, *Judgment, in* 1 TMWC, *supra* note 20, at 10, 11).

138. *Id.* at 116 (quoting INTERNATIONAL MILITARY TRIBUNAL, *Indictment, in* 1 TMWC, *supra* note 20, at 27, 29).

139. *Id.*

140. Darcy, *supra* note 18, at 381 (quoting Prosecutor v. Tadić, Case No. IT-94-1-A, *Judgment*, ¶ 175 (July 15, 1999)).

question before liability could be imputed. Under the third category, however, criminal culpability could arise in those instances involving a common design to pursue a particular course of conduct where one of the members commits an act outside the common design, but which was nevertheless a natural and foreseeable consequence of carrying out the common purpose.¹⁴¹

The first two categories, since they necessitate shared intent, are primarily applicable to membership in criminal organizations.¹⁴² The third category, however, is easily applicable to circumstances in which members of a non-criminal group take a criminal action which is not a part of the group's goals or express purpose, but which is "natural and foreseeable," even if it falls outside the group's "common design[.]"¹⁴³

An example of this sort of "natural and foreseeable" act stemming from the expressly non-criminal purpose of a group with a "common design" would be if a member of a group which promoted hatred of a group (or superiority of another group), but which was non-violent and still a legitimate legal organization in the eyes of the law, used the group's basic ideals as inspiration, and other members of the organization as

141. *Id.* (citing *Tadić*, Case No. IT-94-1-A, at ¶¶ 196–204).

142.

In the first category, the perpetrators act pursuant to a common design and share the same criminal intention [T]he common design element [requires] that the defendants have entered into an agreement with other members of the joint criminal enterprise (JCE) to commit crimes. To be found guilty of the crime of murder via this 'Category One' of JCE, for example, the prosecution must prove that the common plan was to kill the victim, that the defendant voluntarily participated in at least one aspect of this common design, and that the defendant intended to assist in the commission of murder, even if he did not himself perpetrate the killing. The second category of JCE relates to 'systems of ill-treatment,' primarily concentration camps. For this category, the prosecution need not prove a formal or informal agreement among the participants, but must demonstrate their adherence to a system of repression. To convict an individual under this rubric, the prosecution must prove the existence of an organized system of repression; active participation in the enforcement of this system of repression by the accused; knowledge of the nature of the system by the accused; and the accused's intent to further the system of repression.

See Danner & Martinez, *supra* note 110, at 105–06.

143. *Id.* at 106.

compatriots, and committed an illegal act of violence against the marginalized group.¹⁴⁴ This act could, in theory, be a reasonably foreseeable result of promoting hatred of a subset of society, even if that hatred was expressed in a non-violent way.

Therefore, following Malema's conviction, if a member of the ANC Youth League took his words literally and shot an Afrikaner farmer, there is potential for liability for his actions to be imputed to other members of the group. His act would have been "outside the common design," but it could easily be seen as "a natural and foreseeable consequence" of participating in singing "Shoot the Boer" at rallies.¹⁴⁵ Such an act could also potentially raise the severity of Malema's actions themselves from "hate speech" to "incitement."¹⁴⁶

Article 7 of the Rome Statute helps to create liability in the Malema case, because crimes against humanity include:

Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.¹⁴⁷

Thus, as Malema has been found guilty of hate speech, if the crime is sufficient to establish persecution, Malema's actions may be imputable to members of the ANC Youth League as a group.¹⁴⁸ It is highly unlikely, however, that hate speech alone rises to the level of "persecution," which requires "the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the

144. *See id.*

145. *See* Darcy, *supra* note 18, at 382 (explaining criminal culpability under the third category); Danner & Martinez, *supra* note 110, at 106 ("[Participant] in a common design may be found guilty of acts outside that design if such acts are a 'natural and foreseeable consequence of the effecting of that common purpose.'").

146. *See* Rome Statute, *supra* note 11, art. 25 (noting that mere furtherance of a crime as sufficient to result in criminal liability for an individual).

147. *See id.* art. 7.

