The Principal Liability of Political and Military Leaders for International Crimes: Joint Criminal Enterprise *versus* Indirect Co-Perpetration

Briony McKenzie

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I Introduction

Over the last several decades international criminal tribunals have struggled to establish individual criminal responsibility of senior political and military leaders for the commission of international crimes.

The crime of genocide, crimes against humanity and war crimes typically take place in situations of large-scale or widespread criminality. The commission of these crimes is typically planned and set in motion by senior political or military leaders, but they are usually perpetrated by subordinates. In most cases, senior political and military leaders are geographically remote from the scene of the crime and have little or no contact with the low-level members of their organisations who physically perpetrate the crimes. As a result, at trial, Prosecutors have found it difficult to provide evidence which directly links the defendant leaders' actions or omissions to the commission of the crimes.

Consequently, the application of traditional forms of criminal liability often leads to the conclusion that they are mere accessories to such crimes and not principal offenders. The application of accessory liability would not hold these individuals sufficiently responsible and would not adequately reflect their involvement and the gravity of the offences. Thus, the most important issue during these trials is determining the appropriate mode of liability to allege against leaders for the crimes charged in the indictment.

In an attempt to bring justice to high-level perpetrators, international criminal law has developed two alternative modes of liability to allocate individual responsibility for the commission of the international crimes. The International Criminal Tribunal for the Former Yugoslavia (ICTY) introduced and has exclusively utilised the "joint criminal enterprise" (JCE) mode of participation and; in contrast the International Criminal Court (ICC), in its earliest decisions, has rejected this notion and resorted to a complex form of co-perpetration and indirect perpetration based on the "control over the crime". Given the collective nature of international crimes, both of these modes of liability centre around the concept of co-perpetration, which allows the actions of the physical perpetrators, to be attributable to the senior political and military leaders behind the scenes.

JCE may be described as a situation in which a crime is committed by a plurality of persons acting in furtherance of a common criminal plan; the principals to the crime are those who — regardless of the significance of their contribution — share the aim to have the crimes in the common plan committed. The subjective intent and knowledge of the participants is what makes them liable as co-perpetrators. Alternatively, the ICC adopted the notion of control over the crime relies on a materially objective approach to the notion of co-perpetration. Principals to a crime are only those who share control of the crime (and are aware of it) as a result of the key role that their contributions play in the execution of the common plan.

JCE and the control theory are domestic law concepts that have been adapted and developed to reflect the culpability of senior political and military leaders as principals to the commission of widespread and systematic international crimes. JCE arose in the Anglo-American legal system and first emerged in an ICTY case where the physical perpetrators were included as participants in the JCE. Subsequently, it has been adapted and heavily relied upon by the ICTY as a mode of liability in leadership cases involving vast criminal enterprises. Instead, such cases have focused on prosecuting senior political and military leaders, who are the masterminds behind these atrocities, for the crimes committed by the physical perpetrators. In time, the notion of JCE evolved to include an element of indirect perpetration, whereby guilty senior political and military leaders must have a sense of control over their subordinates and require them to commit the alleged crimes. JCE has been criticsed for being overly broad and expansive in its application and drastically encroaching on general criminal law principles of legality and culpability. Despite such criticisms, JCE has been incorporated into the case law of other international tribunals.

The ICC relied on the “control theory” which is developed in German law and subsequently created the notion of “indirect co-perpetration” to deal with situations where senior political or military leaders are not physically involved in the crime but they have ordered their subordinates to commit the crime. Whilst the notion of control over the crime develops and advances some of the criticisms of JCE, there are also some possible weaknesses and difficulties with the ICC’s approach.

Overall, JCE and indirect co-perpetration are conceptually similar in that they aim to hold the leadership-level participants of international crimes liable for their

subordinate's physical perpetration of crimes. Nonetheless, both modes of liability attract criticism and difficulty in practice. International criminal law needs to adapt current approaches and consider suggestions from scholars that instead of focusing on *individual* criminal responsibility, international courts may need to turn to a *mixed-individual-collective* system of responsibility, whereby the focus is attributing crimes to an organisation or an enterprise rather than an individual.

II Diverging Legal Systems

It is clear from the case law and the tribunal's Statutes that both tribunals have chosen to adopt a differentiated model, whereby principals and accessories to the crime are distinguished, but still charged unitarily for the offences committed.[1] Both the ICTY and the ICC have relied upon the notion of co-perpetration to charge senior political and military leaders, however, they are based on a different criterion for the distinction between principals and accessories.[2]

When we analyse the tribunal's statutes in light of national law it becomes apparent how such a divergence has arisen in the context of charging senior political and military leaders. The relevant provisions for individual criminal responsibility in the tribunal's statutes are based on two diverging legal systems.[3] The ICTY provision relies on Anglo-American complicity law and contrastingly, the ICC provision draws heavily upon German law.[4]

Consequently, the ICTY embraced the Anglo-American notion of JCE, which relies on a subjective approach to distinguishing between principals and accessories.[5] Comparatively, the ICC adopted the notion of indirect co-perpetration based on the German notion of control over the crime, which adopts a materially objective

[1] Elies van Sliedregt *Individual Criminal Responsibility in International Law* (Oxford University Press, New York, 2012) at 160-161.
[2] At 175.
[3] At 175-178.
[4] At 175-178.
[5] See generally Héctor Olásolo and others *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes* (Hart, Oxford, 2009) at 35-37.

approach to distinguishing between principals and accessories.[6] Therefore, it is not surprising that the ICTY has struggled to accept the ICC's notion of indirect co-perpetration and that the ICC has refused to apply the ICTY's notion of JCE.[7] Despite these two approaches appearing very different on paper, they have been developed and adapted to the extent that in practice they are in fact very similar.

[6] Olásolo, above n 5, at 307-308.
[7] See *Prosecutor v Stakić (Judgment)* ICTY Appeals Chamber IT-97-24-A, 22 March 2006 [*Stakić*]; *Prosecutor v Lubanga (Confirmation of Charges)* ICC Pre-Trial Chamber I, ICC-01-04-01/06, 29 January 2007 [*Lubanga*].

III Notion and Formation of Joint Criminal Enterprise

A The Notion of Joint Criminal Enterprise

JCE provides that where a crime is committed by a plurality of persons acting together in pursuance of a common criminal purpose, every member of the group is criminally liable (as a principal) for the group's actions.[8] Ultimately, to be guilty of JCE, it is necessary that the participant made a contribution to the common criminal purpose, but the relative importance of the contribution is irrelevant.[9] What matters is that all participants, regardless of whether they are the physical perpetrators or senior political or military leaders, make such contributions with the shared intent to further the common criminal purpose.[10] Furthermore, all participants will be criminally responsible if another member in the criminal enterprise commits a foreseeable crime that is not part of the common criminal plan, so long as there is a shared intent by all to have the core crimes of the enterprise committed.[11]

The notion of JCE was originally conceived to deal with the limits of the strict derivative nature of Anglo-American complicity law, with a perpetrator causing the actus reus and an accomplice whose liability derives from that of the principal.[12] This approach fails to capture the situation where a group commits the crime and it is not clear which party actually caused the actus reus, but all shared the support and intention to commit the crime.[13] In order to solve this, the doctrine JCE does not require a precise pinpointing of the casual contributions that lead to the offence.[14] Typically, common law jurisdictions have applied JCE in the context of 'mob-crimes', as well as other crimes such as bank robberies, which are committed by plurality of persons acting together to execute a common criminal purpose.[15]

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[8] Héctor Olásolo "Joint Criminal Enterprise And Its Extended Form: A Theory Of Co-Perpetration Giving Rise to Principal Liability, A Notion of Accessorial Liability, Or A Form of Partnership in Crime?" (2009) 20 CLF 263 at 269.
[9] At 269.
[10] At 269.
[11] At 272.
[12] van Sliedregt, above n 1, at 202.
[13] At 259.
[14] At 202.
[15] See generally (i) Australia: *R v Johns* [1978] 1 NSWLR 282; *R v McAuliffe* [1995] 69 ALJR 621; Western Australian Criminal Code Act 1913 s 8(1); (ii) England and Wales: *R v Powell, R v English* [1997] 4 All ER 545; *R v Hyde* [1991] 1 QB 134; *R v Anderson, R v Morris* [1966] 2 QB 110; and (iii) United States of America: *Pinkerton v United States* [1946] 328 US 640; *State of Connecticut v Diaz* [1996] 679 A.2d 902; Iowa Code 1997 s 703.2.

The roots of the JCE concept also go back to the Nuremburg Tribunal, which used the "conspiracy" concept to prosecute architects of atrocities, as well as the concept of membership in certain Nazi organisations that qualified as criminal.[16] These notions were used to influence the development of JCE.[17]

B ICTY Adoption of JCE: Tadić

In May 1993, the ICTY was established by the United Nations to hold individuals responsible for the mass atrocities taking place in the Balkans.[18] Despite JCE not being explicitly provided for as a form of liability in the ICTY Statute, in *Prosecutor v Tadić (Tadić),*[19] the Appeals Chamber determined that JCE might be said to constitute a form of "commission" recognised under the Statute. The Chamber ruled that its constitutive elements are well founded under customary international law.[20]

The facts of *Tadić* are as follows: on June 14, 1992, Tadić and a group of armed Serbs firing guns entered the area of Jaskici in Bosnia.[21] Whilst the group ordered residents to leave their homes and separated the men from the women and children, five male residents were killed.[22] Tadić was charged with the murder of these men under the ICTY Statute. However, the Trial Chamber acquitted Tadić because it was not satisfied that he had a personal role in the killing of any of the five.[23]

On appeal, the Prosecution submitted that despite no actual evidence that he personally killed any of the five, Tadić should be individually responsible for the murder as a natural and probable consequence of the criminal activity of the Serbian group under Article 7(1) of the ICTY Statute.[24]

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[16] Harmen Van de Wilt "Joint Criminal Enterprise: Possibilities and Limitations" (2007) 5 JICJ 91 at 93-95.
[17] At 93-95.
[18] United Nations "About the ICTY" (2 August 2014) United Nations: International Criminal Tribunal for the Former Yugoslavia <http://www.icty.org/sections/AbouttheICTY>.
[19] *Prosecutor v Tadić (Judgment*) ICTY Appeals Chamber IT-94-1-A, 15 July 1999 [*Tadić*].
[20] At [188] and [226].
[21] At [178].
[22] At [181].
[23] *Prosecutor v Tadić (Judgment)* ICTY Trial Chamber IT-94-1-T, 7 May 1997 at [373].
[24] *Tadić,* above n 19, at [172] and [175].

Article 7(1) of the ICTY Statute regulates those forms of participation for which an individual may be held criminally responsible for any of the crimes outlined within the ICTY Statute.

