Joint Criminal Enterprise and the International Criminal Court

- A Comparison between Joint Criminal Enterprise and the Modes of Liability in Joint Commission in Crime under the Rome Statute; Can the International Criminal Court Apply Joint Criminal Enterprise as a Mode of Liability?

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Abstract

Keywords: International Criminal Law, Individual Criminal Responsibility, Modes of Liability, Joint Criminal Enterprise, Co-perpetration, Indirect Perpetration, ICC, ICTY, ICTR, ECCC, SCSR.

There are currently two main doctrines for establishing guilt for joint commission of crime in international criminal law: the doctrine of joint criminal enterprise (JCE), applied by international criminal tribunals and hybrid courts, and the “control of the crime” theory applied by the International Criminal Court (ICC) under the Rome Statute.

In this thesis, a comparative analysis between these two doctrines is made. The thesis also aims to address the question of whether it is open for the ICC to apply the doctrine of joint criminal enterprise as a mode of liability, under its Rome Statute mandate.

JCE was introduced by the Appeals Chamber in the Tadić case in 1999. JCE confers criminal responsibility on a defendant for his or her participation in a group’s common criminal plan. It focuses on the subjective elements of the crime in order to hold the accused responsible for participation in crime.

The Rome Statute was adopted prior to the establishment of JCE and the ICC has, in its jurisprudence, chosen to rely on the “control of the crime” theory to interpret the provisions on the modes of liability for joint commission in crime. This theory, on the other hand, focuses on the objective elements in order to hold accused responsible for participation in crime.

The broader conclusion drawn in this thesis is that there are many similarities between the principal modes of liability under the Rome Statute and JCE. Nevertheless, with the current interpretations of the judges in the ICC, amongst other reasons, this thesis argues that the Court is unlikely to apply JCE as a mode of liability. There are, however, indications that different interpretations of the Statute could be made in the future.
Summary in Swedish

Det finns för närvarande två huvudsakliga doktriner för straffansvar för gemensamt ansvar för brott i internationell straffrätt. De två doktrinerna är Joint Criminal Enterprise (JCE), tillämpad av de internationella tribunalerna samt hybrid-domstolarna och kontrollteorin, som tillämpas av Internationella brottmålsdomstolen i tolkningen av domstolens stadga.

I detta examensarbete görs en jämförande analys mellan dessa JCE och straffansvarsbestämmelserna i Internationella Brottmålsdomstolens stadga. Examensarbetet undersöker om den Internationella brottmålsdomstolen kan tillämpa läran om JCE som en form av straffansvar.


Romstadgan antogs före doktrinen om JCE etablerades och domstolen har i sin tolkning av stadgan valt att förlita sig på teorin om ”joint control of the crime” (på svenska: gemensam kontroll över brottet) i tolkningen av stadgans straffansvarsbestämmelser för brott som begås gemensamt. Kontrollteorin fokuserar på de objektiva elementen för att hålla den anklagade ansvarig för deltagande i brott.

De slutsatser som framkommer i examensarbetet är att det finns flera likheter mellan JCE och Romstadgans straffansvarsbestämmelser, emellertid är det inte möjligt för den Internationella brottmålsdomstolens att tillämpa JCE med den nuvarande tolkningen av stadgan. Det finns dock indikationer på att nuvarande tolkning av stadgan kan komma att frångå i framtiden.
Preface

I would like to thank everyone who has encouraged and helped me in the process of writing this thesis. Special thanks to my supervisor, Mark Klamberg, for his suggestions, support and encouragement through this study.

I would also like to give a warm thank you to my supervisor at the Embassy of Sweden, Sara Lindegren, First Secretary. I had the opportunity to be an intern in the Multilateral Unit at the Embassy of Sweden in The Hague, The Netherlands during the fall of 2012. During my time at the Embassy, I gained valuable knowledge of, amongst other things, international criminal law, and my interest in the field grew even stronger.

Finally, I would like to give a special thank you to Ergün Cakal, Karin Sjögren and My Lennerstad for their help, support and encouragement.

Sofia Lord
**Abbreviations**

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<tr>
<th>Abbreviation</th>
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<td>AC</td>
<td>Appeals Chamber</td>
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<td>ECCC</td>
<td>Extraordinary Chambers in the Courts of Cambodia</td>
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<td>Genocide Convention</td>
<td>Convention on the Prevention and Punishment of Genocide of 1948</td>
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<td>ICC</td>
<td>International Criminal Court</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
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<td>ICTY</td>
<td>International Criminal Tribunal for the Former Yugoslavia</td>
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<td>IMT</td>
<td>International Military Tribunal</td>
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<td>JCE</td>
<td>Joint Criminal Enterprise</td>
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<td>STL</td>
<td>Special Tribunal for Lebanon</td>
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<td>PTC</td>
<td>Pre-Trial Chamber</td>
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<td>POW</td>
<td>Prisoner of War</td>
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<td>SCSL</td>
<td>Special Court for Sierra Leone</td>
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<td>SICT</td>
<td>Supreme Iraqi Criminal Tribunal</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UNSC</td>
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1. Introduction

1.1 Introduction and Purpose

The principle of individual criminal responsibility is a principle that international criminal law (hereinafter “ICL”) has been founded upon since the trials in the aftermath of World War II. International crimes, however, are most often committed by groups. Mass crimes or atrocities often involve a plurality of perpetrators who all engage in the collective criminal activity, each performing important and interrelated aspects of the larger crime. There is an ambivalent relationship in ICL between individuals and groups, and also between individual punishment and collective criminality. ICL balances two important objectives: prosecuting those most responsible for international crimes in order to ensure justice and end impunity, as well as ensuring individual criminal responsibility and fair trial standards.

Joint Criminal Enterprise (hereinafter “JCE”) is a mode of liability introduced by the International Criminal Tribunal for the former Yugoslavia \(^1\) (hereinafter “ICTY” or “the Tribunal”) in the Appeals Chamber in the Tadić case in 1999. \(^2\) JCE imposes individual criminal responsibility on a defendant for his or her participation in a group’s common criminal plan. There, the Tribunal argued that the mode of liability was part of customary international law and, therefore, applicable law for the Tribunal. Since the doctrine of JCE was introduced in Tadić, it has developed through case law and is one of the most commonly used modes of liability in international courts and tribunals today. JCE, or categories of JCE, can also be found in national jurisdictions, mainly common law jurisdictions.

JCE has been praised for its ability to hold individuals accountable for international crimes. The doctrine has, however, also been heavily criticized, especially in its extended form (JCE III). There is a large dispute over whether it was customary international law when it was first applied by the ICTY or if it is a product of judicial creativity. JCE, especially extended JCE,

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\(^1\) Full name; The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991.

has also been criticised because it is said to provide an unfairly limited opportunity to the accused to advance a defence, and that it could conceivably lead to guilt by association.³

The International Criminal Court (hereinafter “ICC” or “the Court”) has better defined modes of liability in comparison to the ICTY and the International Criminal Tribunal for Rwanda (hereinafter “ICTR”). The Rome Statute does not explicitly provide JCE as a mode of liability. However, arguably, JCE could be read into the modes of liability in Article 25(3)(1) which provides for criminal responsibility for anyone who commits a crime jointly with another person and through another person. It could also be argued that Article 25(3)(d) incorporates JCE as it refers to crimes committed by groups acting with a common purpose.

However, the ICC has rejected JCE as being part of its jurisprudence on the basis that it is not consistent with the Statute. Instead, the Court has chosen to rely on the “control of the crime” theory in order to hold accountable those most responsible.

There is reason to study how the modes of liability of co-perpetration and indirect perpetration as stated in Article 25(3)(a) as well as Article 25(3)(d) in the Rome Statute, corresponds to the doctrine of JCE. The Rome Statute also recognizes customary international law as a source of law. Therefore, if JCE is recognised as such, the Court may still be able to apply the doctrine. The ICC has explored the different modes of liability for collective crimes in several cases and now also in Lubanga,⁴ one of its two judgments. There is, however, confusion and dispute among judges and scholars over how to best interpret and apply the Statue in this regard, and whether it contains any form of JCE. It has been argued that clarifying the confusing contours of the Rome Statute’s provisions on group complicity and the relationship to JCE is the most pressing issue facing the Assembly of State Parties for the ICC.⁵

The ICTY and the ICTR have contributed tremendously to the developments and fast growth of ICL. Although it remains controversial, the development of JCE has been very important to both the tribunals and other courts. As the tribunals are preparing to close down and the International Criminal Court, after ten years of existence, is starting to deliver judgments, it is important to study the broader legal legacy of the tribunals and their contributions to ICL.

The purpose of this study is to clarify the similarities and differences between JCE and the modes of liability under the Rome Statute and, in doing so, it will aim to gain a better understanding of what the implications are for the Court as well as the tribunals and the hybrid courts. The other questions this study intends to answer include: i. whether or not the ICC can apply JCE as a mode of liability; ii. whether JCE or the modes of liability under the Rome Statute better protects the principle of *nulla poena sine culpa*;6 and iii. whether JCE or the modes of liability under the Rome Statute is more appropriate for international crimes carried out by groups in the context of modern armed conflicts.