148. *See id.* art. 25.

group or collectivity.”¹⁴⁹ In concert with CERD, however, this may be possible given that, in that document, racial discrimination alone can have the effect of nullifying human rights.¹⁵⁰

In regard to *Victims’ Communication*, the actions of a few high Vatican officials, if they were involved in an express plan to cover up abuses by priests, would likely not fall into this category of acts. The acts would be “outside the common design” of the Church, and given the Church’s policies and beliefs, would likely not be found to be “a natural and foreseeable consequence” of their common purpose.¹⁵¹ The only way these acts could fall within this theory is if there was an express policy in place, not in outlying dioceses (as the *Victims’ Communication* alleges), but in the Vatican itself of shifting priests from parish to parish to cover their crimes.¹⁵² This would create an organizational policy under Article 7 of the Rome Statute, and also create evidence of a knowing, widespread, and systematic effort at concealing crimes—which may not constitute an attack, but combined with the harm done to children by the allegedly protected priests, may be sufficient to establish a level of violence to fall under the provision.¹⁵³

C. *Liability of a Leader of a Non-Criminal Group for the Acts of His Subordinates*

Just as a member of or subordinate in a non-criminal group can create liability for other members and the group as a whole, a group member may also create liability for the leader of that non-criminal group as well.¹⁵⁴ This liability arises under the

149. *See id.* art. 7.

150. *See CERD, supra* note 5, art. 1.

151. *See generally* Darcy, *supra* note 18, at 381–82 (summarizing several ways that liability can be established for joint criminal enterprise from *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, ¶¶ 175, 195, 196–201, 202–03, 204 (July 15, 1999)); *see also* Danner & Martinez, *supra* note 110, at 105–06 (describing different categories of collective criminality regarding common purpose).

152. *See Victims’ Communication, supra* note 8, at 2–3.

153. *See Rome Statute, supra* note 11, art. 7 (describing the punishable offense of “crimes against humanity[.]” which can include widespread or systematic sexual violence).

154. Danner & Martinez, *supra* note 110, at 120. *See also* Rome Statute, *supra*

military command responsibility doctrine, which allows both “military and civilian leaders to be held liable for the criminal acts of their subordinates.”¹⁵⁵ There are essentially two types of command responsibility: active and passive.¹⁵⁶ Active command responsibility is when “a commander . . . engages in positive acts to encourage his subordinates to commit crimes [and] will be found to have ‘planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation, or execution of a crime.’”¹⁵⁷

Passive command responsibility, on the other hand, creates liability for a commander “if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.”¹⁵⁸ “[U]nder command responsibility, the commander is convicted of the actual crime committed by his subordinate and not of some lesser form of liability, such as dereliction of duty.”¹⁵⁹

Passive command responsibility operates under the theory that:

Superior officials, as long as they actually have control over their subordinates, are in a better position to identify the relevant standard of conduct and impose it across the board Moreover, . . . they have affirmative obligations related to the governance of society, such as monitoring persons under their control to ensure that they comply with certain standards of conduct. For culpability purposes, the relevant moment

note 11, art. 28 (establishing liability for non-military superior-subordinate relationships).

155. Danner & Martinez, *supra* note 110, at 120.

156. *Id.*

157. *Id.* (quoting ICTY, *supra* note 12, art. 7(1)).

158. Danner & Martinez, *supra* note 110, at 21 (quoting ICTY, *supra* note 12, art. 7(3)). *See also* Rome Statute, *supra* note 11, arts. 25, 28 (imposing liability on military commanders who “knew or, owing to the circumstances at the time, should have known” as well as civilian leaders who “knew, or consciously disregarded information which clearly indicated” that their subordinates were committing or were about to commit crimes).

159. *Id.*

of moral choice for a leader is not necessarily the moment when the crimes are committed, but when he assumes a position of authority over others and fails to monitor his subordinates.¹⁶⁰

Liability for one in a leadership role in this context, therefore, arises both from action and from a failure to achieve or maintain control over one's subordinates once that leadership role has been assumed.¹⁶¹

In order for a leader to be liable under the doctrine of passive command responsibility, the ICTY and ICTR lay out three specific elements: that there be a superior-subordinate relationship in which the superior has effective control over the subordinate, that the superior have actual or constructive knowledge of the subordinates' actions, and that the commander took no action to prevent or punish the subordinates' actions.¹⁶² This doctrine is potentially applicable to the Malema case as well. Given the hypothetical discussed above, if a member of the ANC Youth League were to commit acts of violence based on Malema's speeches and actions, Malema himself could potentially be held liable for those crimes.¹⁶³ As the leader of the ANC Youth League, appointed by the ANC itself, there exists a superior-subordinate relationship between Malema and the ANC Youth League members.¹⁶⁴ Typically, "[w]hen a defendant is found to have had both a relationship of effective control over subordinates and the requisite knowledge of their crimes, then absent some extraordinary proof, it will almost always follow that he failed to take the necessary steps to prevent and punish those crimes."¹⁶⁵

The difficulty in Malema's case would come from

160. Danner & Martinez, *supra* note 110, at 148 (citing *In re Yamashita*, 327 U.S. 1, 15 (1946)). See also Darcy, *supra* note 18 at 377–78, 381.