> Individual criminal responsibility
>
> 1. A person who planned, instigated, ordered, *committed* or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.[25]

Article 7(1) outlines the five modes of liability. The following modes of liability give rise to accessory liability: "planned", "ordered", "instigated" and "aided and abetted".[26] Comparatively, the Appeals Chamber noted that "committed" covers, "first and foremost the physical perpetration of the crime of the offender himself" giving rise to principal liability, but also found that crimes within the jurisdiction of the Tribunal "might also occur through the participation in the realisation of a common design or purpose."[27] Although JCE was not expressly included as a mode of liability in Art. 7 (1), the Chamber determined that it could be implicitly included as a form of "commission" recognised under the Statute.[28]

In interpreting the Statute broadly, the Chamber took into account the Statute's object and purpose and asserted that the ICTY has jurisdiction over individuals responsible for "serious violations" of international humanitarian law regardless of whether the accused physically committed the target crime.[29] It referred to a 1993 report by the UN Secretary-General, which pronounced that "*all* persons who participate in the planning, preparation or execution of serious violations of international humanitarian law in the former Yugoslavia contribute to the commission of the violation and are, therefore, individually responsible."[30] The Chamber recognised that international crimes tend to result from "collective criminality" and that as a result, the "moral gravity" of those participating in the criminal activity is essentially the same as those

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[25] *Statute of the International Criminal Tribunal for the Former Yugoslavia* SC Res 827, S/Res/827 (1993), article 7(1).
[26] Article 7(1).
[27] *Tadić,* above n 19, at [185].
[28] Guénaël Mettraux *International Crimes and the Ad Hoc Tribunals* (Oxford University Press, New York, 2005) at 288.
[29] *Tadić Case,* above n 19, at [189].
[30] Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 GA Res 808, S/Res/25704 (1993) at [54].

actually carrying out the specified crime.[31] The Chamber opined that holding a person who did not physically perpetrate the crimes as an aider and abettor could lead to minimising the offender's culpability.[32] Therefore, the Statute must be interpreted in a manner that permits criminal liability to attach to those who, while acting as co-perpetrators, do not physically carry out any part of the criminal act.[33] The other modes of liability would only give rise to accessory liability and thus it was necessary that JCE as a theory of co-perpetration, be read into the Statute in order to properly allocate individual responsibility and bring all individuals involved to justice.

1 The three forms of JCE

The Appeals Chamber then relied on customary international law to set forth three categories of JCE.[34] Subsequent case law of the ICTY has developed these categories and refers to them as "the basic form of JCE, the systematic form of JCE and the extended form of JCE".[35]

The "basic" form includes cases where all participants, acting pursuant to a common purpose, share the same criminal intent and act to give effect to that intent.[36] The Chamber added that the prerequisites for imputing criminal responsibility to a participant are as follows:

> (i) the accused must voluntarily participate in one aspect of the common design; and
>
> (ii) the accused, even if not personally effecting the crime, must nevertheless intend this result.[37]

With regard to this category of cases, the Chamber examined the British Military Tribunal Decision in the *Georg Otto Sandrock* case.[38] In that case, a British court found three Germans who killed a British prisoner of war guilty under the "common enterprise" doctrine. Although each of them played a different role, all three

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[31] *Tadić,* above n 19, at [191].
[32] At [192].
[33] At [185]-[192].
[34] At [196]-[226].
[35] Verena Hann "The Development of the Concept of Joint Criminal Enterprise at the International Criminal Tribunal for the Former Yugoslavia" (2005) 5 ICLR 170 at 178.
[36] *Tadić,* above n 19, at [196]-[201].
[37] At [196].
[38] At [197], n 233.

defendants had intended to kill the British solider and thus they were all co-perpetrators of the crime of murder.[39] The Chamber examined the *Ponzano* case,[40] which involved the killing of four British prisoners of war. In *Ponzano*, the court found that while the defendant's criminal involvement must form a link in the chain of causation, it did not need to be essential, or that the offence would not have occurred but for his participation.[41] The Judge Advocate did stress the necessity of knowledge and intent on the part of the accused to further the common criminal purpose.[42] The Chamber noted that many other countries had taken the same approach to crimes where two or more person participated with a different degree of involvement. However, in countries such as Italy and Germany, instead of relying upon the common purpose doctrine, the notion of co-perpetration had been adopted.[43]

The second category is essentially similar to the first one, but is characterised by the "systematic" nature of the crimes committed pursuant to the JCE, in the sense that it implies the existence of "an organised system of ill-treatment".[44] The Chamber examined the *Dachau Concentration Camp* case[45] and the *Belsen* case,[46] which were decided by United States and British military courts siting in Germany. In these cases, the common criminal purpose was allegedly committed by members of military or administrative units, such as those running concentration camps.[47] From these cases, the Appeals Chamber deduced that the actus reus was the active participation in the enforcement of repression, which could be inferred from the position of authority held by the accused.[48]

However, the third category, known as the "extended" form, descends into darker territory. Under this category, all participants are responsible for crimes committed within the common criminal plan, but also for any crimes committed by a principal offender which fall outside of the intended JCE, given they are a "natural and

[39] *Tadić,* above n 19, at [197].
[40] At [199], n 239.
[41] At [199].
[42] At [199].
[43] At [201].
[44] Mettraux, above n 28, at 288.
[45] *Tadić,* above n 19, at [202], n 248.
[46] At [202], n 249.
[47] At [202].
[48] At [203].

foreseeable" consequence of effecting the agreed to JCE.[49] In *Essen Lynching*,[50] German servicemen were convicted for the murders of Allied prisoners of war lynched by mobs of German civilians.[51] Evidence was given that the leader of the group loudly ordered his followers not to interfere in the attack of the POWs from the surrounding mob. The Chamber discovered in the judgment a two-fold requirement for culpability: a criminal intention to participate, and foreseeability that criminal acts outside the common criminal design could occur.[52] The defendants were held to have common intent to assault the POWs,[53] and it was held that the leader could have foreseen that his instructions would lead to the ensuing events.[54]

Scholars have harshly criticised the Chambers declaration that the extended form of JCE was part of customary international law.[55] The Chamber only cited cases convened by British, Canadian and American military tribunals applying Control Council Law No. 10, all of which originally applied national concepts of attribution.[56] Additionally, the Chambers reliance on domestic Italian post-World War II cases[57] has been criticised for failing to provide evidence of customary *international* law.[58]

Furthermore, under the extended category, a solider manning a door can be convicted of torturing, even if he believed he was defending the entrance from the enemy and only foresaw that one of his associates might commit torture.[59] The problem is that the lookout is punished for a torture he was not involved in and moreover that he is convicted on mere foresight – a standard well below the mens rea required for the offence of torture.[60] Scholars have argued the incongruity between the mens rea for

[49] *Tadić,* above n 19, at [204].
[50] At [207], n 255.
[51] At [205]-[213].
[52] At [206] and [207].
[53] At [209] and [213].
[54] At [206] and [207].
[55] Jens David Ohlin "Joint Intentions to Commit International Crimes" (2010) 11 CJIL 693 at 707.
[56] *Tadić,* above n 19, at [204]. See generally Hann, above n 35, at 177.
[57] *Tadić,* above n 19, at [215].
[58] See generally Hann, above n 35.
[59] Antonio Cassese "The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise" (2007) 5 JICJ 109 at 121.
[60] At 121.

the mode and that required for the crime leads to a violation of the principle of *culpability*.[61]

The third category was the most relevant to the factual circumstances of Tadić's case. The Chamber found that Tadić had participated in the group's common criminal purpose to forcibly remove the non-Serb population from the Prjedor region, which resulted in five men being shot and killed.[62] While murder was not explicitly the common design, it was held that it was foreseeable that when forcibly removing persons at gunpoint, the group could end up killing one or more of the non-Serbs. Tadić had voluntarily placed himself in jeopardy by continuing to participate in the criminal enterprise.[63] Therefore, the Chamber concluded that Tadić was guilty of the charges against him.[64]

2 Actus reus elements common to all forms of JCE

Because the ICTY Statute does not specify the mens rea and actus reus elements for JCE, the Chamber relied on customary international law in defining this form of liability.[65] All three categories were found to have the following actus reus elements:

> (i) *A plurality of persons.* They do not need to be organised in a military, political or administrative structure.
>
> (ii) *The existence of a common plan, design or purpose amounting to or involving acting out a crime provided under the Statute*. There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialse extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a JCE.[66]
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> (iii) *The participation of the accused in the common criminal plan.* This participation does not need to involve the commission of a specific crime under a Statute provision (for example, murder, extermination, torture, rape,

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[61] See generally Kai Ambos "Joint Criminal Enterprise and Command Responsibility" (2007) 5 JICJ 159 at 174.
[62] *Tadić,* above n 19, at [231].
[63] At [232].
[64] At [233].
[65] At [194].
[66] *Prosecutor v Furundžija (Judgment)* ICTY Appeals Chamber IT-95-17/1-A, 21 July 2000 at [120] and [121].

etc.), but may take the form of assistance in, or contribution to, the execution of the common criminal plan.[67]

3 Mens rea elements particular to each form of JCE

The Appeals Chamber observed that the mens rea element differs for each of the three common design categories.[68] The first category requires the intent to carry out a particular crime (this being the shared intent by all co-perpetrators).[69] The second category requires personal knowledge of the system of ill treatment of prisoners or others within a scheme of criminal behaviour and the intent to further such a scheme.[70] The third category requires the intention to participate in and further the criminal activity or purpose of a group and to contribute to the JCE – or in any event to the commission of a crime – by the group.[71] Additionally, responsibility for a crime other than the one envisaged by the group in the common design arises only if (i) it was *foreseeable* that one or other group members might commit such crime and (ii) the accused *willingly took that risk*.[72]

In essence, JCE is a theory of co-perpetration whereby all participants can be held liable as principal co-perpetrators The notion of co-perpetration based on JCE is grounded in a subjective criterion because essentially, the wrong doing lies in the shared intent by all the participants to commit the crimes encompassed in the common criminal purpose.[73] The distinction between principal and accessories to the crime will not depend on the level of their contribution but whether or not they shared the intent to further the common criminal purpose.[74]

The notion of JCE has been criticised for breaching the wider corpus of general principles of criminal law, in particular the principle of legality.[75] One of the most problematic aspects of JCE is the lack of specificity and clarity by having three

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[67] *Tadić,* above n 19, at [227].
[68] At [228].
[69] At [228].
[70] At [228].
[71] At [228].
[72] At [228]. The Chamber explained this to be more than mere negligence and referred to this as *dolus eventualis*, or in some national legal systems, "advertent recklessness".
[73] Olásolo, above n 8, at 271.
[74] At 272.
[75] Stefano Manacorda and Chantal Meloni "Indirect Perpetration versus Joint Criminal Enterprise Concurring Approaches in the Practice of International Criminal Law?" (2011) 9(1) JICJ 159 at 165.

separate categories that encompass a variety of elements for an individual to qualify as a participant in the JCE, some of which are the same but there are also significant differences.[76] Furthermore, JCE elements are not set down in Statute and Powles argues this is "not ideal because criminal law, especially international criminal law, requires clear and certain definitions of the various bases of liability, so as to enable the parties, both the prosecution and, perhaps more importantly, the defence, to prepare for the case."[77]

C The Difference Between JCE and Other Similar Modes of Liability

1 The difference between JCE and aiding and abetting

In practice, aiding and abetting might be easily confused with JCE; however, they are two separate mode of liability under which a senior political or military leader can be charged. It is important to bear in mind the key differences between them.