1.2 Methodology

This is a comparative study between the modes the modes of liability for collective action in ICL. The method for the study will be to analyse the jurisprudence of the ICC and the U.N. ad-hoc tribunals, namely the ICTY and ICTR, and the hybrid courts of ECCC and the Special Court for Sierra Leone (hereinafter “SCSL”) regarding the use of JCE and other modes of liability for collective action in prosecution. Case law is a secondary source of international law. In practice, however, it serves as an important source of law for the courts and tribunals. The primary sources of law, the Rome Statute, and the statutes for the UN-tribunals will be studied. To be able to analyse the legal framework from a critical view, literature from scholars within ICL will be reviewed. After having established the historical and judicial basis for the different modes of liability, the different elements of the two will be compared and contrasted.

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6 The definition of the term is; an individual can be criminally responsible only for acts in which he or she was personally engaged or in some other way participated.
1.3 Delimitation

Due to the limited scope of this study, the account on the development of the doctrine of JCE will largely be limited to the major developments in the ICTY as well as in the ICTR, the SCSL and the ECCC. The modes of liability that will be studied in the ICC will be limited to the principal modes of liability in Article 25(3)(a) and contribution to a crime by a group of persons in Article 25(3)(d). Therefore, ordering, soliciting, inducing, aiding and abetting or command responsibility will not be studied.

1.4 Structure of Analysis

The thesis is divided into six chapters. Following this introduction chapter two will introduce the subject of ICL and its legal sources, and provides an account of individual criminal responsibility in ICL. Thereafter, chapter three will give a detailed account on the development of the doctrine of JCE, following World War II to today. Moreover, an account on the criticism of the doctrine will be laid out. Chapter four will explore the relevant modes of liability under the Rome Statute, the “control of the crime” theory, as well as the criticism that this theory has received. Chapter five will compare JCE and the modes of liability under the Rome Statute. Based on the findings, a discussion on how the different modes of liability deal with the principle of *nulla poena sine culpa* as well as their function in the context of armed conflicts will be given. In chapter six, there will be a discussion on these findings and a conclusion.
2. International Criminal Law

2.1 Introduction to International Criminal Law

International criminal law (ICL) is a body of law under international public law. ICL criminalizes certain forms of conduct (including war crimes, crimes against humanity, genocide, torture, aggression) and confers individual responsibility on those persons who engage in such conduct. ICL differentiates itself both from general international law, which mainly deals with relations between nation-states, and from national criminal law, for its sources emanate from international law, and not national legislative bodies.

Although prosecutions have traditionally been rare and mainly concerned war crimes, individuals have been held accountable for international crimes for a long time. After World War II, the four allied states agreed in 1945 to form an International Military Tribunal (hereinafter “IMT”) in Nuremberg to hold the most responsible in the Nazi regime accountable for the war crimes and atrocities during the war. Soon after, another military court was formed in Tokyo, namely the International Military Tribunal for the Far East. Although the Nuremberg Trials have been criticized for their shortcomings, they are still regarded as the starting point of modern war crimes law at the international level.

During the war in the former Yugoslavia, the United Nations Security Council established the ICTY in 1992 to deal with the international crimes that were being committed during and, after the war. After the atrocities in Rwanda in 1994, the UN Security Council also established the ICTR. A regime of ICL has gradually evolved through these developments. The years that followed have seen further developments in the field of ICL with the establishment of several UN hybrid courts, including the ECCC, SCSL and the Special Tribunal for Lebanon (hereinafter “STL”). The adoption of the Statute for the ICC in 1998,

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and the establishment of the Court in 2002, has furthered this development. With the permanent nature of the ICC, of which 132 state parties are currently members, a new era of ICL has begun.

2.2 Sources of International Criminal Law

ICL is a subset of international law. As such, its sources are those of international law. The sources of international law are found listed in Article 38 of the Statute of the International Court of Justice, and are enumerated as primarily including: treaty law, customary law and general principles of law; and secondarily including: judicial decisions, and judicial writings of the most qualified publicists.

ICL also finds sources in criminal law as well as other areas of law, rendering it a hybrid. Its body of rules, notions, principles and legal constructs are derived from national criminal law, international humanitarian law (IHL) and human rights law. With the developments in the field and especially with the establishment of the ICC, ICL has emerged to become a more or less fully fledged, albeit hybrid, body of law. The influence of national criminal law comes from civil law, common law and hybrid legal systems, which sometimes causes conflicting interpretations.

Under the Rome Statute, on the other hand, the sources of law for the Court are outlined in a hierarchical order in Article 21. Namely, there are, primarily, the Statute, the Elements of Crime and the Rules of Procedure and Evidence. Furthermore, it provides that the secondary sources include applicable treaties and the principles and rules of international law. Finally, the Rome Statute also recognizes general principles derived from national law as being a source for its own jurisprudence. This is a very different approach compared to the statutes of the ICTY and ICTR which do not list the sources of law. Since international criminal law is a

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part of general international law, the tribunals are merely called to apply the sources of general international law.\textsuperscript{14}

\section*{2.3 Individual Criminal Responsibility in International Criminal Law}

The principle of individual criminal responsibility is a fundamental principle in international criminal law. An accused can only be convicted for criminal conduct if this conduct can be attributed to him or her through a mode of liability. The different modes prescribe whose conduct can be attributed to the accused if the mode’s elements are met. The only mode that attributes the accused’s own conduct is personal commission; all other modes can attribute conduct carried out by others.

The principle to individual criminal responsibility is expressed in the term \textit{nulla poena sine culpa}, with the meaning that an individual can be criminally responsible only for acts in which he or she was personally engaged or in some other way participated.

The understanding of the several modes of liability found in ICL differs in the various tribunals and courts. Despite providing outlines in Article 7 (ICTY) and Article 6 (ICTR), the statutes of the ICTY and ICTR do not give detailed accounts on the modes of liability. To a large degree, the tribunals have used comparative methods to demonstrate the existence of general principles in criminal law.\textsuperscript{15} Notwithstanding the lack of definitions for the elements of the modes of liability, the Rome Statute outlines the \textit{forms} of liability in Article 25(3). This outline is also much more detailed in comparison.

\textsuperscript{14} According to the Report of the Secretary-General on the establishment of the ICTY, the judges of the Tribunal could only apply those laws that were beyond doubt part of customary international law. (Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), presented 3.5.1993, (S/25704) para. 34.)

3. Joint Criminal Enterprise in International Law

JCE\textsuperscript{16} has become one of the most, if not the most important, mode of liability in ICL. One of the reasons for its popularity is that it fits well into the reality of modern day warfare and armed conflicts. International crimes are almost, by logistical necessity, always group crimes. The crimes require many actors to coordinate and carry out the different steps of the crimes. This is the case especially when the crimes are large scale, as they almost always are. Since the Appeals Chamber in the \textit{Tadić} judgment established that participation in a JCE was illegal under international criminal law,\textsuperscript{17} it has become what has been referred to as the ‘darling of the prosecutors,’\textsuperscript{18} or even as strongly as the ‘nuclear bomb of the prosecutor.’\textsuperscript{19} JCE has been used as a mode of liability not only by the ICTY, but also by the ICTR and some of the hybrid UN courts.

JCE has also been widely criticized, with many arguing that JCE was not part of customary international law at the time when the Appeals Chambers established the doctrine in the \textit{Tadić} judgment. As such, many have argued that it is a product of judicial creativity, outside the scope of the ICTY Statute. Others have argued that the main problem with the judgment relates to the \textit{mens rea} requirements, especially those entailed by the extended category JCE, as the doctrine is seen as giving rise to 'guilt by association.'\textsuperscript{20}

This chapter will start by giving an account of the formation of doctrine by the ICTY in the Appeals Chamber in the \textit{Tadić} judgment. This will be followed by the different categories of JCE, the elements, and the difference between JCE and aiding and abetting. The examination of JCE will take into account the developments of JCE since \textit{Tadić}. The application of JCE in other courts and tribunals will also be accounted for. Finally, there will be an examination of the critique of the doctrine.

\textsuperscript{16} JCE has been alternatively referred to as ‘common criminal plan’, ‘common criminal purpose’, ‘common criminal design’, ‘common purpose’, ‘common design’, and ‘common concerted design.’

\textsuperscript{17} \textit{Tadić} Appeal Judgment, \textit{supra} note 2, para. 181.


\textsuperscript{19} \textit{Ibid}.

\textsuperscript{20} \textit{Ibid}., p. 79.
3.1 Development of the Doctrine

In 1997, the Trial Chamber issued the judgment against Duško Tadić, a member of the Serb paramilitary forces. Tadić was charged on several counts, one of them being the crimes committed when he allegedly, together with a group of armed men, had gone to the village of Jaskići to remove Muslim men (Bosniaks) by force. After the group left, five men were found dead, four of whom had been shot dead.\textsuperscript{21} There was no evidence whether all of the men or only some of them had taken part in the killing. The defence argued that there was no evidence that the men had been killed by any member of the group at all. The Trial Chamber held that there wasn’t sufficient evidence to establish that the men had been killed by the group led by Tadić and therefore held that there was no evidence that Tadić was responsible for the killings\textsuperscript{22}. The Trial Chamber, therefore, acquitted him on the count of murder as a crime against humanity.\textsuperscript{23}

The Appeals Chamber overturned the acquittal and held that there was sufficient evidence proving that the deaths were committed by members of Tadić group.\textsuperscript{24} The Appeals Chamber held that Tadić was responsible for the five deaths because he and his group had a common purpose to ethnically cleanse the region of Prijedor and the murders were considered 'natural and foreseeable consequences' of that common purpose.\textsuperscript{25} There was, however, no mode of liability called common purpose or “joint criminal enterprise” in the Statute of the ICTY.