161. See Danner & Martinez, *supra* note 110, at 120–21 (noting potential liability from both actions and omissions of commanders or superiors).

162. Danner & Martinez, *supra* note 110, at 122.

163. See *id.* (discussing the possibility of being implicated in crimes for your subordinates).

164. See *id.* at 130 (explaining the superior-subordinate relationship); Cowell, *supra* note 3.

165. Danner & Martinez, *supra* note 110, at 122.

determining that he “knew or, owing to the circumstances at the time, should have known” of the hypothetical crimes.¹⁶⁶ The ICTY and ICTR have determined that a superior may be held criminally liable “only if some specific information was in fact available to him which would provide notice of offences committed by his subordinates.”¹⁶⁷ It would not be enough, therefore, to argue that Malema “should have known” based on the inciting nature of his words and actions.¹⁶⁸ He would have to have some concrete information that would lead a reasonable person to believe a criminal act was going to take place, or had already taken place, for the second element to be satisfied.¹⁶⁹

It is even more doubtful that the so-called “farm murders” in South Africa, or indeed any of the violent acts taking place in the country, can be linked to Malema’s actions to in any way form a sufficient basis for the Rome Statute’s requirement for a link to “other inhumane acts” in conjunction with persecution.¹⁷⁰ While he is no doubt aware of the murders and the controversy surrounding them, without actual or constructive knowledge that his followers are undertaking the crimes on his urging, there can be no liability under command responsibility.¹⁷¹ The connection between Malema’s actions and the farm murders is too nebulous, and cannot be pinned down as a result of any one action or policy, nor can the farm murders be determinatively deemed a phenomenon in and of themselves without significant further investigation.¹⁷²

166. *Id.* at 121.

167. *Prosecutor v. Delalic*, Case No. IT-96-21-T, Judgment, ¶ 393 (Nov. 16, 1998).

168. *Id.*

169. *Id.*

170. *See Rome Statute*, *supra* note 11, art. 7.

171. *Danner & Martinez*, *supra* note 110, at 122.

172. SOUTH AFRICAN POLICE SERVICE (SAPS), REPORT OF THE COMMITTEE OF INQUIRY INTO FARM ATTACKS ch. 18 (2003), *available at* http://www.saps.gov.za/statistics/reports/farmattacks/farmattacks_2003.htm (explaining that the South African government commissioned SAPS to investigate the apparent “farm murder” phenomenon). The Committee of Inquiry into Farm Attacks issued a lengthy report in 2003, which stated that the “farm murders” are not politically or racially motivated, and have no underlying organizational support. *Id.* The Committee also determined that there is no significantly higher incidence of crime against Afrikaner farmers than against any other socio-racial group in South Africa. *Id.* However, the Committee also

As expressed above, it is unlikely that the ICC (if they are even able to make a determination due to the lack of Vatican City's signing or ratifying of the Charter) would be able to find a "systematic attack" in the Vatican's actions of transferring abusive priests, nor would they likely find that the Vatican had an ultimate goal of conducting such an attack.¹⁷³ The Rome Statute's definition of a "crime against humanity" and the necessary element of "a widespread or systematic attack directed against any civilian population, with knowledge of the attack . . . pursuant to or in furtherance of a State or organizational policy to commit such attack,"¹⁷⁴ are not well established in this case.

That said, command responsibility creates potential liability for the Pope and high Vatican officials under both active and passive command responsibility. If the officials had actual or constructive knowledge of the actions, then they had a duty to either put a stop to it or to punish those responsible for the actions.¹⁷⁵ By not doing so, they exposed themselves to potential liability, as is now being sought through the *Victims' Communication*.¹⁷⁶ Were the ICC to establish jurisdiction and decide to hear the case, there is a strong possibility that Vatican officials could be held liable under the command responsibility doctrine.

noted that they suspected vast underreporting of farm attacks, and that there did appear to be racial or political undertones in at least some of the attacks. *Id.* The Committee found that it had insufficient data to make any conclusive findings, and recommended further research, which has not been forthcoming. *Id.*

Additionally, while South Africa is not a party to genocide, the human rights organization "Genocide Watch" recently raised South Africa from a "Level 5—Polarization" status to a "Level 6—Preparation" status, based in part on Malema's actions and the ANC's failure to curtail his hate speech. Level 7 is actual genocide. Leon Parkin & Gregory H. Stanton, *Genocide Watch Upgrades South Africa to Stage 6 'Preparation' on Countries at Risk Chart*, GENOCIDE WATCH (Sept. 15, 2011), <http://www.genocidewatch.org/southafrica.html>.