An aider or abettor is always an accessory to a crime perpetrated by another person, the principal whereas under JCE, each participant is a principal perpetrator.[78] In the case of aiding and abetting, no common plan or agreement is required; indeed, the principal may not even know about the accomplice's contribution.[79]

Aiding and abetting consists a contribution that must have a "substantial effect" upon the perpetration of the specific crime.[80] By contrast, under JCE, it is sufficient for the participant to contribute in some way to the furtherance of the common criminal plan.[81] JCE compensates for a lower level of contribution with a more stringent mens rea element, the "*intent* to commit the common purpose", as opposed to the aiding and abetting requirement of "*knowledge* to assist in the commission of a specific crime". [82] It is important to closely examine a senior political or military leader's state

[76] Manacorda and Meloni, above n 75, at 166.
[77] Steven Powles "Joint Criminal Enterprise - Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity" (2004) 2 JICJ 606 at 606.
[78] *Tadić,* above n 19, at [229].
[79] At [229].
[80] At [229]. See generally Olásolo, above n 5, at 252-254.
[81] *Tadić,* above n 19, at [229].
[82] At [229].

of mind, because in most situations it will be preferable to charge them as a principal under JCE, as opposed to an accessory to the crime.[83]

Because JCE is a mode of liability and not a crime itself, it is not possible to aid and abet a JCE.[84] However, a senior political or military leader may be held liable for aiding and abetting a crime committed by an individual or by a plurality of persons involved in a JCE.[85] In the case where the crime is carried out by several co-perpetrators (in a JCE), the senior political or military leader does not need to share the intent of the common criminal purpose; rather, they only need to be aware that their acts or omissions will substantially assist in the commission of the crime.[86] Furthermore, it is not necessary that the co-perpetrators know of the aider and abettor's contribution.[87]

2 The difference between JCE and command responsibility

Article 7(3) ICTY Statute creates the offence of command responsibility.[88] The ICTY Appeal Judgment in the *Kvocka* case held that co-perpetration based on JCE and command responsibility are "distinct categories of individual criminal responsibility," each of them with specific legal requirements.[89]

Command responsibility is an offence of mere omission, according to which criminal liability does not arise for subordinates' crimes, but for breaches of the duty imposed by international law on superiors to take the necessary and reasonable measures at their disposal to prevent and punish subordinates' offence once such duties have been triggered.[90]

In the situation where a senior political or military leader has committed an offence under command responsibility, *and* has also participated as a principal or an accessory, in the commission of his subordinates crimes, it is open to the courts to

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[83] Olásolo, above n 5, at 261.
[84] At 255.
[85] *Prosecutor v Kovčka (Judgment)* ICTY Appeals Chamber ICTY-98-30/1-A, 28 February 2005 at [90].
[86] See Olásolo, above n 5, at 256.
[87] *Prosecutor v Vasiljevic (Judgment)* ICTY Appeals Chamber IT-98-32-A, 25 February 2004 at [102].
[88] *Statute of the International Criminal Tribunal for the Former Yugoslavia,* above n 25, article 7(3).
[89] *Prosecutor v Kovčka,* above n 85, at [104]; *Prosecutor v Blaškić (Judgment)* ICTY Appeals Chamber IT-95-14-A, 29 July 2004 at [91]; and see generally Ambos, above n 61.
[90] See *Yamashita v Styer* 327 US 1 (1946).

convict the leader in multiple ways simultaneously and the rules of *concursus delictorum* should be applied in sentencing.[91]

IV Application of JCE Post-Tadić

A Traditional Notion of JCE in the ICTY

Initially, the ICTY applied JCE to small-scale enterprises. Although no judgment has contradicted the principles articulated in *Tadić*, subsequent decisions and judgments that followed have added to the scope and application of the doctrine.[92] For instance, the common criminal purpose could be found to evolve over time.[93] Furthermore, in *Blaškić*, the Appeals Chamber found that where the prosecution cannot specifically name the co-perpetrators in a JCE, they can be identified by a group or category.[94]

The ICTY then applied what became known as "the traditional notion of JCE".[95] In these "traditional" JCE cases, persons who physically carried out the actus reus elements of the crimes were held to be part of the JCE and all other participants, such as senior political and military leaders were equally liable as principals.[96] The traditional notion of JCE was adequate to reflect the criminal liability in small-scale cases, for example, of the members of a unit, who co-operatively tortured prisoners for information about the enemy.[97] Nevertheless, it did not apply so well to large-

[91] Olásolo, above n 5, at 109.
[92] Shane Darcy "An Effective Measure of Bringing Justice?: The Joint Criminal Enterprise Doctrine of the International Criminal Tribunal for the Former Yugoslavia" (1995) 554 AJIL 554 153 at 169.
[93] *Prosecutor v Krajišnik (Judgment)* ICTY Trial Chamber IT-00-39-T, 27 September 2006. The Trial Chamber found that, in the early stage of the Bosnian-Serb campaign for territorial contest the common objective of the joint criminal enterprise was discrimination, deportation and forced transfer. The objective evolved to encompass additional crimes including unlawful detention, cruel or inhumane treatment, sexual violence, murder and extermination at [1089]-[1119].
[94] *Prosecutor v Blaškić,* above n 89, at [217].
[95] See generally Hann, above n 35, at 176-194. For a more comprehensive explanation of the application of the traditional notion of joint criminal enterprise by the jurisprudence of the ICTY; and Attila Bogdan "Individual Criminal Responsibility in the Execution of a "Joint Criminal Enterprise" in the Jurisprudence of the ad hoc International Tribunal for the Former Yugoslavia" (2006) 6 ICLR 63 at 79-108.
[96] *Prosecutor v Furundžija,* above n 66; *Prosecutor v Vasiljevic,* above n 87.
[97] Héctor Olásolo "Reflections on the Treatment of the Notions of Control of the Crime and Joint Criminal Enterprise in the Stakić Appeal Judgement (2007) 7 ICLR 143 at 157.

scale or systematic criminality where senior political or military leaders were structurally and geographically remote from the physical perpetrators.[98]

The reason for this is because the higher the position of a political or military leader, the broader the range of criminal activities alleged may be, and, consequently, the higher the number of members in the alleged JCE.[99] For example, if one were to examine the criminal responsibility of a senior politician who has been a member of a small group of leaders that designed and set in motion an ethnic cleansing campaign which was physically perpetrated by thousands of low-level subordinates over the course of four years throughout Bosnia-Herzegovina territory, the traditional notion of JCE would have to include: (i) the small group of leaders who designed and commissioned the ethnic cleansing campaign (common criminal plan); (ii) the mid level superiors who prepare its implementation; and (iii) the hundreds or thousands of low level followers who physically implemented it.[100]

Therefore, a number of issues arise when the Prosecution alleges this kind of JCE in order to prosecute the senior political leader. Firstly, according to a number of commentators, this kind of scenario shifts from a situation of individual criminal responsibility closer to a form of collective criminal liability or guilt by association.[101] Given the immense number of alleged members in the enterprise, each participant's "subjective" intention will essentially be assumed, thus breaching the principle of individual criminal culpability.[102] This is even more so with JCE in its extended form for "foreseeable" crimes. Despite that the crimes are not agreed upon, the intent can be inferred from the fact that a person continued participating in a common criminal plan. The structure of a traditional JCE begins to resemble the law of conspiracy and the membership or organisational liability that was applied and criticised in Nuremburg.[103]

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[98] Olásolo, above n 5, at 189.
[99] At 190.
[100] Olásolo, above n 97, at 157.
[101] See generally Jens David Ohlin "Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise" (2007) 5 JICJ 69; Ambos, above n 61, at 167 and 168; Mohamed Elewa Badar "Just Convict Everyone!-Joint Perpetration from Tadić to Stakić and Back Again (2006) 6 ICLR 293 at 302; Allison Marston Danner and Jenny S. Martinez "Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law" (2005) 93 CLR 75.
[102] Ambos, above n 61, at 167 and 168; Badar, above n 101, at 302; and Danner and Martinez, above n 101.
[103] Ambos, above n 61, at 167. See also Powles, above n 77.

Secondly, Olásolo argues that broadly defined JCEs with hundreds and even thousands of members are "sort of a legal fiction" that can hardly equate to reality.[104] JCE liability requires that *all participants* of the enterprise contribute to the furtherance of a common purpose and share the necessary state of mind, including any special intent necessary for certain crimes. With this in mind, it is questionable whether such an enormous enterprise, which meets the aforementioned elements, can actually exist.[105]

Finally, considering that every member is criminally liable for the crimes of the enterprise committed by other members, there is a real risk of an unacceptable extension of criminal liability for low-level perpetrators and mid-level superiors.[106] For example, as Olásolo pointed out, the Appeals Chamber judgment in *Stakić* found that the accused, as a participant in the JCE to ethnically cleanse the Municipality of Prejidor, was criminally responsible as a co-perpetrator for the 1,500 killings that were natural and foreseeable consequences of the implementation of such an enterprise. *[107]* The Appeals Chamber, however, did not introduce any safeguards to avoid the conclusion that thousands of low-level members of the civilian administration, the army, and the police of the Municipality of Prijedor (who in one way or another participated in the implementation of the JCE to ethically cleanse the Municipality) could be held criminally liable as co-perpetrators for the 1,500 killings.[108] Such an extension of potential liability does not seem to be within the aim of imposing proper criminal liability on the senior political and military leaders as the masterminds of the crimes.

The ICTY addressed the issue of applying the traditional notion of JCE to senior political and military leaders in a very creative manner. It has departed from the traditional notion of JCE to embrace the notion of "JCE-at-leadership-level". [109]

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[104] Olásolo, above n 97, at 158.
[105] At 158.
[106] At 159.
[107] *Stakić,* above n 7.
[108] Olásolo, above n 97, at 159.
[109] Olásolo, above n 5, at ch 4.

B JCE-at-leadership-level in the ICTY

The turning point in JCE law was the *Prosecutor v Brdanin (Brdanin)* Appeals Chamber judgment in 2007.[110] JCE-at-leadership-level allowed the ICTY to convict only senior political and military leaders as members of JCEs, for the crimes committed by physical perpetrators who were far removed and not considered participants in the JCE. This variant of JCE became a regular feature of ICTY indictments against senior political and military leaders.[111] Interestingly, leadership-level prosecution had surfaced earlier in the ICTY jurisprudence under "co-perpetratorship" (which see later is equivalent to "indirect co-perpetration" in the ICC).