To show that Tadić could be held responsible for the killings of the five men as a member of a JCE, the Appeals Chamber undertook three interconnected steps. First, the Appeals Chamber examined whether the acts of one person could give rise to the criminal culpability of another

\begin{itemize}
  \item \textsuperscript{21} The \textit{Prosecutor v. Duško Tadić}, ICTY, Judgment, Case No. IT-94-1-T, 14 July 1997 (Trial Chamber), para. 373.
  \item \textsuperscript{22} \textit{Ibid.}, para. 761.
  \item \textsuperscript{23} \textit{Ibid.}, para. 232.
  \item \textsuperscript{24} See \textit{The Prosecutor v. Anto Furundžija}, ICTY, Judgment, Case No. IT-95-17/1-T, 20 December 1998, (Trial Chamber), paras. 257 and 274. The Trial Chamber established that for co-perpetration, involving a group of persons pursuing a common design to commit a crime, the accused needs only to partake in the purpose behind the torture, but does not need to have directly inflicted the torture. This judgment was an influence for the Appeals Chamber in \textit{Tadić}.
  \item \textsuperscript{25} \textit{Tadić} Appeal Judgment, \textit{supra} note 2, para. 232.
\end{itemize}
where both participate in the execution of a common criminal plan.\textsuperscript{26} The second step was for the Appeals Chamber to analyse whether such mode of participation would fall under Article 7 (1) of the ICTY Statute. The third step was for the Appeals Chamber to prove that participation in a common criminal plan was considered customary international law at the time when the alleged crimes were committed.

The Appeals Chamber found that the acts of one person could indeed give rise to the criminal culpability of another where both participate in the execution of a common criminal plan (JCE). It also found that participation in a common criminal plan was considered customary international law at the time when the alleged crimes were committed, by looking at two international treaties, national law and case law, mainly the cases from the post-World War II international military tribunals.\textsuperscript{27} The main case law will be covered in the next sub-chapter.

The first international treaty the Appeals Chamber referred to in establishing that JCE was part of customary international law was the International Convention for the Suppression of Terrorist Bombing.\textsuperscript{28} Article 2(3)(c) of the Convention states that individuals can be held liable for acts carried out by group of persons acting with a common purpose.\textsuperscript{29} The second treaty was the Rome Statute,\textsuperscript{30} adopted the year before the judgment. The Appeals Chamber argued that support for JCE could be found in Article 25(3)(d) of the Statute,\textsuperscript{31} which provides responsibility for contribution to the commission of a crime by a group of persons acting with a common purpose.\textsuperscript{32}

\textsuperscript{26} Ibid., para 186.
\textsuperscript{27} Ibid., paras. 193-226.
\textsuperscript{29} Article 2(3)(c) In any other way [other than participating as an accomplice, or organising or directing others to commit an offence] contributes to the commission of one or more offences as set forth in paragraphs 1 or 2 of the present article by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned.
\textsuperscript{31} Tadić Appeal Judgment, supra note 2, para. 222.
\textsuperscript{32} See section 4.4
As will be discussed in this thesis, given the contested nature of how article 25 (3)(d) is to be interpreted, it was a controversial move for the Appeals Chamber to argue that the article was an expression of JCE (or at least extended JCE).\(^3^3\)

The Appeals Chamber argued that, as the Rome Statute was adopted by a large number of states and also approved by the Sixth Committee of the United Nations General Assembly, the Rome Statute could be taken to express the legal position i.e. *opinio iuris* of those States.\(^3^4\)

The Appeals Chamber also argued that JCE was part of customary law by stating that it was present in the national law of many states.\(^3^5\) According to the Appeals Chamber, JCE could be found in many countries with a common law legal tradition, and could also be found in the legal tradition of civil law countries as well.\(^3^6\) As such, with the case law, treaties and national legal norms taken into account, the Appeals Chamber came to the conclusion that JCE was part of customary international law.\(^3^7\)

Furthermore, the Appeals Chamber found that participating in a JCE falls under the liability of 'committing' in Article 7 (1) of the statute.\(^3^8\) The Appeals Chamber argued that this was possible due to the purpose of the Statute and the need for solutions to the inherent characteristics of crimes committed in warlike situations.\(^3^9\)

The Appeals Chamber found the doctrine of JCE to be a necessary mode of liability for the Tribunal as it was found appropriate in adjudicating the group-based criminality that is common in modern conflict and necessary in order to facilitate conviction of all those

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\(^{33}\) It is also worth mentioning that the Convention of terrorist bombing was of great influence during the negotiations for the Rome Statute.

\(^{34}\) *Tadić* Appeal Judgment, *supra* note 2, para. 223.

\(^{35}\) Ibid., para. 224.


\(^{37}\) Ibid., para. 226.

\(^{38}\) Article 7 (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.”

responsible for a crime, and not only the physical perpetrators.\textsuperscript{40} The Appeals Chamber, however, also considered the principle of personal culpability, \textit{nulla poena sine culpa}.\textsuperscript{41} The principle is of great importance in both international and national law and is laid down in Article 7 (1) of the Statute.

The Appeals Chamber further established that there were three distinct categories of JCE. After the \textit{Tadić} Judgment, the Tribunal has not only relied heavily on JCE, but, through a number of judgments, further developed the different categories of the doctrine. The subchapters that follow takes into account the most important developments by the ICTY regarding JCE.

\textbf{3.2 The Three Categories of JCE}

The first category is called basic JCE, the second, a very similar category to the first, is called systemic JCE, the third, and most far-reaching category, is called extended JCE.

\textbf{3.2.1 Category I: Basic JCE}

The Appeals Chamber in \textit{Tadić} stated that basic JCE (also known as common design or common enterprise JCE or JCE I) entailed cases where:

\begin{quote}
"[A]ll co-defendants, acting pursuant to a common design, possess the same criminal intention (for instance, the formulation of a plan among the co-perpetrators to kill, where, in effecting this common design (and even if each co-perpetrator carries out a different role within it) they nevertheless all possess the intent to kill."
\end{quote}

It further held that the accused did not have to physically perpetrate the crime to be liable, and that he or she only needed to have voluntarily participated in one aspect of the common design and intend the result.\textsuperscript{43}

\begin{footnotes}
\item[40] \textit{Ibid.}, paras. 191-192.
\item[41] \textit{Ibid.}, para. 186.
\item[42] \textit{Tadić} Appeal Judgment, \textit{supra} note 2, para. 196.
\item[43] \textit{Ibid.}, para. 196.
\end{footnotes}
The Appeals Chamber in *Tadić* referred to several cases where basic JCE had been applied. One of them was the *Almelo Trial*\(^44\) where three German men were found guilty, by a British military court, for killing a prisoner of war hereinafter “POW”) under the ‘common enterprise’ doctrine. It was found that all three prisoners possessed the same intention, and they were, therefore, co-perpetrators in the murder of the prisoner despite each of them having a different role in the killing.\(^45\)

### 3.2.2 Category II: Systemic JCE

Systemic JCE is a variant to basic JCE, and is also known as the “concentration camp JCE”. Systemic JCE is applied to charges where the offences charged were committed by members of military or administrative units such as those running concentration camps. The Appeals Chamber in *Tadić* held that there were three requirements for systemic JCE: i) the existence of an organized system to ill-treat the detainees and commit the various crimes alleged; ii) the accused had to be aware of the nature of the system; and, iii) the accused had to in some way actively participate in enforcing the system.\(^46\)

The Appeals Chamber in *Tadić* referred to the *Dachau Concentration Camp*\(^47\) and the *Belsen* cases.\(^48\) The accused were charged with having acted in pursuance of a common design to kill or mistreat prisoners and hence commit war crimes.\(^49\) In *Kvočka*, the Appeals Chamber established that, for systemic JCE, there was no obligation to prove that there existed a more or less formal agreement between the participants. More importantly, there is no obligation to prove their involvement in the system of ill-treatment.\(^50\) Regarding systemic JCE, it is

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45 See also *Ibid.*, paras. 197-200, where the Appeals Chamber also referred to several other cases, including the Canadian case Hoelzer et al., The British cases Jepsen and others and the Ponzano case, as well as the US case Einsatzgruppen.


50 The Prosecutor v. Miroslav Kvočka et al., ICTY, Judgment, Case No. IT-98-30/1-A, 28 February 2005 (Appeals Chamber), para. 208.
important to note that not everyone working in a detention camp where conditions are abusive becomes automatically liable as co-perpetrators for their participation in a JCE. 51

3.2.3 Category III: Extended JCE

The third, and most far reaching category of JCE, and therefore the most controversial, is called “extended JCE”. This category concerns cases involving a common design to pursue one course of conduct where one of the perpetrators commits an act, which, while not at the outset a part of the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose. 52

The Appeals Chamber in Tadić illustrated extended JCE with the cases Essen Lynching and Borkum Island, the so called mob violence cases 53. The Essen Lynching 54 concerned three British POW’s who had been lynched by a mob of Germans in the town of Essen-West. The POWs were marched through the city and a captain commanded the soldiers not to interfere with the crowd. He did this in front of the crowd so that they could hear him. The civilian crowd threw rocks at the POWs as they were paraded through the town and later threw them off a bridge. Two survived the fall and were later killed by beating and kicking. Seven persons were convicted for war crimes for the killing. The Tadić Appeals Chamber interpreted the judgment as even though not all of the accused intended to kill the prisoners, they nevertheless intended to participate in their ill treatment, and by extension, they were equally guilty of the killing. 55 That is, the Appeals Chamber emphasised that:

“[T]hose who merely struck a blow or implicitly incited the murder were also found guilty of murder because they could have foreseen that others could kill the prisoners”. 56

In the Borkum Island case, the Prosecutor noted that the accused were:

51 Ibid., paras. 208-209.
52 Tadić Appeal Judgment, supra note 2, para. 204.
53 See also Ibid., para.215, where the Appeals Chamber also referred to several Italian cases, such as the D’Ottavio et al. Case, para. 215.
54 Trial of Erich Heyer and six others, British Military Court for the Trial of War Criminals, Essen, 18th-19th and 21st-22nd December, 1945, UNWCC, vol 1, p. 88.
55 Tadić Appeal Judgment, supra note 2, para. 207.
56 Ibid., para. 209.
“[C]ogs in the wheel of common design, all equally important, each cog doing the part assigned to it. And the wheel of wholesale murder could not turn without all the cogs”.