173. See Darcy, *supra* note 18, at 381–82 (noting that to find liability outside the scope of an agreed plan the results must be a "natural or foreseeable consequence" of the plan); see Rome Statute, *supra* note 11, art. 7 (explaining the requirements for crimes against humanity, which would be needed for conviction).

174. See Rome Statute, *supra* note 11, arts. 5, 7.

175. See Danner & Martinez, *supra* note 110, at 122.

176. See generally *Victims' Communication*, *supra* note 8, at 71.

The Catholic Church is a hierarchical organization in which the senior members have effective control over their subordinates, meaning they have “the material ability to prevent and punish the offenses.”¹⁷⁷ Under command responsibility, the Church’s structure, organization, and power renders high-level officials sufficiently in control of their subordinates to expose themselves to liability if they had knowledge of their subordinates’ actions.¹⁷⁸

VII. CONCLUSION

The idea of liability for group membership is not a new one, however, recent decisions have implemented it in novel ways, and the potential for future novel applications has been created.¹⁷⁹ The modern trend appears to be to apply imputation even more broadly as a prophylactic against participation in illegal activities through organized groups.¹⁸⁰

These recent cases have raised questions about the extent of this doctrine, as well as its future use or potential abuse.¹⁸¹ Criminal membership has the potential to massively expand terrorism prosecutions worldwide, and particularly in the

177. Victims’ Communication, *supra* note 8, at 52–53 (explaining the hierarchical structure of the Catholic Church); Danner & Martinez, *supra* note 110, at 130.

178.

[E]ven a civilian leader may be considered a superior for purposes of assigning liability under command responsibility. Extension of the doctrine to civilian leaders rests on the notion that, where such leaders exercise a level of control over subordinates comparable to that exercised by military commanders, the nominal distinction between a military hierarchy and some other sort of hierarchy (such as a police hierarchy) should not be dispositive.

Danner & Martinez, *supra* note 110, at 130.

179. See *United States v. Al Bahlul*, 820 F. Supp. 2d 1141 (USCMCR 2011) (applying criminal liability in the context of terrorist organizations); Victims’ Communication, *supra* note 8, at 69–71; *Afri-Forum v. Malema* 2011 ZAEQC 2;20968/2010 at 42, 65–66, 68 (S. Afr.), available at <http://www.saflii.org/za/cases/ZAEQC/2011/2.pdf>.

180. *Al Bahlul*, 820 F. Supp. at 1191–93 (applying criminal liability for participation in a terrorist organization).

181. See Danner & Martinez, *supra* note 110, at 133–38, 159, 163–66 (“The potential application of the more expansive forms of JCE to domestic criminal prosecutions of terrorists demonstrates the danger of such an unbounded doctrine.”).

United States since the decision in *Al Bahlul*.¹⁸² Liability under this doctrine could easily be expanded to cover the most tenuous of connections to criminal or terrorist organizations, provided that the necessary elements can be established.

In the civilian sphere, the *Malema* decision and the claims raised in the *Victims' Communication* raise issues in regard to the actions of a superior creating liability for the entire group in the former, and the actions of subordinates creating liability for senior officials in the latter. As no action has been taken (nor is it likely to be) to further the potential liability in *Malema*, expansion of the doctrine in that direction will have to await future cases. The ICC's response to the *Victims' Communication* (barring any refusal based on jurisdictional concerns) will hopefully shed more light on the command responsibility arm of this kind of liability.

The separate yet closely related doctrines comprising the body of membership liability—command responsibility, joint criminal enterprise, criminal membership—continue to intermingle and coalesce into the greater wholes of group liability for individual acts, and individual liability for group acts. As these doctrines change and develop, they will create new pathways for litigation, and new means through which to adjudicate previously unreachable claims.

182. See *Al Bahlul*, 820 F. Supp 2d at 1203.