1 Leadership-level prosecution: Stakić

Prior to the *Brdanin* judgment, the ICTY had referred to the notion of prosecuting the leadership-level in *Prosecutor v Stakić (Stakić)*, although, the Trial Chamber had relied on the notion of "co-perpetratorship", as opposed to JCE.[112] Stakić was charged, along with the heads of police and the army for designing, planning and ordering a prosecutorial campaign against the non-Serb population in the Prejidor municipality and implementing the common plan through subordinates.[113] The Chamber found that "committing" meant "that the accused participated, physically, or otherwise directly or *indirectly*, in the material elements of the crime".[114] Subsequently, the Chamber adopted the ICC's approach to interpreting "indirectly" by relying on Roxin's theory of "perpetrator behind a perpetrator".[115] The Prosecution established all of the necessary elements and the tribunal convicted Stakić as a co-perpetrator. Nevertheless, the Appeals Chamber rejected the Trial Chambers theory of indirect co-perpetration based on the lack of tribunal jurisprudence and support in customary international law and directed that JCE was the notion to apply for co-

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[110] *Prosecutor v Brdanin (Judgment)* ICTY Appeals Chamber IT-99-36-A, 3 April 2007 [*Brdanin*].
[111] See *Prosecutor v Bradnin (Sixth Amended Indictment)* ICTY IT-99-36-T, 9 December 2003; *Prosecutor v Bradnin and Talić (Corrected Version of the Fourth Amended Indictment)* ICTY IT-99-36-PT, 10 December 2001; *Prosecutor v Milutinović (Third Amended Indictment)* ICTY IT-99-37-PT, 5 September 2002; *Prosecutor v Krajišnik and Plavšić (Consolidated Amended Indictment)* ICTY IT-00-39&40-PT, 7 March 2000; *Prosecutor v Milošević (Second Amended Indictment: Croatia)* ITCY IT-02-54-PT, 28 July 2004; and *Prosecutor v Milošević (Amended Indictment: Bosnia)* ITCY IT-02-54-PT, 21 April 2004.
[112] *Prosecutor v Stakić (Judgment)* ICTY Trial Chamber IT-97-24-T, 31 July 2003.
[113] *Prosecutor v Stakić,* above n 112.
[114] At [439].
[115] At [439], n 942.

perpetrators in the ICTY.[116] Such a reversal by the ICTY was not unreasonable given the ad hoc nature of the tribunal, which was supposed to conclude its activities by 2010, at this stage a jurisprudential shift may have undermined the legal certainty of the ICTY settled jurisprudence.[117]

2 JCE-at-leadership-level: Brdanin

In 2007 the ICTY Appeals Chamber took the opportunity to overturn the Trial Chambers decision in *Brdanin* and develop the notion of traditional JCE to JCE-at-leadership-level.[118] Radoslav Brdanin was a relatively high-level political figure who together with other Bosnian-Serb leaders formulated a plan to link Serb-populated areas in Bosnia-Herzegovina together to create a Bosnian-Serb state from which non-Serbs would be forcibly removed.[119] The alleged JCE covered a broad range of crimes, committed over a significant period of time and included a large number of senior leaders. The Trial Chamber was concerned with the remoteness and attenuation between the leadership-level and those at the execution level.[120] Consequently, the Chamber held that JCE required proof of an agreement between the senior political leader and the participants that physically commit the crimes and – implicitly – that the physical perpetrator must be a member of the JCE.[121] Furthermore, that JCE was not intended to apply to such large enterprises only concerned with senior leaders, and the agreement among senior leaders would not fulfill the "agreement requirement".[122] Consequently, Brdanin could only be convicted for accessory liability of ordering, instigating, aiding and abetting war crimes and crimes against humanity, which would not adequately reflect the gravity of his involvement.[123]

Following this, the Office of the Prosecutor realised that the *Brdanin* decision could undermine the practice of charging senior political and military leaders through large-scale JCEs. The Prosecutor attempted reintroduce the *Stakić* notion of indirect co-perpetration as an alternative to JCE. In the indictments against *Popovic, Prilic* and

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[116] *Stakić*, above n 7.
[117] Olásolo, above n 97, at 151.
[118] *Brdanin*, above n 110.
[119] *Prosecutor v Brdanin (Judgment)* ICTY Trial Chamber ICTY-99-36-T, 1 September 2004 at [53]-[95].
[120] At [355].
[121] At [347]-[353]; and van Sliedregt, above n 1, at 297.
[122] *Prosecutor v Brdanin*, above n 119, at [345]-[355].
[123] *Prosecutor v Brdanin*, above n 119; and van Sliedregt, above n 1, at 297.

Milutinović, the Prosecutor argued that "committed" included two forms of co-perpetration: (1) JCE and (2) indirect co-perpetration.[124] However, in *Milutinović,* the Trial Chamber rejected the notion that co-perpetration or indirect co-perpetration had any support in customary international law.[125] It was clear that the ICTY was not willing to shift from the notion of JCE and thus, the doctrine would have to evolve in order to focus on charging the leadership-level of these mass atrocities.

Some cases began to question what the Trial Chamber had ruled in *Brdanin* and lay the foundations for the development of JCE for large-scale enterprises. In *Milutinović,* Judge Bonomy in a separate concurring opinion did not endorse the agreement requirement due to the lack of basis in customary international law.[126] The Trial Chamber in *Krajišnik* also rejected the requirement of an agreement and held that "a JCE may exist even if none or some of the principal perpetrators are part of it because, they are not aware of the JCE or its objective and are procured by members of the JCE to commit the crimes which further the objective."[127]

Now confused about the agreement requirement and thus the status of leadership JCEs, the Prosecutor requested the Appeals Chamber rule on the issue in *Brdanin*. In April 2007, the Appeals Chamber rejected the Trial Chambers' ruling on JCE and explicitly introduced what has become known as "JCE-at-leadership-level".[128] Under this innovation, only the senior political and military leaders who at the highest level plan and set into motion the execution of the criminal campaign are members of the JCE, whereas the low-level executers are mere "tools" through which the leaders secure the commissions of the crimes.[129]

The Chamber made three key rulings. Firstly, that the physical perpetrator does not have to be part of the JCE. It was found that "what matters is…not whether the person who carried out the actus reus of the crime is part of the JCE but whether the crime in question forms part of the common purpose".[130] The crime can be imputed to a

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[124] van Sliedregt, above n 1, at 300, n 17.
[125] At 301.
[126] *Prosecutor v Milutinović (Decision on Ojdanic's Motion Challenging Jurisdiction: Indirect Co-Perpetration, Separate Opinion of Judge Bonomy)* ICTY IT-05-86-PT, 22 March 2006.
[127] *Prosecutor v Krajišnik,* above n 93, at [883].
[128] Olásolo , n 5, at 220-226. Although, several other cases before the ICTY had applied this notion prior to the explicit endorsement by the ICTY in *Bradnin.*
[129] Olásolo , n 5, at 222.
[130] *Brdanin*, above n 110, at [410].

member of the JCE (and to other members of the JCE) when that member uses a non-member as a "tool" to carry out the common criminal purpose.[131] This was also held to apply in the extended form of JCE where a non-member committed "natural and foreseeable" crimes and the member "willingly took that risk".[132] Secondly, the Chamber held that proof of an agreement between the accused and the principal perpetrators is not a necessary requirement.[133] Additionally, in cases where the principal perpetrator shares the common criminal plan, in other words, is a member of the JCE, it would be superfluous to require an additional agreement.[134] Lastly, the Chamber held that the tribunal's jurisprudence does not warrant the conclusion that JCE only applies to small-scale enterprises.[135] The Chamber held Brdanin, as a member of the JCE, liable for using the relevant physical perpetrators who were not members of the JCE as "mere" tools to carry out the actus reus of the crimes.[136] JCE-at-leadership-level makes it possible to charge those at leadership-level for using others as tools to commit crimes, which is typically the nature of international crimes. Nevertheless, this innovative prosecution tool has come under significant scrutiny.

3 Critique of JCE-at-leadership-level

Firstly, the Chamber relied upon only two cases, the *Justice* case and the *RuSHA* case to establish the notion of JCE-at-leadership-level.[137] In all likelihood, this is an insufficient basis on which to suggest a customary law basis.[138]

JCE-at-leadership-level effectively loosens the links between JCE participants and the principal perpetrators.[139] Such "delinking" is expressed by allowing the physical perpetrators non-membership to the JCE.[140] The physical perpetrator may be aware of the common criminal purpose but not have the necessary mens rea to become a JCE member.[141] As a result, it is possible to prosecute for parallel liability. There can be one JCE-at-leadership-level with a criminal objective, interlinked with a JCE at

[131] *Brdanin*, above n 110, at [413].
[132] At [411].
[133] At [415]-[419].
[134] At [418].
[135] At [420]-[425].
[136] At [448].
[137] At [404].
[138] See generally Olásolo, above n 5, at 207-213.
[139] van Sliegregt, above n 1, at 304.
[140] At 304.
[141] At 304.

execution level with a different criminal objective. This proved to be problematic in the ICTY because indictments of various JCEs – although relating to the same period and usually the same incidents were described inconsistently in different indictments.[142] Such elasticity and lack of precision by the Prosecution is not desirable. Furthermore, somewhere there will be an agreement between a representative of each JCE (execution and leadership-level). Consequently, interlinking a physical perpetrator who does not share the common criminal objective to those at the policy level may result in guilt by association, which violates the principle of personal culpability.[143]

Other questions also remain unanswered; can the mens rea of a member participant truly replace the mens rea of *all* JCE participants? For instance, in the extended category of JCE, a member participant may recognise the natural and foreseeable consequences of using "tool" to commit a crime and willingly take that risk. But can this foreseeability truly be imputed to all other participants?[144]

Most importantly, the foundation of the notion of JCE is that principal liability for the defendant will arise for the crimes committed by *other* participants in the enterprise, so long as they are within the scope of the common plan. The exclusion of the physical perpetrators in the enterprise requires that at least one of the participants is a principal to the crimes. Although, the Chamber did not elucidate precisely what type of involvement would be required to become a principal. Under closer scrutiny, it seems that the Chamber resolves this problem by relying on the notion of indirect perpetration. Indirect perpetration is a manifestation of the notion of control over the crime and has been mentioned in earlier ICTY jurisprudence.[145] A senior political or military leader who does not physically carry out the acuts reus of the crimes becomes an indirect perpetrator (principal to the crimes) if he uses the physically perpetrators (usually his subordinates) as 'instruments' or 'tools' to have the crimes committed.