Tadić was found guilty for murder as a crime against humanity on the basis of extended JCE. The Appeals Chamber concluded that Tadić participated in the armed conflict with the intent to commit inhumane acts against the non-Serb civilian population of the territory, with the aim to achieve the creation of a Greater Serbia. This was to be achieved according to a recognizable plan, in which Tadić as a member of an armed group actively took part. The attack against the village of Jaskići, and, subsequently, the killing of five men, was part of the plan. That non-Serbs might be killed in the effecting of this common aim was, in the circumstances of the present case, foreseeable. The Appellant was aware that the actions of the group of which he was a member were likely to lead to such killings, but he nevertheless willingly took that risk. In addition, extended JCE is not a stand-alone mode of liability. It always requires the elements of basic JCE or systematic JCE to be fulfilled, with the exception that the basic JCE or systematic JCE does not have to be completed.

3.3 Elements of JCE

3.3.1 The Objective Elements

The actus reus requirements for all categories in the mode of liability of JCE are:

(i) a plurality of persons
(ii) the existence of a common plan, design or purpose, which amounts to or involves the commission of a crime provided for in the Statute.
(iii) participation of the accused in the common design involving the perpetration of one of the crimes provided for in the Statute; and,

These elements has been outlined as follows:

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57 Ibid., para. 210, Kurt Goebell et al. United States military court, 6 February – 21 March 1946, also known as the Borkum Island case, Charge Sheet, in U.S. National Archives Microfilm Publications, I (on file with the International Tribunal's Library p. 1188).
58 Tadić Appeal Judgment, supra note 2, para. 230.
59 Ibid., para. 232.
61 Tadić Appeal Judgment, supra note 2, para. 227.
(i). A plurality of persons: the participants need not to be organised in a military, political or administrative structure. There is no limit to how few or how many persons that can constitute the enterprise. They also need not have a previous relationship and need not be personally identified. It is sufficient if there is evidence that demonstrates that a group of individuals, whose identities could be established, at least, by reference to their category as a group, furthered a common plan.

(ii). The existence of a common plan, design or purpose, which amounts to or involves the commission of a crime provided for in the Statute: there is no necessity for this plan, design or purpose to have been previously arranged or formulated because it may materialise extemporaneously.

There are different opinions on how specific a common plan, design or purpose should be defined. In Kvočka, the Trial Chamber argued (regarding systemic JCE) that it could be as broad as to include the entire Nazi persecution of millions of Jews during WWII. The largest common plan referred to by the ICTY was in the indictments against Slobodan Milošević. The indictments alleged that Milošević, during his time as President of the Federal Republic of Yugoslavia had participated in a joint criminal enterprise extending to three different countries (Kosovo, Croatia, and Bosnia and Herzegovina) and comprising a multitude of criminal offences. However, due to the death of Milošević on 11 March 2006, the proceedings terminated before any judgment could be rendered. There are, however, also

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62 Ibid., para. 227.
65 The Prosecutor v. Miroslav Kvočka et al., supra note 50, para. 310.
66 The Prosecutor v. Slobodan Milošević, Indictment (‘Bosnia Herzegovina’), Milošević (IT-01-51-I), paras. 5-31; First Amended Indictment (‘Croatia’) Milošević (IT-02-54-T), paras. 5-33; Second Amended Indictment Slobodan Milošević, Milan Milutinović, Nikola Sainović, Dragoljub Ojdanić, Vlajko Stojiljković (IT-99-37-PT), paras.16-29.
67 Ibid.
68 The Prosecutor v. Slobodan Milošević, ICTY, Order terminating the proceedings, Case No.: IT-02-54-T, 14 March 2006. (Trial Chamber).
judgments that convincingly argue that liability by JCE should be limited to small scale JCE's, for example the Trial Chamber’s judgment in Brđanin. 69

(iii). Participation of the accused in the common plan or design involving the perpetration of one of the crimes provided for in the Statute: the contribution of the co-perpetrator in a joint criminal enterprise can be made through a variety of roles. In Brđanin, the Trial Chamber argued that:

“Participants in a [JCE] may contribute to the common plan in a variety of roles. Indeed, the term participation is defined broadly and may take the form of assistance in, or contribution to, the execution of the common plan. Participation includes both direct participation and indirect participation.” 70

The level of contribution to the common plan has been interpreted differently in different cases. In the Simić case, the Trial Chamber argued that the level of contribution must be significant. 71 This was rejected by the Appeals Chamber in Kvočka, where, the Chamber came to the conclusion that there were no legal requirements for the level of contribution by the accused in the JCE, but rather argued that, in practice, the significance of the accused's contribution will be relevant to demonstrating that the accused shared the intent to pursue the common purpose. 72

In Brđanin, the Appeals Chamber found somewhat of a middle ground when it came to the level of contribution and argued that

“Although the contribution need not be necessary or substantial, it should at least be a significant contribution to the crimes for which the accused is to be found responsible”. 73

70 Ibid., para. 263.
72 The Prosecutor v. Miroslav Kvočka et al., ICTY, Judgment, Case No. IT-98-30/1-A, 28 February 2005 (Appeals Chamber), para. 97.
In *Krajišnik*, the Appeals Chamber held that the plan must involve or amount to the commission of a crime. However, this does not require the accused’s contribution to a JCE to be criminal, as long as the acts significantly contributes to the common criminal objective.\(^74\)

The Appeals Chamber in *Brdanin* came to the conclusion that the principal perpetrator does not have to be a member of the JCE. What was important for the Chamber there was that the crime *is* part of the common purpose. The Appeals Chamber held that, in order to hold a member of the JCE responsible for crimes perpetrated by a non-member, it is sufficient to show that at least one member of the JCE can be linked to a non-member. When the non-member is used by the member as a tool to carry out the common criminal purpose, the other participants of the JCE can be held equally liable for the crimes.\(^75\) This development has been referred to as inter-linked or vertical mode of JCE.\(^76\)

### 3.3.2 The Subjective Elements

The *mens rea* requirements are different for the different categories of JCE,\(^77\) basic JCE being the strictest, systemic being less so, and extended JCE being the least strict.

#### 3.3.2.1 Subjective Elements in Basic JCE: Same Criminal Intention

The accused and the physical perpetrator need to share the intent to commit the crime that is the object of JCE. Indeed, this intent to commit the crimes of the enterprise must be shared by all participants.\(^78\) The accused voluntarily participates in one aspect of the common criminal design; and, for crimes for which a specific intent is required, the accused must possess that intent, e.g. for crimes of persecution the accused must share the common intent of the JCE.\(^79\)

For crimes that in addition to the general subjective element also require an ulterior intent,

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\(^75\) *The Prosecutor v. Radoslav Brdanin*, ICTY, Judgment, Appeals Chamber, *supra* note 73, paras. 410-413.


\(^77\) Tadić Appeal Judgment, *supra* note 2, para. 228.


*dolus specialis*, (like the crime of torture or genocide), the participant in the basic JCE also must be motivated by an ulterior intent.

3.3.2.2 Subjective Elements in Systemic JCE

The requisite *mens rea* for systemic JCE comprises the knowledge of the nature of the system of ill-treatment and the intent to further the common design of ill-treatment. Such intent may be proven either directly or could also come from the accused's authority within the camp or organized hierarchy.\(^80\)

3.3.2.3 Subjective Elements in Extended JCE

The accused must have had an intention to participate in and further the criminal activity or the criminal purpose of a group, and to contribute to the JCE or in any event to the commission of a crime by the group. Hence, the accused still needs to have intent towards the original criminal purpose of the group. In addition, responsibility for a crime other than the one agreed upon in the common plan arises if, under the circumstances of the case, it was foreseeable that such a crime might be perpetrated by one or more members of the group and the accused willingly took the risk.\(^81\) Furthermore, extended JCE also requires the defendant to be aware that the commission of the foreseeable crimes is a possible consequence of the implementation of the common plan, and to voluntarily take the risk by joining or by continuing to participate in the enterprise.\(^82\) The crime committed must have been a natural and foreseeable consequence of the common purpose. In relation to the crime actually committed in the JCE, the *mens rea* requirement is merely advertent recklessness, or *dolus eventualis*.\(^83\)

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\(^80\) *Tadić* Appeal Judgment, *supra* note 2, para. 228.
\(^81\) *Ibid.*, para. 228.
\(^82\) H. Olásalo, *The criminal responsibility of senior political and military leaders as principals to international crimes, supra* note 63, p. 175, with reference to *Tadić* Case AC para 204,220, 228; *Vasiljević* Case Appeals Judgment AC para 99-101; *Kvočka* Case AC para 83, *Stakić* Case AC para 65; *Blaskić* Case AC para 33; *Krnojelač* Case TC para 78, *Krajinšek* Case TC paras 881,890; *Brđanin*, Case TC para 265.
The question of whether or not extended JCE is applicable to crimes where a *dolus specialis*\(^84\) is required (e.g. Genocide) has been disputed in the tribunals. The Trial Chamber in *Brđanin* held that if extended JCE was applicable to genocide, any defendant who participates in a JCE to commit murder would be liable as a co-perpetrator (principal) of genocide by merely: “(i) being aware of the possibility that any other member of the enterprise would carry out the agreed upon murder with a genocidal intent; and (ii) voluntarily taking the risk by joining or continuing to participate in the enterprise despite such awareness.” In the light of this, the Chamber there argued that extended JCE was not applicable to genocide.\(^85\)

However, the Appeals Chamber disagreed and held that extended JCE was applicable on the crime of genocide by arguing that the Trial Chamber had conflated the subjective elements of the crime (genocide) with the subjective elements of the mode of liability pleaded by the prosecution (extended JCE).\(^86\) The ICTY has thereafter held several perpetrators responsible for genocide through JCE.