As a result, the question arises as to what is the controlling criterion to decide whether a participant in the JCE is a principal to the crime or not. Is it the shared intent to implement a common criminal plan with other senior political and military leaders

[142] Mettraux, above n 28, at 292
[143] At 305.
[144] van Sliedregt, above n 1, at 307.
[145] *Prosecutor v Stakić,* above n 112.

that the traditional notion of JCE relied on? Or is it that they share control over the commission of the crimes with other senior political and military leaders in the enterprise? Or is it both? Effectively, the leader's state of mind is equally important to their control over the crime. The notion of JCE-at-leadership-level relies on two competing approaches to decide whether a senior political or military leader is a principal to the crime. Such uncertainty may breach the wider general criminal law principle of legality, which requires precision.[146]

C Recognition of JCE Beyond the ICTY

Despite such criticism, the theory of JCE has also gained ground outside the ICTY. The International Criminal Tribunal for Rwanda (ICTR) has fully embraced JCE as a mode of liability, giving rise to senior political and military leaders principal liability. The ICTR Appeals Chamber expressly recognised JCE as an applicable mode of liability under Art. 6(1) ICTR Statute, which is virtually identical to Art. 7(1) ICTY Statute.[147] The theory has been applied at the ICTR in *Ntakuritimana,*[148] *Karemera*,[149] *Kayishema and Ruzindana*,[150] and *Simba*.[151] Additionally, other mixed Tribunals have adopted the notion of JCE. At the Extraordinary Chambers of the Court of Cambodia (ECCC) the JCE doctrine has been applied in cases against the accused for the crimes committed during the Khmer Rouge regime in the 1970s.[152] Whilst the Pre-Trial Chamber held that the ECCC generally has jurisdiction over JCE liability, it has rejected application of the so-called "extended" JCE category.[153] The

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[146] Manacorda and Meloni, above n 75, at 166.
[147] *Statute of the International Criminal Tribunal for Rwanda* SC Res 955, S/Res/955 (1994), article 6(1).
[148] *Prosecutor v Ntakirutimana (Judgment)* ICTR Appeals Chamber ICTR-96-10-A, 13 December 2004. In the end did not convict of JCE as it was not properly pleaded.
[149] *Prosecutor v Karemera (Decision on Jurisdictional Appeals: Joint Criminal Enterprise)* ICTR Appeals Chamber ICTR-95-44-AR72.5, 12 April 2006. Found firm grounding for JCE in customary international law and that the application of JCE was not in violation of culpability principle.
[150] *Prosecutor v Kayishema and Ruzindana (Judgment)* ICTR Appeals Chamber ICTR-95-1-A, 1 June 2001. The Appeals Chamber endorsed conviction of Ruzindana on the basis of a genocidal JCE.
[151] *Prosecutor v Simba (Judgment)* ICTR Appeals Chamber ICTR-01-76-A, 27 November 2007. The accused was convicted on the basis of JCE and the case is a precedent for JCE liability at the ICTR.
[152] *Nuon, Khieu, Ieng, Ieng (Closing Order)* ECCC OCIJ 002/19-09-2007/ECCC/OCIJ, 15 September 2010 at [1613].
[153] *Ieng, Ieng, Khieu (Public Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise)* ECCC OCIJ 002/19-09-2007/ECCC/OCIJ(PTC38), 20 May 2010 at [69] and [77]. See generally Kitti Jayangakula "Is the Doctrine of Joint Criminal Enterprise a Legitimate Mode of Individual Criminal Liability?-A Study of the Khmer Rouge Trials" (5 September 2014) Social Science Research Network <http://ssrn.com.abstract=2247882>.

Special Court for Sierra Leone has recently relied upon the doctrine of JCE to convict senior military leaders of the Revolutionary United Front,[154] which was the main protagonist in the violent civil war in Sierra Leone from 1991 to 2001.[155] In the Special Tribunal For Lebanon, the Appeals Chamber acknowledged and accepted the application of JCE to the crime of terrorism, except for in its extended form.[156] JCE has further been applied by the East Timorese Special Panel for Serious Crimes[157] and the Supreme Iraqi Criminal Tribunal.[158]

When working with smaller scale cases in the early case law, the ICTY lacked foresight of the best mode of liability for senior political and military leaders. As a result, the ICTY tried to navigate its way through the issues of an all-encompassing traditional JCE to create the notion of JCE-at-leadership-level. However, this development lacks support in customary international law and creates uncertainty to the controlling criterion for a senior political or military leader becoming a principal to the crimes. According to Van de Wilt, JCE "degenerates into a smokescreen that obscures the possible frail connection between the accused and the specific crimes for which they stand trial".[159] Nevertheless, other ad hoc tribunals have embraced the notion of JCE and the ICTY has heavily relied upon this doctrine as a mode of liability in the course of charging over 160 senior political and military leaders for appalling acts such as murder, torture, rape, enslavement, destruction of property and other crimes listed in the ICTY Statute.[160] The ICC on the other hand, was not prepared to adopt the notion of JCE.

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[154] *Prosecutor v Serray, Kallon and Gbao (Judgment)* SCSL Trial Chamber SCSL-04-15-T, 2 March 2009.
[155] See generally Mallesons Stephen Jacques "Special Court for Sierra Leone: Joint Criminal Enterprise" (6 September 2014) Australian Red Cross <https://www1.umn.edu/humanrts/instree/SCSL/Joint_Criminal_Enterprise.pdf>.
[156] *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging* STL Appeals Chamber STL-11-01/I, 16 February 2011) at [248]-[249].
[157] *Prosecutor v Marques (Judgment)* ESPSC Trial Chamber 09/2000, 11 December 2001.
[158] *Prosecutor v Hussein (Judgment)* SICT Trial Chamber 1/9/1st/2005, 22 November 2006.
[159] Van de Wilt, above n 16, at 101.
[160] United Nations, above n 18.

V ICC Rejection of JCE and Notion of Control Over Crime

When confronted with the question of how to attribute individual responsibility to senior political and military leaders in relation to the joint commission of crimes, the ICC unhesitatingly departed from the notion of JCE. Instead, the ICC judges interpreted Article 25(3)(a) of the ICC Statute as encompassing the concept of "control over the crime". Subsequently, a novel sophisticated form of perpetration has emerged in the ICC based on the notion of "indirect co-perpetration". The ICC's new mode of liability marks a distinct conceptual improvement on the subjective orientated theory of JCE. Nevertheless, as a recent development, indirect co-perpetration attracts its own difficulties and criticism.

A The ICC Rejection of JCE

Initially, one might be surprised that the judges of the ICC abandoned the doctrine of JCE, which was almost exclusively applied by the ICTY. Was this not the most successful doctrine to date dealing with the joint commission of international crimes by a plurality of persons acting at different levels? Nevertheless, the ICC had its reasons.

As explained above, the notion of JCE had been heavily criticised for conflicting with the wider corpus of general principles of criminal law, in particular legality and culpability. Although, the ICTY claimed that JCE was "firmly established in customary international law",[161] some of the cases JCE was founded on are of dubious value as precedent under the international criminal law. Even if the ICC was to find JCE in existence in customary international law, pursuant to Article 21(1)(a) of the ICC Statute, the Court shall, in the first place, apply its Statute, while customary law only applies as a subsidiary source.[162]

The ICC Statute provides a much more precise provision for regulating modes of participation than the ICTY Statute, with a four-tier system of participation,

[161] *Tadić,* above n 19, at [220].
[162] Manacorda and Meloni, above n 75, at 166.

corresponding to different degrees of individual guilt.[163] Article 25(3) of the ICC Statute reads:[164]

> A person shall be criminally responsible and liable for punishment for a crime, within the jurisdiction of the court if that person:
>
> (a) *Commits* such a crime, whether as an individual, jointly with another or through another person, etc. … [emphasis added]
>
> (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
>
> (c) For the purposes 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;
>
> (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
>
> (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions.…

In particular, under subarticle 3(a), perpetration (or commission of a crime) is allowed in three different forms: (i) directly as an individual, (ii) jointly with another person (co-perpetration) and (iii) through another person (indirect perpetration). The latter two forms of perpetration in Art. 25(3)(a) provide some leeway for the ICC to use these as alternative forms of participation other than JCE to impute crimes to high-

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[163] Gerhard Werle "Individual Criminal Responsibility in Article 25 ICC Statute" (2007) 5(4) JICJ 953 at 953.

[164] *Rome Statute of the International Criminal Court* UNTS 2187,A/CONF.183/9* (1998), article 25(3).

level perpetrators, and in doing so, make a positive improvement on meeting the principles of legality and culpability.[165]

It is arguable that because the term "commits" is not defined in the ICC Statute, the Court could have relied on ICTY jurisprudence to interpret its meaning. However, the Court held that Article 21 of the ICC Statute renders JCE unnecessary:

> Since the Rome Statute expressly provides for this specific mode of liability, the question as to whether customary law admits or discards the "joint commission through another person" is not relevant for the International Criminal Court.[166]

The ICC Statute "is an independent body of law with its own structure, and must therefore be interpreted independently",[167] thus, a mechanical transfer of the ad hoc tribunals' case law to the ICC is not necessarily the correct approach. The ICC judges took this opportunity to steer the ICC Statute away from an interpretation that would incorporate the doctrine of JCE. In the search for a more precise approach to charging senior political and military leaders, the ICC interpreted Article 25(3)(a) to embody the notion of control over the crime and elaborated the novel concept of "indirect co-perpetration".

B The Notion of Control Over the Crime

The Pre Trial Chamber in *Prosecutor v Lubanga (Lubanga)* held that "committed" in Article 25(3)(a) of the ICC Statute encompassed the notion of "control over the crime".[168] According to the Chamber:

> The concept of control over the crime constitutes a third approach for distinguishing between principals and accessories…principals to a crime are not limited to those who physically carry out the objective elements of the offence, but also those who, in spite of being removed from the scene of the crime, control or mastermind its commission because they decide whether and how the offence will be committed.[169]

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[165] Manacorda and Meloni, above n 75, at 167.
[166] *Prosecutor v Katanga and Ngudjolo (Confirmation of Charges)* ICC Pre-Trial Chamber I, ICC-01/04-01/07, 1 October 2008 [*Katanga and Ngudjolo*].
[167] Werle, above n 163, at 961.
[168] *Lubanga*, above n 7, at [318].
[169] At [330].

The Chamber carefully pointed out that "control over the crime" is a materially objective approach, distinguishable from the (alleged) subjective approach adopted by the ICTY through the concept of JCE.[170] The Chamber hoped that using this doctrine would assist in providing a clear distinction between principal and accessorial liabilities within the context of the collective and multi-level commission of crimes, which JCE has struggled with. In order to distinguish principals from accessories, the focus is no longer on the state of mind in which the contribution was made, but instead the level of control over the commission of the offence.[171] The Chamber noted that all three categories of perpetration in Article 25(3)(a) would be based on the notion of control over the crime and the objective element would be different for each form of perpetration.[172] In the form of co-perpetration, principal liability for a senior political or military leader requires proof of an essential contribution to the common plan that resulted in the commission of the crime. In the form of indirect perpetration, principal liability requires proof that a senior political or military leader has control over an organisation.[173] As a result of combining these two approaches, the ICC created the novel mode of liability called "indirect co-perpetration".

Unlike JCE, which has its antecedents in post World War II case law, the "control-theory" is new to international criminal proceedings.[174] It is largely premised on a legal doctrine set out in the writings of a renowned German legal scholar, Claus Roxin, who attempted to devise a theory whereby Nazi leaders such as, Adolf Eichmann could be held responsible as perpetrators of the atrocities committed under their regime.[175] In relying on the control theory, the ICC explained that the notion of control over the crime has been incorporated into the framework of the Statute, it had been increasingly used in national jurisdictions and it had been addressed in the jurisprudence of international tribunals.[176] However, with regard to the second argument, the ICC simply asserted its existence in many legal systems. In essence, the notion of control over the crime only exists in the legal systems of two countries,

[170] *Lubanga,* above n 7, at [329]; and van Sliedregt, above n 1, at 185. The ICTY never used the terminology objective and subjective.
[171] *Lubanga,* above n 7, at [329].
[172] At [340].
[173] Manacorda and Meloni, above n 75, at 169.
[174] At 167.
[175] Claus Roxin "Crimes as Part of Organized Power Structures" (2011) 9 JICJ 193; and Claus Roxin *Taterschaft und Tatherrschaft* (7th ed, Grutyer, Berlin, 2000) at 242–52 and 704–17 (translation: *Control Over the Crime*).
[176] *Katanga and Ngudjolo,* above n 166, at [500]-[510].

Germany and Spain.[177] Moreover, there has been strong dissent within the ICC regarding the importation of the control theory. In *Lubanga*, Judge Fulford dissented from the majority analysis and argued that it had improperly imported the control of the crime theory into the interpretation of Article 25(3)(a).[178] Subsequently, Judge Van den Wyngaert concurred that the notion of "control over the crime" was unwarranted and that the ICC should adopt a plain reading interpretation of Article 25(3)(a).[179] Despite dissent and criticism, the ICC has continued to apply the control theory to all forms of perpetration in Article 25(3)(a) and has subsequently combined the notion of co-perpetration and indirect perpetration.

C Co-Perpetration and Indirect Perpetration Based on the Notion of Control Over the Crime

In order to properly explain the notion of "indirect co-perpetration", it is important to briefly outline the key elements of co-perpetration and indirect perpetration based on the control theory.

1 Co-perpetration

In the case of co-perpetration, the relevant leader and his fellow co-perpetrators must have a *common plan* and carry out in a coordinated manner their *essential* contributions resulting in the realisation of the actus reus elements of the crime (joint commission of the crime).[180] The Pre-Trial Chamber in *Lubanga* relied on Roxin's theory and defined "control" as "*joint control* over the crime by reason of the *essential* nature of the various contributions to the commission of the crime".[181] The Chamber acknowledged that in situations of co-perpetration, the commission of the crime results from a division of labour.[182] But

> when the objective elements of an offence are carried out by a plurality of persons acting within the framework of a common plan, only those to whom *essential tasks* have been assigned – and who, consequently, have the *power to frustrate* the

[177] Manacorda and Meloni, above n 75, at 170.
[178] *Prosecutor v Lubanga (Judgment)* ICC Trial Chamber I, ICC-01/04–01/06, 14 March 2012.
[179] *Prosecutor v Ngudjolo (Judgment Pursuant to Article 74 of the Statute)* ICC Trial Chamber II, ICC-01/04-02/12, 18 December 2012.
[180] *Lubanga,* above n 7, at [349]-[360].
[181] At [341].
[182] At [342].

> commission of the crime by not performing their tasks – can be said to have *joint control* over the crime.[183]

The key feature of co-perpetration is that all participants can frustrate the execution of the common plan by withholding their contribution to the crime.[184] The co-perpetrators liability comes from their shared *control* of the crime.[185] However, proving the "essential" nature of contribution and the ability to frustrate the crime can be difficult at trial because one has to create hypothetical situations as to how events might have unfolded without the accused's involvement.[186]

2 Indirect Perpetration

Following the *Lubanga* decision, the Pre-Trial Chamber in *Prosecutor v Katanga and Ngudjolo (Katanga and Ngudjolo)* examined the notion of committing a crime "through another person" (indirect perpetration) under Article 25(3)(a). The Chamber affirmed the adoption of the control theory and decided that in the case of indirect perpetration the control over the crime amounted to "control over the organisation", or what Roxin called *organisationsherrschaft*.[187]

To be guilty of indirect perpetration, a senior political or military leader will need to be in control of a hierarchically organised structure of power (OSP) and use physical perpetrators as a "tool" to commit the crimes.[188] From the senior leaders perspective, subordinates are not perceived as free responsible individuals, but, rather as anonymous and replaceable members of the organisation.[189] In essence, the fungibility of these subordinates means the superior's dominant will has ultimate control whether the crime will be committed and how it will be accomplished.[190] Thus, the leader's control over the apparatus allows him or her to use his or her

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[183] *Lubanga,* above n 7, at [347].
[184] Roxin *Taterschaft und Tatherrschaft,* above n 175, at 141. See also *Lubanga*, above n 7, at [332] (iii); and *Katanga and Ngudjolo*, above n 166, at [488] (b).
[185] Olásolo, above n 5, at 37, n 137.
[186] Thomas Weigend "Intent, Mistake of Law, and Co-perpetration in the *Lubanga* Decision on Confirmation of Charges" (2008) 6 JICJ 471 at 485-486.
[187] *Katanga and Ngudjolo*, above n 166; see generally Roxin *Taterschaft und Tatherrschaft*, above n 175; and Roxin "Crimes as Part of Organized Power Structures", above n 175.
[188] *Katanga and Ngudjolo*, above n 166, at [515]-[518].
[189] At [515]-[516].
[190] Roxin "Crimes as Part of Organized Power Structures", above n 175, at 200.

subordinates "as a mere gear in a giant machine" in order to produce the criminal result "automatically".[191]

The Pre Trial Chamber pointed out that the notion of OSP had been explicitly applied in a number of national jurisdictions,[192] as well as in the jurisprudence of the ICTY as part of the notion of JCE-at-leadership-level.[193] In *Katanga and Ngudjolo*, the Chamber relied on the *Juntas* Trial carried out in Argentina and the *German Border* case as hallmark applications where the defendants were convicted for the crimes of their subordinates under the notion of OSP.[194]

In regards to the mens rea for both indirect perpetration and co-perpetration, the relevant leader must be aware of the factual circumstances enabling him to jointly control the crime or have control over the OSP, and have "awareness of the substantial likelihood that the crimes would occur".[195] The mens rea elements for JCE are more stringent than co-perpetration and indirect perpetration based on control over the crime. JCE requires that all participants share the aim to commit the crimes of the common plan, but compensates with a low-level contribution by the senior political or military leader to become a participant in the enterprise.[196] Furthermore, it is important to note that, unlike JCE, co-perpetration and indirect perpetration do not allow liability for "foreseeable" crimes.[197] The ICTY inclusion of these crimes under the extended category of JCE was widely criticised for breaching the general principle of culpability and excluding liability for such crimes in the ICC is a significant improvement.

The ICC's importation of the control theory had provided precision and specificity to the elements of each form of liability, something the JCE certainly lacked. Nevertheless, these two modes of liability (co-perpetration and indirect perpetration) could not fully address the specific systematic nature of international crimes. Situations arose where senior political or military leaders stood outside the realms of both co-perpetration and indirect perpetration. These were situations where senior

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[191] *Katanga and Ngudjolo*, above n 166, at [515].
[192] Olásolo, above n 5, at 125, n 209.
[193] *Stakić*, above n 7.
[194] Olásolo, above n 5, at 126.
[195] *Lubanga,* above n 7, at [361]-[365]; and *Katanga and Ngudjolo*, above n 166, at [538]-[539].
[196] Olásolo, above n 5, at 283.
[197] At 283.

political or military leaders were part of a common plan to execute the commission of crimes through subordinates, but did not *participate* in the commission of the crime, or *instruct* their subordinates, neither co-perpetration nor indirect perpetration could be applied independently to hold them principally liable. As a solution, the ICC combined these two modes of liability to jointly hold senior political and military leaders liable as indirect co-perpetrators (principals) of the crimes.

VI Indirect Co-Perpetration

In *Katanga and Ngudjolo*, the ICC first combined the concepts of co-perpetration and indirect perpetration, thus creating the novel concept of indirect co-perpetration. There has been dissent within the ICC and criticism from a few scholars who have directly addressed the question of whether the ad hoc combination of these modes of liability is appropriate. Nevertheless, indirect co-perpetration appears now to be the ICC's key prosecutorial tool. There are conceptual similarities between JCE-a-leadership-level and indirect co-perpetration but in sum the ICC's new mode of liability has resulted in a significant improvement on the notion of JCE. Despite advancement, as indirect co-perpetration evolves, ambiguities arise as to the concept of "control" and the doctrine lacks the precision and specificity the ICC thought it would entail.

A Formation of Indirect Co-Perpetration

1 Combining modes of liability

In *Katanga and Ngudjolo*, the Pre-Trial Chamber applied this mode of liability in order to overcome the difficulties of categorising the two accused as principals for the crimes physically carried out by members of two military organisations under their control during a joint attack on a village.[198] In this case, some of the members of the organisations only accepted orders from the leader of their own ethnic group.[199] Consequently, indirect perpetration could not be applied because it was not possible to identify to which specific armed group the direct perpetrators of each crime belonged. Additionally, co-perpetration could also not be applied because neither of the accused member had directly committed the crimes that took place during the attack. Ultimately, the success of the attack was dependent on the common plan between Katanga and Ngudjolo to combine their forces in a coordinated manner and use their respective subordinates to perpetrate the atrocities.[200] As a result, the judges held that:

> an individual who has no control over the person through whom the crimes would be committed cannot be said to commit the crimes by means of that other person. However, if *he acts jointly with another individual—one who controls the person*

[198] Manacorda and Meloni, above n 75, at 172.
[199] *Katanga and Ngudjolo,* above n 166, at [493].
[200] Manacorda and Meloni, above n 75, at 172.

> *used as an instrument*—these crimes can be attributed to him on the basis of mutual attribution.[201]

As a result, under indirect co-perpetration, both Katanga and Ngudjolo became principally liable not just for the crimes of their own troops but also the crimes of each other's subordinates.[202]

The Chamber acknowledged that Article 25(3)(a) of the ICC Statute does not include the notion of "indirect co-perpetration",[203] but the Chamber notes that Article 25(3)(a) states "jointly with another person *or* through another person".[204] The Chamber held it was justified to combine modes of liability because the connective "or" meant, "either one or the other, and possibly both".[205] The Chamber affirmed that:

> There are no legal grounds for limiting the joint commission of the crime solely to cases in which the perpetrators execute a portion of the crime by exercising direct control over it. Rather, through a *combination* of individual responsibility for committing crimes *through another person together* with the mutual attribution among the *co-perpetrators* at the senior level, a mode of liability arises, which allows the Court to asses the blameworthiness of "senior leaders" adequately.[206]

Interestingly, as discussed earlier, the ICTY had previously attempted to apply this notion of indirect co-perpetration in *Stakić*, albeit under the term "co-perpetratorship".[207] However, unsurprisingly the Appeals Chamber reversed the Trial Chamber decision and declared "this mode of liability…does not have support in customary international law or in the settled jurisprudence of this Tribunal.[208] Nevertheless, in *Katanga and Ngudjolo*, the ICC held that this rejection by the ICTY was immaterial to it because the ICC Statute expressly provides for this mode of liability; therefore, the Court does not need to do as the ICTY did in questioning whether customary law admits or discards the concept.[209]

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[201] *Katanga and Ngudjolo,* above n 166, at [493].
[202] At [484].
[203] At [490].
[204] At [490].
[205] At [490].
[206] At [492].
[207] *Prosecutor v Stakić,* above n 112.
[208] *Stakić,* above n 7, at [62].
[209] *Katanga and Ngudjolo,* above n 166, at [507].

However, in the *Ngudjolo* acquittal, Judge Van den Wyngaert concludes that Article 25(3)(a) outlines perpetration "jointly with another" and "through another person", but makes no mention of the theory of indirect perpetration.[210] Furthermore, Van den Wyngaert argued that there was nothing in the text of Article 25 to justify or make possible such an ad hoc combination of two modes of liability.[211] Scholars have argued that this combination is a novel judicial development that has no basis in Roxin's original theory, which made no mention of an indirect co-perpetrator.[212] Moreover, national legal systems that have relied on Roxin's control theory, did not apply the concept of indirect co-perpetration.[213]

Whether this form of indirect co-perpetration is recognised by international criminal law remains unclear.[214] The question of whether special modes of liability can be combined without special justification is open to debate. An important debate considering that the ICC has embraced the notion of indirect co-perpetration in many recent indictments to hold senior political and military leaders liable as principals to the crimes committed by their subordinates. Including the high profile case of *Prosecutor v Al-Bashir (Al-Bashir)*,[215] *Bemba*,[216] and the Kenya cases.[217] So what elements make a senior political or military leader liable as a principal to the crimes committed by their subordinates.