### 3.4 Distinguishing JCE Liability and Aiding and Abetting

The doctrine of JCE share several similarities to the mode of liability of aiding and abetting. Aiding is defined as the provision of support whereas the meaning of abetting involves encouragement or sympathy. Where the objective elements (*actus reus*) for aiding and abetting are the same as for JCE, the subjective elements (*mens rea*), however, are different. The aider and abettor do not share the criminal intent of the perpetrator, but only intend to assist the perpetrator in the commission of a crime.\(^87\) Aiders and abettors need only be aware that his or her contribution assists or facilitates a crime committed by the perpetrator. Aiders

\(^{84}\) The necessary intent (*dolus specialis*) for genocide is to destroy, in whole or in part, a national, ethnical, racial and religious group. Article 2 in the Convention on the Prevention and Punishment of the Crime of Genocide (entered into force on 1951). Also stated in Article 2 (2) of the ICTR Statute, Article 4 (2) of the ICTY Statute, and Article 6 of the Rome Statute with reference to the Genocide Convention.

\(^{85}\) *The Prosecutor v. Radoslav Brđanin*, ICTY, Decision on motion for acquittal pursuant to rule 98 bis, Case No. IT-99-36-T, 28 November 2003, (Trial Chamber), paras. 55-57.


and abettors are, therefore, accessories/secondary participants, and hence less culpable than co-perpetrators.

In Kvočka, the Appeals Chamber stated that it is wrong to speak about aiding and abetting a joint criminal enterprise, since JCE is simply a means of committing a crime and not a crime in itself. If someone is aiding and abetting crimes committed through a JCE and shares that intent, he or she may be found criminally responsible for the crimes committed in furtherance of that common purpose as a co-perpetrator.\(^{88}\)

### 3.5 JCE in Other Courts and Tribunals

As noted earlier, JCE has been applied by other international tribunals and hybrid courts, the main jurisprudence regarding JCE in these tribunals and hybrid courts will be accounted for in the following sub-chapters.

#### 3.5.1 JCE in the International Criminal Tribunal for Rwanda

The International Criminal Tribunal for Rwanda (ICTR) was established after a decision by the UNSC in 1994 to prosecute those responsible for the atrocities that occurred in the spring of 1994.\(^ {89}\)

JCE has been applied in the ICTR, but not as extensively as it has been in the ICTY. Until 1 April 2007, around 16 per cent of the indictments issued at the ICTR\(^ {90}\) were charged explicitly under JCE, compared to 64 per cent at the ICTY in the period of 2001-2004.\(^ {91}\)

In the case against Ntakirutimana and Ntakirutimana, the Appeals Chamber argued that since Article 6 (1) of the ICTR Statute, that identifies the modes of responsibility mirrors Article 7

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\(^{88}\) The Prosecutor v. Miroslav Kvočka et al., ICTY, Judgment, Appeals Chamber, supra note 72, paras. 90-91.


(1) of the ICTY Statute, the jurisprudence of the ICTY should be used for interpretation of Article 6 (1) of the ICTR Statute and hence, acknowledge JCE. The Appeals Chamber stated that participation in a JCE is a form of 'commission' that falls under Article 6 (1) of the Statute.\(^2\) In a decision on interlocutory appeal in *Rwamakuba*, the Appeals Chamber acknowledged that JCE was a part of customary international law prior to the ICTR period of jurisdiction,\(^3\) and has since used JCE as a mode of liability for convicting perpetrators in several judgments. In addition, the ICTR has held that it has jurisdiction to try an appellant on a charge of genocide through participation in a JCE,\(^4\) and has done so in several cases, for example, in *Simba*, the Trial Chamber held that the accused was guilty under JCE to commit genocide and extermination.\(^5\)

### 2.5.2 Application of JCE in the Special Court for Sierra Leone

SCSL is a hybrid court established by an agreement between the government of Sierra Leone and the UN in 2002.\(^6\) It is mandated to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.\(^7\)

The Statute of SCSL mirrors that of ICTY and ICTR. As such, the SCSL has relied heavily on the jurisprudence of ICTY.\(^8\) Its application of JCE has also been controversial. In 2003, the Office of the Prosecutor issued indictments against leaders of the Armed Forces Revolutionary Council (AFRC), Revolutionary United Front (RUF) and Charles Taylor. The indictments all concerned multiple crimes committed in the entire territory of Sierra Leone over a span of six years, and grouped all of them under the theory that the accused


\(^{7}\) SCSL Statute, art. 1.

\(^{8}\) E. Van Slidregt, *Individual Criminal Responsibility in International Law*, supra note 8, p. 144.
participated in a single, unified JCE. The indictment concerned a non-criminal objective, without alleging any criminal means as a necessary part of that objective. For the RUF, AFRC and original Taylor indictments, the common plan, purpose or design pled were identical: ‘to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas’.\(^9\) The indictments therefore left out any criminal objectives of the group. The indictments also failed to plead criminal intent as a necessary part of the common purpose, which is necessary in order to prove criminal liability in participating in a JCE and contrary to the jurisprudence of the ICTY.

In the AFRC judgment, the Trial Chamber held that the Prosecution had not properly pleaded JCE, and as such, no JCE liability was found to attach to any of the three accused.\(^10\) The Trial Chamber convicted the accused under other modes of liability.

In the RUF case, however, the Appeals Chamber held that, as long as the accused committed crimes within the Statute as the means to achieve a non-criminal objective, JCE liability could be applied. The Appeals Chamber stated that there was no requirement that a JCE involve a “necessary relationship between the objective of a common purpose and its criminal means”.\(^11\) Judge Fisher handed down a dissenting opinion in which Her Honour argued that the application of JCE in this manner “blatantly violates the principle of nullum crimen sine lege”\(^12\) because it imposes “criminal responsibility without legal support in customary international law applicable at the time of the offence.”\(^13\)

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\(^13\) _Ibid._
The application of JCE by the SCSL has been criticized by scholars who have argued that this type of reasoning will threaten the very foundations of international criminal law because it's inherent errors run against the right to fair and just trials.  

The conviction of Charles Taylor in the Trial Chamber might have changed the SCSL reliance on JCE. Taylor was not convicted for participating in a JCE as charged on first account by the Prosecutor; instead he was convicted for aiding and abetting war crimes and crimes against humanity.

2.5.3 JCE in the Extraordinary Chamber in the Courts of Cambodia

The ECCC was established for prosecuting the former senior leaders of the Khmer Rouge for crimes committed during the Democratic Kampuchea regime (during 1975-1979). It relies on the law of Cambodia during the period of temporal jurisdiction as well as international law.

The provision on individual criminal responsibility in the Statute for the ECCC is also modelled on Article 7 (1) of the ICTY Statute. In the case against Ieng Sary, the Pre-Trial Chamber discussed whether or not JCE was part of customary international law at the time of the offences. It found that the basic and systemic forms of JCE were part of customary international law and could also be found in Cambodian law in the period of the court's temporal jurisdiction.

Regarding extended JCE the Pre-Trial Chamber discussed the case law that Tadić relied on in order to establish extended JCE was part of customary international law at the time. It concluded that the two cases referred to in Tadić in support of extended JCE, namely the

105 Prosecutor v. Charles Taylor, SCSR, Judgment, Case No. SCSL-03-1-T, 26 April 2012, Trial Chamber, para. 6959.
107 Case of Ieng Sary. ECCC, Decision on the Appeals Against the Co-investigative Judges Order on Joint Criminal Enterprise, Case No. 002/19-09-2007-ECCC/OCIJ, 20 May 2010, para. 41.
Essen Lynching case and the Borkum Island case, were vague and did not clearly support extended JCE.\textsuperscript{108} The Chamber concluded that it was not clear if customary law supported the existence of extended JCE. The Chamber held that even if it did, it would not have been foreseeable for the accused since Cambodia's criminal law did not provide for it at the time.\textsuperscript{109}

This Decision has been subject to critique, but also applauded by others for giving a thorough analysis of the sources used in Tadić and acknowledging that extended JCE does not live up to the standards of legality.\textsuperscript{110}

2.5.4 Application of JCE in Other Hybrid Courts

Other hybrid courts have also considered the doctrine of JCE. The Special Tribunal for Lebanon has, in an interlocutory decision on the crime of terrorism, held that extended JCE does not apply to a special intent crime like terrorism. It has ruled that a person's attitude under extended JCE should be regarded as assistance to the terrorist act rather than a form of perpetration.\textsuperscript{111}

JCE has been applied by the Special Panels of the Dili District Court (also called the East Timor Tribunal).\textsuperscript{112}

Moreover, JCE has also been applied in the case against Saddam Hussein et al in the Supreme Iraqi Criminal Tribunal. The tribunal is national. Saddam Hussein and six of seven of his co-accused were convicted for several crimes on the ground of common purpose liability.\textsuperscript{113}

\begin{flushleft}
\textsuperscript{108} Ibid., paras. 211-213 and 615-616.
\textsuperscript{109} Ibid., para. 87.
\textsuperscript{111} Interlocutory Decision on the applicable law: terrorism, conspiracy, homicide, perpetration, cumulative charging, STL, Case No. STL-11-01/1, 16 February 2011, (Appeal Chamber), paras.489-9.
\textsuperscript{113} Al-Dujail against Saddam Hussein et al. Supreme Iraqi Criminal Tribunal, judgment, Case no. 1/9/1st/2005 Judgment, 5 November 2006.
\end{flushleft}
3.7 Critique of JCE: Judicial and Scholarly Positions

JCE has been subjected to extensive critique, particularly from scholars and defence lawyers. The critique has revolved around different grounds and the main ones will be accounted for below.