2 Elements of indirect co-perpetration

In theory, one might assume that indirect co-perpetration, as a combination of co-perpetration and indirect perpetration, that the elements could be identified simply by

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[210] *Prosecutor v Ngudjolo (Judgment)* ICC Trial Chamber II, ICC-01/04-02/12, 18 December 2012 at [59].
[211] At [60].
[212] See generally Roxin *Taterschaft und Tatherrschaft,* above n 175.
[213] Jens David Ohlin "Second Order Linking Principles: Combining Vertical and Horizontal Modes of Liability" (14 September 2014) Cornell Law Faculty Publications <http://scholarship.law.cornell.edu/facpub/577/?utm_source=scholarship.law.cornell.edu%2Ffacpub%2F577&utm_medium=PDF&utm_campaign=PDFCoverPages > at 777.
[214] Manacorda and Meloni, above n 75, at 174.
[215] *Prosecutor v Al Bashir (Warrant of Arrest)* ICC Pre-Trial Chamber I, ICC-02/05-01/09-3), 4 March 2009 [*Al-Bashir*].
[216] *Prosecutor v Bemba (Warrant of Arrest)* ICC Pre-Trial Chamber III, ICC-01/05-01/08-14-Ten, 10 June 2008.
[217] *Prosecutor v Ruto and Sang (Decision on Confirmation of Charges)* ICC Appeals Chamber ICC-01/09-01/11, 23 January 2012; and *Prosecutor v Muthaura and Kenyatta (Decision on Confirmation of Charges)* ICC Pre-Trial Chamber II, ICC-01/09-02/11, 23 January 2012.

– simultaneously applying the criteria for each of the two modes of liability. Indeed, the ICC has claimed that in order for a senior political or military leader to be principally liable as an indirect co-perpetration, Prosecution would need to prove the fulfillment of the actus reus and the mens rea elements of *both* co-perpetration and indirect perpetration.[218]

In summary conjunction of these two modalities will require the following actus reus elements:

(i) an agreement or common criminal plan amongst all co-perpetrators;

(ii) each co-perpetrator needs to make an essential contribution to the implementation of the common plan; and

(iii) the existence of an OSP, that the senior political or military leader controls to secure the execution of the objective elements of the crime.[219]

Also the following mens reas elements:

(i) the leader must fulfill the mens rea elements of the offence in question, including any ulterior intent; and

(ii) all co-perpetrators must share the awareness and acceptance of the substantial likelihood that the crimes would occur when implementing the common plan; and

(iii) the relevant leader must be aware of their position of authority and their ability to frustrate implementation of the common plan.[220]

In *Muthaura and Kenyatta*,[221] the court found the defendants satisfied all elements of indirect co-perpetration. They established a common plan between Mr. Muthaura, Mr. Kenyatta and others to attack in Nakuru and Naivasha.[222] The court found both defendants made essential contributions by forming links and agreements with leaders regarding the commission of the crimes.[223] Finally, the court ruled that the Mungiki

[218] *Prosecutor v Ruto and Sang,* above n 217, at [292]; *Prosecutor v Muthaura and Kenyatta*, above n 217, at [399]-[419]; *Prosecutor v Bemba,* above n 216, at [350]-[351]; *Katanga and Ngudjolo*, above n 166, at [500]-[514] and [527]-[539]; and *Al-Bashir*, above n 215, at [209]-[213].
[219] Olásolo, above n 5, at 307.
[220] At 307.
[221] *Prosecutor v Muthaura and Kenyatta,* above n 217.
[222] At [399]-[400].
[223] At [404]-[406].

was a legitimate hierarchical OSP and that the defendants had control over it for the purposes of the commission of the crimes.[224] In regards to the mens reas, the court held both defendants fulfilled all mens rea requirements.[225]

In terms of legality, indirect co-perpetration has marked progress on the ICTY's doctrine of JCE. As discussed earlier, JCE had various categories of JCE, with an overlap of elements but also notable differences. Contrastingly, the acuts reus elements and the mens rea elements required for principal liability under indirect co-perpetration are specific, precise and consistently laid down and applied by the ICC.

More importantly, indirect co-perpetration has made a positive theoretical improvement on JCE-at-leadership-level conflated criterion for distinguishing principals and accessories. Under indirect co-perpetration, the distinction between principal and accessories is based on a materially objective approach that focuses on "control" over the crime, whether it is joint control through an essential contribution and control over an OSP. As opposed to the subjective approach of JCE-at-leadership-level as explained earlier, which conflated the controlling criterion for distinguishing principals from accessories. Uncertainty arose as to whether it was the subjective intent to commit the common plan or the indirect perpetration, which made the senior political or military leader liable as a principal. Ambos observes that the functional control of persons over commission of the crime is the "most convincing criteria" of distinguishing between principal co-perpetrators and mere accessories.[226] Indirect co-perpetration requires more precise and specific evidence of control for principal liability and is therefore more respectful of the principles of legality and culpability than JCE. However, that precision lies only in Roxin's theory itself, and application to concrete cases with complex facts has created difficulty.

(a) Critique of elements of indirect co-perpetration

It would seem illogical to prove both modes of liability because prosecutors could simply proceed with *one* of these doctrines as their theory of the case instead of proving both. Indirect co-perpetration appears to require something more. Scholars have suggested that the critical issue is the identification of the accused's source of

[224] *Prosecutor v Muthaura and Kenyatta*, above n 217, at [407]-[409].
[225] At [413]-[419].
[226] Ambos, above n 61, at 170.

"control",[227] – whether it be through an essential contribution or control over an organised structure of power. At a theoretical level, having two objective elements of centered around the idea of control has created difficulty in determining the nature of attribution. It is difficult to know exactly what controlling act by the senior political or military leader makes him liable as a principal. Is it his essential contribution? Or his control over the OSP? Or both?

At a practical level, the ICC has struggled specifically identifying this source of "control". In regard to proving control via a hierarchical OSP, Judge Van den Wyngaert has strongly dissented that requiring the Prosecution to prove such a structure with special features (outlined earlier), has created an unnecessary and burdensome element for the Prosecution to prove.[228] She argues that the Statute specifies that liability can attach when an individual commits a crime "through another person", and that there is no mention whatsoever of an organised structure of power.[229] The requirement a hierarchical structure works well for charging senior political or military leaders within the framework of strictly hierarchically structured contexts, such as the crimes committed in Nazi Germany or in Communist Germany, for which this doctrine was originally conceived.[230] However, it is less appropriate for crimes committed in the context of informal structures of power, such as those that exist in the conflicts in Africa, which are currently under the jurisdiction of the ICC.[231] Often African rebel insurgencies that have emerged in a modern day context are decentralised and may not fulfill the specific elements required for an OSP (automatic compliance, fungibility of subordinates).

Take the example of child soldiers fighting for rebel movements like the Lord's Resistance Army in Uganda. These fighters tend to have grown up with the rebel groups and become committed to their ideological cause. Joseph Kony's authority over his child soldiers was more spiritualistic and charismatic than formally hierarchical. Instead of senior political and military leaders being said to have *control*

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[227] See generally Thomas Weigend "Perpetration through an Organization: The Unexpected Career of a German Legal Concept" (2011) 9 JICJ 91 at 110–11; and Olasolo, above n 5, at 306–30.
[228] *Prosecutor v Ngudjolo,* above n 210, at [52]-[55].
[229] At [52]-[55].
[230] Manacorda and Meloni, above n 75, at 171.
[231] See generally Mark Osiel "Perpetration by Hierarchical Organization" (22 April 2009) ICC < http://www.icc-cpi.int/NR/rdonlyres/9FCE9732-65A3-4997-B74E-A4B3ABE144CF/280586/PresentationMOsiel1.pdf>

over the subordinates, the fighter's dedication to the group appears to be more voluntarily based. Additionally, situations arise where lower-level commanders take control of situations and commit crimes with an agenda of their own. In these instances of usurpation, senior political and military leaders cannot be said to have *control*.[232] Frequently senior political and military leaders of these African rebel movements tend to have a high degree of trust between them, and their lines of de facto authority over subordinates shift where emergencies arise. This sort of cohesion is not present in all insurgencies, but where it has arisen it makes it difficult to pinpoint the exact nature and location of the control. It appears that the ICC's adoption of Roxin's theory of control over an organisation is outdated to the modern understanding of responsibility for mass atrocity. If such difficulty continues, it may be best if the ICC abandon the hierarchical organisation requirement.

4 Broad scope of indirect co-perpetration

Indirect co-perpetration has been developed to cover a broad scope of situations and can only be described as a truly potent prosecutorial tool. There are several various ways that cases of indirect co-perpetration may arise. Firstly, it can arise in the *Katanga and Ngudjolo*-like situation discussed above: where indirect perpetrators coordinated their own distinct OSP to physically perpetrate the crimes.[233] Secondly, it can arise in the situations that involve the structure described by the Pre-Trial Chamber in *Al-Bashir,* where the accused was characterised as collaborating with other high-ranking Sudanese political and military leaders in "directing the branches of the 'apparatus' of the State of Sudan that they led, in a coordinated manner, in order to jointly implement the common plan".[234] This could be described as a "junta model" if it turns out that the leaders exercised their control *as a group* over the vertical branches, rather than exercising individual control.[235] The third possibility involves a horizontal group of military and political leaders, who each control a vertical branch of governmental authority, though only some of the vertical branches are engaged in the physical commission of the crimes. The *Bemba* case is good

[232] Osiel, above n 231, at 24-25.
[233] *Katanga and Ngudjolo,* above n 166.
[234] *Al-Bashir,* above n 215, at [216].
[235] Ohlin, above n 213, at 779.

example of this third structure.[236] In *Bemba*, the defendant was accused of being the commander-in-chief of the Movement for the Liberation of Congomilitia and of co-perpetrating his crimes with former Central African Republic president Ange-Félix Patassé.[237] Although Patassé also controlled a separate hierarchical OSP (his Presidential Security Unit), the crimes were physically committed by Bemba's troops. Lastly, there can be a situation, as in *Stakić*, where a senior political or military leader does not have his or her own OSP at their disposal.