3.7.1 Legality of the Doctrine

Both scholars and defence lawyers have held that JCE, and particularly extended JCE, did not exist in customary international law at the time when the crimes were committed (for example in the former Yugoslavia). The main arguments are that the Appeals Chamber in Tadić did not draw accurate conclusions of the legal sources analysed in the judgment regarding extended JCE. The cases that the Appeals Chamber relied on have been criticised for not being clear in actually articulating liability for participating in a criminal enterprise.\(^{114}\) The Italian case of D'Ottavio et al.\(^{115}\) is the only one of the cases referred to by the Appeals Chamber that is considered as fully acknowledging extended JCE. This was a case which isn't considered having rendered the doctrine to be part of customary international law. The international treaties referred to by the Appeals Chamber\(^ {116}\) have also been considered to lack the necessary language for acknowledging extended JCE.

Attempts have been made in the tribunals to question the doctrine of JCE. In Milutinović et al, the defence submitted a motion to the Appeals Chamber claiming that JCE infringed the principle of *nullum crimen sine lege* (no crime without law) and that JCE could not be derived from Article 7 (1) of the Statute.\(^ {117}\) However, the Appeals Chamber held that JCE was part of international customary law at the time and dismissed the motion.\(^ {118}\) The ECCC did, however,

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\(^{114}\) J. D. Ohlin, 'Three conceptual problems with the doctrine of Joint Criminal Enterprise', *Journal of International Criminal Justice*, vol. 5, no. 1, 2007, p.76.

\(^{115}\) Tadić Appeal Judgment, *supra* note 2, para. 115.

\(^{116}\) See section 3.1.2.

\(^{117}\) *The Prosecutor v. Milutinović et al.* ICTY, Decision on Dragoljub Ojdanić Motion Challenging Jurisdiction, Case No. IT-05-87-PT, 22 March 2006, (Trial Chamber) paras. 20-29.

\(^{118}\) *Ibid.*, para. 29.
reach a different conclusion and argued that extended JCE was not part of customary international law during its period of jurisdiction.119

3.7.2 Unacceptable Expansion of Individual Criminal Liability

It has also been argued that the expansion of individual criminal responsibility to include participation in extended JCE may lead to a guilt by association and severely damage the reputation and purpose of international criminal law. Individual criminal responsibility has been considered undermined in favour of collective responsibility. American scholars Martinez and Danner argue that extended JCE has expanded the notion of individual criminal responsibility to the extent that there is no clear definition of where the limits are. They argue that the current interpretation of extended JCE could lead to a guilt by association, and that the liability could go so far as to find every defendant who participates in a genocide, and who foresees the killings that occurred, could be found liable for the murder of hundreds of thousands of people. They therefore argue that JCE should not be allowed for crimes requiring a dolus specialis.120 They also argue that extended JCE damages the goal of ICL to provide an accurate account of an individual's role in the relevant crimes.121 Martinez and Danner suggest that JCE ought to be limited to substantial contribution, and that extended JCE is most appropriate for cases involving the most senior leadership.122

The doctrine of JCE has not been considered clear enough when it comes to the requirements of intentionality, foreseeability and culpability.123 It has also been argued that there are no clear distinctions between JCE and command responsibility. The late Antonio Cassese, who sat on the bench in Tadić, had been a firm proponent of JCE and argued that much of the critique of JCE is exaggerated. He did, however agree that the critique against the doctrine on the foreseeability standard, being somewhat loose as culpability and causation, needed some

119 See section 2.5.3.
121 Ibid., p. 142.
122 Ibid., p. 166.
123 J.D. Ohlin, 'Three conceptual problems with the doctrine of Joint Criminal Enterprise', supra note 114, p.81.
He was also of the opinion, contrary to the developments in the ICTY, that extended JCE should not be applied in specific intent crimes such as genocide.

### 3.7.3 The Doctrine is Unnecessary

The ICTY Judge Lindholm argued, in a Separate Opinion to the Simić Trial Chamber judgment, that JCE was an unnecessary doctrine. He argued that the mode of liability of co-perpetration was sufficient in order to ensure criminal responsibility—stating that:

“I dissociate myself from the concept or doctrine of joint criminal enterprise in this case as well as generally. […] The concept or the “doctrine” has caused confusion and a waste of time, and is in my opinion of no benefit to the work of the Tribunal or the development of international criminal law. [...] JCE is nothing more than a new label affixed to a since long well-known concept or doctrine in many jurisdictions as well as in international criminal law, namely co-perpetration.”

Others have also held such opinions. The Trial Chamber in Stakić, for instance, also held a similar view. In an attempt to move away from the doctrine of JCE, they convicted the accused as a co-perpetrator based on joint control over the crime, a criterion now used by the ICC. The Appeals Chamber, however, dismissed the reasoning by the Trial Chamber and argued that this reasoning was not supported by customary international law or the jurisprudence of the ICTY and, accordingly, it convicted Stakić as a co-perpetrator in a JCE.

### 3.8 Is JCE Customary International Law?

As earlier stated, the Appeals Chamber in Tadić argued that JCE was customary international law. As noted, courts, judges and legal scholars have questioned whether JCE was customary law at the time when the alleged crimes were committed in cases where it has been applied.

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125 Ibid., p. 122.
There are two questions at stake: whether JCE was customary international law when it was first applied in Tadić; and, whether or not it is customary international law at this point in time.

The Statute of the International Court of Justice defines custom as “evidence of a general practice accepted as law.”\textsuperscript{129} In ascertaining whether a certain rule is to be considered customary, two elements must exist: an objective element, namely the behavior of the state, i.e. state practice; and a subjective element, namely the belief that such behavior is lawful and in accordance with law, i.e. \textit{opinio juris}.\textsuperscript{130}

State practice is the behavior and acts of states in their relations with other states. Included in state practice is, for instance, international treaties, decisions of national and international courts and tribunals, the national law of States, and, to a lesser extent, also the declarations and resolutions of the UN General Assembly and Security Council. \textit{Opinio juris} is the belief that such behavior, i.e. state practice, is lawful and done in accordance with international law. State practice may itself demonstrate the existence of \textit{opinio juris}.\textsuperscript{131} Therefore, both state practice and \textit{opinio juris} is needed to establish customary law. If one of the two elements is less apparent, the other one needs to be more evident.\textsuperscript{132} There is no set time for how long it takes for a norm to establish itself as customary law. What is important is that during this timeframe, the practice of states, especially those concerned by the rule, was extensive and essentially uniform.\textsuperscript{133}

In \textit{Tadic}, the Appeals Chamber of the ICTY argued that JCE was part of customary international law by referring to national law, case law from domestic international military tribunals as well as national courts and international treaties. Given the large amount of

\textsuperscript{129} Statute of the International Court of Justice, Article 38(1)(b)
\textsuperscript{130} \textit{Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v. Malta)}, Judgment, 21 March 1984, ICJ Reports 1984, paras. 13 and 29.
\textsuperscript{132} \textit{Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)}, ICJ, Judgment 27 June 1986, ICJ Reports 1986, para. 98 and 186.
\textsuperscript{133} \textit{North Sea Continental Shelf Cases}, supra note 131, para. 74.
material from many different countries and that the Rome Statute, which was adopted by a large number of states and also approved by the Sixth Committee of the United Nations General Assembly, it could be argued that JCE was part of state practice. If this practice was done in the belief that it was in accordance with international law, it could also be argued to have been *opinion juris*. However, as argued by the ECCC concerning extended JCE, it is not clear if the Appeals Chamber interpreted the findings of the material correctly.

It is not within the scope of this study to assess the reasoning of the Appeals Chamber, making it not feasible to draw any conclusions whether the reasoning in *Tadić* was correct and therefore, no assumptions will be made in this study whether or not JCE was customary international law at the time when it was applied in *Tadić*.

As earlier stated, since *Tadić*, JCE has emerged as one of the most commonly used modes of liability in ICL today. The level of state practice has increased due to its frequent use in international decisions. The use of JCE in the international courts and tribunals is done with the understanding that it is *opinio juris*. It could, therefore, be argued that it is at least more likely to be customary international law today than it was during *Tadić*.
4. Participation in Crime under the Rome Statute

This chapter will provide an introduction to the relevant provisions under the Rome Statute. Thereafter, the modes of liability of principal responsibility in Article 25(3)(a), that is, direct perpetration, co-perpetration, indirect perpetration as well as indirect co-perpetration will be analysed. Later, contribution to a commission of a crime by a group of persons acting with a common purpose in Article 25(3)(d), an accessorial mode of liability, will be examined. The Rome Statute, as interpreted by judges of the Court, distinguishes between commission (principal) liability and accessory liability. The main factor distinguishing principals from accessories is the principal’s control over the crime. The “control of the crime” theory will be accounted for, as well as the critique against it.

Due to the limited case law available from the Court, the two Trial Chamber Judgments of Lubanga134 and Ngudjolo Chui135 are the only judgments available. The reasoning in these judgments regarding the relevant modes of liability will be analysed. Additionally, there are several Decisions on the Confirmation of Charges136 from the Pre-Trial Chamber (hereinafter “PTC”) of Lubanga137, Katanga and Ngudjolo138 and Warrants of Arrest of Al Bashir139 and Mbarushimana140 that deal with the relevant modes of liability. These will also be examined.

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134 Lubanga Trial Judgment, supra note 4.
135 The Prosecutor v. Ngudjolo Chui, ICC, Judgment, Case No. ICC-01-04-02-12, 18 December 2012, (Trial Chamber II), para. 516.
136 Pursuant to regulation 52 (3) of the Regulations of the Court, the Document Containing the Charges must include “a legal characterisation of the facts to accord both with the crimes under articles 6,7 or 8 and the precise form of participation under articles 25 and 28.
139 The Prosecutor v. Al bashir, ICC, Decision on the Issuance of a Warrant of Arrest, Case No. ICC-02-05-01-09-03, 4 March 2009. (PTC)
140 The Prosecutor v. Callist Mbarushimana, ICC, Decision on the Prosecutor’s Application for a Warrant of Arrest, Case No.ICC-01-04-01-10, 28 September 2010, (PTC I).
4.1 Relevant provisions under the Rome Statute

The sources of law for the Court are found in Article 21(1)(a-c). It provides that the Court shall apply in the first place its Statute and the Elements of Crimes and Rules of Procedure and Evidence. Following this, it deems that principles and rules of international law (customary international law) as a secondary source of law and only to be applied when the primary sources fail to provide a solution. Only when these sources are depleted can the Court rely on general principles of law derived from national laws of legal systems of the world.

Article 22 of the Statute incorporates the principle of nullem crimen sine lege (no crime without law) and states that the definitions of crime shall be strictly construed and shall not be extended by analogy.

There is no general provision outlining the objective elements for the different crimes. The mental elements are, however, laid down in Article 30. The article sets a high standard for the mental elements of crimes. It provides that the material elements are committed with intent and knowledge. Knowledge is defined as an “awareness that a circumstance exists or a consequence will occur in the ordinary course of events”, whereas intent is defined as:

a) in relation to conduct, that person means to engage in the conduct; and,
b) in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

Article 25\(^{141}\) provides for the Court’s jurisdiction over natural persons.

\(^{141}\) Article 25; In accordance with this Statute, 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, regardless of whether that other person is criminally responsible;
(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) Be made in the knowledge of the intention of the group to commit the crime;
The provision emphasises the principle of individual criminal responsibility by stipulating that only natural persons are individually responsible and liable for punishment.

Article 25(2) of the Statute establishes that individual responsibility must be consistent with the Statute. A person may not be criminally responsible under the Statute unless the attributed conduct constitutes a crime under the jurisdiction of the Court.142

The various modes of liability are laid down in article 25(3) of the Statute. That provision describes the different modes of liability much more precisely than do the ICTY/ICTR. While it does distinguish various forms of criminal participation, the provision does not, however, define each of their elements. Its outcome, like the rest of the Statute, is considered to be the result of comprehensive negotiations between parties from very different legal traditions.143

4.2 Liability under the Rome Statute

Article 25(3) differentiates clearly between four levels of participation; (1) commission; (2) instigation and ordering; (3) assistance; and, (4) contribution to a group crime. Different degrees of individual guilt correspond to each level of participation.144 Article 25(3) also provides for incitement to commit genocide and attempt.

In the Lubanga Decision on the Confirmation of Charges (hereinafter “Lubanga Decision”), the PTC found that under the Rome Statute, ‘committing’ in Article 25(3)(a) constitutes

(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. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

142 Katanga and Ngudjolo Decision, supra note 138, para. 487.
principal liability, whereas the other forms of liability under Article 25(3) (b)-(d) of the Statute constitute accessorial liability.145

4.2.1 Principal Liability in Article 25(3)(a)

The term 'commission' is considered to be synonymous with 'perpetration'.146 Article 25(3)(a) recognizes three different kinds of perpetration. The first kind is direct perpetration, where a crime is committed as an individual. The second kind of perpetration is co-perpetration. In the Statute, this is referred to as committing a crime jointly with another. The third kind is indirect perpetration, defined as committing through another person, regardless of whether that other person is criminally responsible. The Statute is the first international instrument in which indirect perpetration is explicitly regulated.147

The PTC in the Katanga and Ngudjolo Decision on the Confirmation of Charges (hereinafter “Katanga and Ngudjolo”) has also introduced a fourth kind of perpetration, a version of indirect perpetration called indirect co-perpetration, a notion that has been subject to critique. The next sub-chapters will give an account for each of these four kinds of perpetration.

4.2.1.1 Direct Perpetration

The first kind of perpetration is direct perpetration and takes place when an individual physically carries out the objective elements of a crime and has the mental state required by article 30(1) and the crime in question.148 The Statue refers to direct perpetration as committing a crime as an individual. The meaning of this is not to reinforce the principle of individual criminal responsibility, but should be read as direct perpetration.149 Committing as an individual is rare in relation to Rome Statute Crimes, for, given the wide-scale nature of

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145 Lubanga Decision, supra note 137, paras. 320, 332.
148 Lubanga Decision, supra note 137, para. 332; Katanga and Ngudjolo Decision, para. 488.
such crimes, those who are accused of being most responsible before the Court, are often said to have lead in perpetrating these crimes remotely, away from the scene of the crime.

4.2.1.2 Co-perpetration
Committing jointly with another, co-perpetration, connotes two or more perpetrators who each contribute to the commission of the crime. Co-perpetration is a form of committing and, therefore, indicates a principal liability, an autonomous form of perpetration and not a form of accessorial liability.\textsuperscript{150}

Co-perpetration was first discussed in the \textit{Lubanga} Decision. Thomas Lubanga Dyilo was charged with conscripting and enlisting children, and using them to participate in hostilities during the Ituri conflict between 2002 and 2003. He was charged as a co-perpetrator for the crimes. Later on, in the first verdict delivered by the Court (hereinafter “\textit{Lubanga Judgment}”), the Trial Chamber found Lubanga guilty as a co-perpetrator for the alleged crimes.\textsuperscript{151} The PTC argued that co-perpetration was the relevant mode of liability to charge Lubanga with, because:

“the concept of co-perpetration is originally rooted in the idea that when the sum of the co-ordinated individual contributions of a plurality of persons results in the realisation of all the objective elements of a crime, any person making a contribution can be held vicariously responsible for the contributions of all the others and, as a result, can be considered as principal to the whole crime.”\textsuperscript{152}

The PTC contemplated different methods of distinguishing between perpetrators and resolved to rely on the theory of “control of the crime” after rejecting a purely objective and purely subjective approach to distinguishing between perpetrators and accessories. A purely objective approach would have required a principal to physically carry out the elements of the offence, and the PTC argued that this was not compatible with Article 25(3)(a) of the Statute, because of the reference to committing an offence through another person.\textsuperscript{153} There was no evidence that the accused personally committed the \textit{actus reus} of the alleged crime.

\begin{footnotes}
\item[150] \textit{Lubanga} Decision, supra note 137, para. 340.
\item[151] \textit{Lubanga} Trial Judgment, supra note 4, para. 1358.
\item[152] \textit{Lubanga} Decision, supra note 137, para. 326; \textit{Katanga and Ngudjolo} Decision, supra note 138, para. 520.
\item[153] \textit{Lubanga} Decision, supra note 137, para. 333.
\end{footnotes}
A purely subjective approach defines the perpetrators as only those who make their contribution with the shared intent to commit the offence and considers them as being principals to the crime, regardless of their respective contributions. The PTC argued that this approach was similar to Article 25(3)(d), that is, contribution to a commission by a group of persons acting with a common purpose. Here, it was held that this was a form of accessory liability, and therefore not principal liability. It was also concluded that the provision was indeed similar to JCE liability. The PTC ultimately opted for a mixed subjective and objective approach that required objective joint control over the crime and awareness of the factual circumstances that enabled the accused to jointly control the crime.

The PTC in the Lubanga Decision analysed co-perpetration in the context of the control over the crime theory, highlighting that:

“Principals to a crime are not limited to those who physically carry out the objective elements of the offence, but also include 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.”

4.2.1.3 The Theory of “Control of the Crime” and its Application in Lubanga

The theory, in German known as Tatherrschaft was developed by the German criminal law scholar Claus Roxin in the 1960's. Roxin's control theory of perpetration distinguishes between principals and accessories ('Täter' and 'Beihilfe') by asking who had control over the crime in question. The theory requires that the person have the power to determine whether a certain act is done.