(a) Critique of broad nature of indirect co-perpetration

In the latter two scenarios, the mode of liability resembles an inverted-L-shaped form of indirect co-perpetration, notably similar to JCE-at-leadership-level. Under this scheme, the senior leaders would be linked together under co-perpetration, then one of them would be linked vertically to the physical perpetrators via indirect perpetration. Under this theory, the court can trace the line of responsibility from the physical perpetrator not only to the indirect perpetrator who controlled them, but also to the co-perpetrator at leadership-level who was cooperating with the indirect perpetrator. The L-shaped structure involves a form of double vicarious attribution.[238] Firstly, the physical perpetrators acts are vicariously attributed to the indirect perpetrator and then, as a second step, the indirect perpetrator's *vicarious liability* is attributed to the other co-perpetrators.[239] It is arguable that such a weak and attenuated link to the physical perpetrator demands some theoretical scrutiny. Some scholars have suggested that the ICC need to point to a justification for allowing such an expansive cross-liability theory like indirect co-perpetration.[240]

Indirect co-perpetration in this form looks very similar to JCE-at-leadership level. Both modes of liability are attempting to create parallel liability at both leadership-level and execution level. However it is important to recognise that indirect co-

[236] *Prosecutor v Bemba (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute)* ICC Pre Trial Chamber II, ICC-01/05 -01/08, 5 June 2009 at [370].
[237] *Prosecutor v Bemba*, above n 216, at [373]. Although the Pre-Trial Chamber continuously referred to Bemba as a co-perpetrator, their description of his control over Movement for the Liberation of Congomilitia troops, as well as his co-perpetration with former Central African Republic president Angel-Felix Patasse, suggests that he was an indirect co-perpetrator.
[238] Ohlin, above n 213, at 781.
[239] At 783.
[240] See generally Ohlin, above n 213. Suggests personality principle to link horizontal and vertical liability.

perpetration has managed to maintain the link with the physical perpetrator, whereas JCE-at-leadership-level had to "delink" the leadership level from the execution level.

Ultimately indirect co-perpetration did not provide the specificity, precision and limitation of liability that some expected it to bring. It has evolved into an expansive doctrine with ambiguities and theoretical difficulties. Nevertheless, the ICC's formation of indirect co-perpetration has made a conceptual improvement on the notion of JCE.

B Indirect Co-perpetration Compared to JCE-at-Leadership-Level

On paper, indirect co-perpetration and JCE-at-leadership-level may appear different, but essentially the differences between the jurisprudence of the ICC and the ICTY are more apparent than real.

On a conceptual level, both JCE-at-the-leadership-level and indirect co-perpetration share distinctive, *sui generis*, features. Both modalities are based upon the concept of co-perpetration, whereby senior political and military leaders working together in a horizontal relationship control or dominate the commission of the crime by virtue of a hierarchical organisation, and thus become liable as principals for their subordinates actions.

On a basic level, both modes of liability require proof of slightly different elements however a certain overlap can be detected. Both modes of liability require a common plan and the control over another person. However, on a deeper level they diverge by relying on different principles of attribution: "control" for indirect perpetration and "intent to commit the common plan"/"indirect perpetration" for JCE-at-leadership-level.

Both modalities directly derive from national legal systems, however they have both shifted away from their domestic roots and become genuine inventions in international criminal law specifically attuned to the systematic nature of international criminal law.[241] The ICTY and the ICC have attempted to create parallel liability, at

[241] Ohlin, above n 213, at 294.

leadership-level and execution level, to address the responsibility for senior political and military leaders who are in fact the intellectual perpetrators and can be considered most responsible for the international crimes while being far removed from the scene of the crime.[242] Such parallel liability differs from traditional modes of liability and creates a structure that poses problems with attributing liability.[243] As Ohlin submits "the ICC's problem of combining modes of liability is structurally identical to the ICTY's problem of linking a leadership level JCE with the RPP (relevant physical perpetrator)".[244]

Despite criticism, the use of indirect co-perpetration and JCE remains justified while international criminal law continues to develop and consider alternative options of liability for senior leaders. It is essential that the centers of power behind the decision making to carry out the most egregious crimes against the international community are held accountable.

[242] van Sliedgret, above n 1, at 294.
[243] At 316.
[244] At 316.

VII Where to From Here?

The ICC has made undoubtedly made advances on the criticisms and pitfalls of JCE. In light of this, and the ICTY's completion strategy,[245] the following recommendations will focus on the direction the ICC should take from here.

A Recommendations for the ICC

1 Remove the OSP requirement

It would be best if the ICC did not require the Prosecution to prove the rigid elements of an OSP under indirect co-perpetration (and indirect perpetration). As explained earlier, the ICC is struggling to prove that rebel and insurgents groups in the African context meet the specific elements of an OSP. The commission of international crimes is no longer confined to these structured hierarchical organisations. As Judge Van den Wyngaert suggested, the ICC should read the plain language of the Statute to commit a crime "through another person", rather than "through an organisation".[246]

2 Unitary approach to sentencing

The ICC could choose to differentiate between principals and accessories, but take a unitary approach to sentencing. The main intention of the ICC in using indirect co-perpetration was to make senior leaders responsible as *principals* to the crime. However, it is important to remember that there are a large variety of accessory modes of liability that are easier to prove and most leaders would indisputably be liable for. Article 25(3)(b), (c) and (d) outline modes of liability such as: aiding and abetting, ordering, inciting, soliciting and article 25(3)(e) even leaves a residual mode of liability for someone who "contributes in any other way".[247] Furthermore, Article 28 makes a commander or superior criminally responsible for their subordinates if they satisfy the necessary elements.[248] Given that the ICC Statute is premised on a unitary approach to sentencing: no fixed sentences, or sentence reductions are attached to modes of liability.[249] Ultimately, if the Prosecution pleaded one of the

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[245] United Nations, above n 18. The completion strategy is a plan to make sure that the Tribunal concludes its mission successfully, in a timely way and in coordination with domestic legal systems in the former Yugoslavia.
[246] *Prosecutor v Ngudjolo,* above n 210, at [56].
[247] *Rome Statute of the International Criminal Court,* above n 164, article 25(3).
[248] Article 28.
[249] van Sliedregt, above n 1, at 154.

modes of liability outlined above and the senior leader fulfilled the necessary elements, they could be charged just as equally as a principal to the crime.

Although this approach would ensure that senior leaders are given an appropriate sentence, referring to them as *accessories* does not adequately reflect the magnitude of their involvement as the masterminds and controllers behind these mass atrocities. It would be best if international criminal law continues to search for a mode of liability that accurately labels them as *principals* to the crimes.

B Collective Liability?

Traditionally individual attribution of responsibility has always been characterised by the *individual* commission of distinct crimes.[250] However, international crime is inherently collective therefore, a new approach to allocating responsibility of individuals may be required.

Authors such as Ambos have signaled international criminal law retreat from the individual responsibility and develop a *mixed system of individual-collective responsibility*.[251] According to this mixed system of responsibility, the criminal enterprise or organisation as a whole serves as the entity upon which attribution of criminal responsibility is based.[252] The doctrine makes a distinction between the contextual element of the crime (*Zurechnungsprinzip Gesamttat*) and its specific element (*Einzeltat*).[253] Instead of looking at the specific crime in question, the doctrine will focus on the "global act" or "overall plan" (the criminal enterprise).[254]

In *Lubanga* the court noted that "[n]one of the participants exercises, individually, control over the crime as a whole but, instead, the control over the crime falls in the hands of a collective as such".[255] If the ICC is going to rely on the collective nature of the horizontal group, then instead of relying on remarks about joint control – a standard that was developed by Roxin for co-perpetration and not indirect co-

[250] Olásolo, above n 5, at 335.
[251] Kai Ambos "Command Responsibility and Organisationsherrschaft" in Andre Nollkaemper and Harmen van de Wilt (ed) *System Criminality in International Law* (Cambridge University Press, Cambridge, 2009) 127 at 157.
[252] Olásolo, above n 5, at 335.
[253] Manacorda and Meloni, above n 75, at 177-178, n 90.
[254] At 178.
[255] *Lubanga,* above n 7, at [994].

perpetration per se, the ICC would need to consider what makes a horizontal group at leadership-level a *collective*, in the sense for ascribing criminal liability to all indirect co-perpetrators.

Naturally, criminal law scholars object that this doctrine looks somewhat similar to the widely criticised criminalisation of Nazi organisations in the Nuremberg Tribunals.[256] Furthermore, that it would threaten the principle of individual culpability by allowing for guilt by association. It would no longer be about individual blameworthiness, rather, guilt based on a *connection* to an enterprise. Indeed, it is necessary to be wary of lofty; over expansive doctrines as in the end the individual is the one who suffers punishment. The theory will need to be careful not to completely dissolve the individual into the collective mass, but chart the horizontal relationships between its members. Domestic concepts have struggled to apply to the context of inherently collective international crimes and thus, a doctrine of mixed individual-collective responsibility may be necessary.

[256] See generally United States Office of the Historian "The Nuremberg Trial and the Tokyo War Crimes Trials (1945–1948)" (30 September 2014) United States Department of the State < https://history.state.gov/milestones/1945-1952/nuremberg>.

VIII Conclusion

International criminal law has developed two alternative modes of liability to hold senior political and military leaders liable as co-perpetrators (principals) to the crimes committed by their subordinates. The ICTY adopted the Anglo-American notion of JCE and morphed it into JCE-at-leadership-level. Following this, the ICC clearly displayed that it does not feel bound or even guided by the ICTY jurisprudence and rejected the doctrine of JCE. Instead, the ICC adopted German principles concerned with the notion of control over the crime and combined modes of liability to form the doctrine of of indirect co-perpetration.

Neither of these concepts are a perfect mode of liability for charging senior political and military leaders as *principals* to the crimes. They have both shifted from their original domestic law origins to try to cater for the systematic nature of international crimes. As a result, scholars have raised some legitimate and serious concerns. Both JCE and indirect co-perpetration have been criticised for their expansive nature, imprecision and encroachment on general criminal law principles.

On a conceptual level these modes of liability share similar attributes. Nevertheless, the ICC's notion indirect co-perpetration was undoubtedly a step forward from JCE as it provided more specificity and precision, particularly regarding the distinguishing criterion between principals and accessories. However, not all the problems related to the notion of perpetration of international crimes by senior leaders have been solved, and some problems and inconsistencies still arise before the ICC.

In order to move forward and overcome such difficulties, it is best that in future cases the ICC interpret the plain language of Article 25(3) "through another person". In doing so, the ICC will no longer have to prove the rigid requirement of an OSP, which most modern day criminal structures do not adhere to. In cases where the Prosecution cannot prove that senior leaders fulfill the necessary elements of JCE-at-leadership-level or indirect co-perpetration, the ICC should rely on other modes of liability to hold them accountable and sentence them unitarily to the physical perpetrators (principals) of the crime. Whilst this approach is legitimate and will be successful in most cases, it is problematic. Although these leaders do not physically perpetrate the crimes, they are the masterminds behind these atrocities and the ones most responsible. Referring to them as mere accessories does not sufficiently indicate

the significance of their involvement. International criminal law should seek to develop a mode of liability or attribution that takes into account the specific systematic, widespread nature of international crimes and holds senior leaders *principally* liable for the crimes.

It is difficult to know exactly what this may look like, but a possibility is imputing liability to the collective organisation. According to this theory, Prosecution will no longer carry the burdensome task of proofing evidence that directly links the senior political or military leader to the commission of the crime. Instead, it will be about proving that the horizontal relationship between leaders should be considered a collective organisation, which all crimes are attributable to. A generation ago, Roxin developed *organisationsherrschaft* to impute liability to leaders of vertical organisations. Now, this generation needs a doctrine for horizontal ones. It is no longer just indirect perpetration *through* an organisation but indirect perpetration *by* an organisation.

As a consequence of the continually evolving nature of international crimes, international criminal law must consider adapting current approaches and exploring new approaches to criminal participation that can provide the judges with the proper tools to address the criminal responsibility of senior political and military leaders as principals for the commission of mass atrocities.

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