In the Lubanga Judgment, the Trial Chamber outlined the necessary material elements for co-perpetration as follows: a) the involvement of at least two individuals in the commission of a

154 Ibid., paras. 334-337. See also section 5.2.
155 Ibid., para. 338. See also A. Cassese and P. Gaeta, International Criminal Law, supra note 7, p. 176.
156 Lubanga Decision, supra note 137, para. 330.
158 E. Van Sliedregt, Individual criminal responsibility in international law; supra note 8, p.82.
crime;\textsuperscript{159} b) the existence of an agreement or common plan (that can be implicit) between two or more persons, that must, in the ordinary course of events, result in the occurrence of the crime;\textsuperscript{160} and, c) the accused provided an essential contribution to the common plan that resulted in the commission of the relevant crime.\textsuperscript{161}

Joint control of the crime is inherent to the essential function of each co-perpetrator in the implementation of the overall common plan.\textsuperscript{162} Only those who have been assigned tasks which are so essential that they can frustrate the commission of the crime by not performing them are considered co-perpetrators. However, none of the co-perpetrators need to have overall control over the offence.\textsuperscript{163} Therefore, when a crime is committed by a plurality of persons, the only ones that are considered co-perpetrators (the principals to the crime) are those who make a contribution which is essential for the performance of the objective elements of the crime. Without them making that contribution, the performance (crime) would be disrupted.\textsuperscript{164} Each co-perpetrator is responsible for the whole crime. Their cooperation must therefore be close, as their contributions are mutually attributable.\textsuperscript{165}

The Trial Chamber in the \textit{Lubanga} Judgment stated that for the mental element, co-perpetration requires action with intent. However, the Trial Chamber argued that it was sufficient that the accused and at least one other perpetrator meant to conscript, enlist or use children under the age of 15 to participate actively in hostilities, or that they were aware that in implementing their common plan, this consequence will occur in the ordinary course of events and that the accused was aware that he provided an essential contribution to the implementation of the common plan.\textsuperscript{166} The \textit{mens rea} required is therefore \textit{dolus eventualis} (awareness of the possibility). Hence, for establishing \textit{mens rea} in co-perpetration, it is sufficient with the same degree of \textit{mens rea} that suffices for individually committing. If a

\textsuperscript{159} \textit{Lubanga} Trial Judgment, supra note 4, para. 980.
\textsuperscript{160} \textit{Ibid.}, paras. 981, 984, 987.
\textsuperscript{161} \textit{Ibid.}, para. 1006.
\textsuperscript{162} \textit{Lubanga} Decision, supra note 137, paras. 332, 342 and 347; \textit{Katanga and Ngudjolo} Decision, supra note 138, paras. 488, 521 and 525.
\textsuperscript{163} \textit{Lubanga} Decision, supra note 137, para. 347; \textit{Lubanga} Trial Judgment, supra note 4, para. 922.
\textsuperscript{164} H Olásalo, \textit{The criminal responsibility of senior political and military leaders as principals to international crimes} supra note 63, p. 266.
\textsuperscript{165} E. Van Sliedregt, \textit{Individual criminal responsibility in international law}, supra note 8, p.99.
\textsuperscript{166} \textit{Lubanga} Trial Judgment, supra note 4, paras. 1007-1016.
special mens rea is required, such as *dolus specialis* of genocide, this will also be the *mens rea* required for co-perpetration.

**4.2.1.4 Indirect Perpetration**

Indirect perpetration, occurs when the indirect perpetrator uses another person to physically commit the crime. In indirect perpetration, the physical perpetrator can be an innocent agent who is not fully criminally responsible for his or her actions because he or she is acting under a mistaken belief, duress or incapacity.\(^{167}\) In *Katanga and Ngudjolo*, the PTC established that this mode of liability may also apply when the other person is not innocent, when the accused person (the perpetrator behind the perpetrator) acts through another by means of control over an organisation.\(^{168}\)

The PTC further argued that as long as the senior political or military leaders control the will of the person who physically carries out the objective elements of the crime (and thus has the power to decide whether the crime will be committed and how it will be committed), he or she is considered to have in fact committed the crime and is therefore a direct perpetrator. The person who physically carries out the objective elements of the crime is only used as a tool through which his decision to commit the crime is physically implemented.\(^{169}\)

The PTC used Roxin's organisational variant of the control theory (*Organisations-herrschaft*), where the accused acts through an “organized structure of power” to exercise control of the will and acts of the physical perpetrators. Indirect perpetration thus requires either that the defendant use a subordinate individual who is used as an instrument to commit the crime, or that the defendant have authority over a hierarchical and rule-governed organisation whose members, carry out the crimes under the command of the leader. To have control of the crime in indirect perpetration, therefore, entails to have control of the will of those who carry out the objective elements of the offence.\(^{170}\)

\(^{167}\) *Katanga and Ngudjolo Decision*, supra note 138, para. 495.


\(^{170}\) *Lubanga Decision*, supra note 137, para 332.
The objective element for indirect perpetration primarily requires that the accused control an organisation.\textsuperscript{171} In order to enable the perpetrator behind the perpetrator to commit crimes through an organisation, the organisation must be an organised and hierarchical apparatus of power.\textsuperscript{172} The perpetrator behind the perpetrator who carries out the \textit{actus reus} of the crime must be a part of the organisation in such a way that he or she is merely an anonymous figure that could easily be substituted for another.\textsuperscript{173}

In order to fulfil the subjective elements for indirect perpetration, the accused must fulfil the same subjective elements that are needed for co-perpetration. In addition, the accused must be aware of the factual circumstances enabling him or her to exercise control over the crime through another person. The accused must also be aware of the character of their organisation, their authority within the organisation, and the factual circumstances enabling near automatic compliance with their orders.\textsuperscript{174}

\subsection*{4.2.1.5 Indirect Co-perpetration}
In \textit{Katanga and Ngudjolo}, the PTC established a fourth form of direct perpetration, a combination of co-perpetration and indirect perpetration called indirect co-perpetration. This case involved Germain Katanga and Mathieu Ngudjolo Chui who were military commanders of the FRPI and FNI armed groups in Eastern Congo. Katanga and Ngudjolo Chui were accused of war crimes and crimes against humanity allegedly committed in the village of Bogoro in DRC from January to March 2003. They were charged in a joint case but on 21 November 2012, the Trial Chamber decided to separate the joint case against the two suspects. On 18 December 2012 the Trial Chamber delivered the verdict against Ngudjolo Chui, where it held that it had not been proven beyond reasonable doubt that Ngudjolo was the commander of the Lendu combatants from Bedu-Ezekere at the time of the attack in Bogoro and, therefore, that he could not be proven to be responsible for the crimes charged.\textsuperscript{175} The verdict in the case against Katanga is expected in 2013.

\textsuperscript{171} \textit{Katanga and Ngudjolo} Decision, \textit{supra} note 138, para. 500.
\textsuperscript{172} \textit{Ibid.}, para. 511.
\textsuperscript{173} \textit{Ibid.}, para. 515.
\textsuperscript{174} \textit{Ibid.}, para. 538.
\textsuperscript{175} \textit{The Prosecutor v. Ngudjolo Chui}, ICC, Judgment, (Trial Chamber), \textit{supra} note 135.
The PTC argued that neither indirect perpetration nor co-perpetration, by themselves, were sufficient to capture the legal relationships between the relevant perpetrators because Katanga and Chui controlled separate militias, each of which committed elements of the overall criminal endeavour. The militias were ethnic (or tribal) organisations and could not (or would not) be integrated into a single organisation and obey to the same orders.\footnote{Katanga and Ngudjolo Decision, supra note 138, para. 493.}

The PTC combined Roxin's doctrine of co-perpetration (Mittaterschaft) with the doctrine of indirect perpetration, the perpetrator behind the perpetrator (Täter hinter dem Täter), creating the notion of an indirect co-perpetrator (mittelbare Mittatterschaft).\footnote{Ibid. para. 492.} Indirect co-perpetration, however, has no basis in Roxin's initial theory and was instead a judicial construct by the PTC.\footnote{J.D Ohlin, 'Second-Order Linking Principles: Combining Vertical and Horizontal Modes of Liability', Leiden Journal of International Law, vol. 25, no. 3, 2012, p.777.} Article 25(3)(1) provides for the commission of a crime through another person but does not mention perpetration through an organisation. The PTC argued that since the crimes covered by the Statute will almost inevitably concern collective or mass criminality, the Statute must be understood to target the category of cases which involves a perpetrator’s control over the organisation.\footnote{Katanga and Ngudjolo Decision, supra note 138, para 501.}

The PTC stated that the mode of liability of indirect co-perpetration is necessary as;

"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 assess the blameworthiness of ‘senior leaders’ adequately."\footnote{Ibid.}

Due to the acquittal of Ngudjolo Chui, the verdict did not rule on the law in relation to the mode of responsibility charged. However, in a concurring opinion by Judge Christine Van den Wyngaert, indirect co-perpetration was extensively criticized.\footnote{See section 4.3.5}
In the Warrant of Arrest against Omar Al Bashir, the President of Sudan, accused of bearing criminal responsibility for genocide, crimes against humanity and war crimes committed against members of the Fur, Masalit and Zaghawa groups in Darfur, Al Bashir was described as an indirect co-perpetrator. Al Bashir is alleged to have played an essential role in coordinating the design and implementing the common criminal plan. The application of indirect co-perpetration differed substantially from that in Katanga and Ngudjolo as Al Bashir and his co-perpetrators were in charge of different branches of the apparatus of power. The PTC held that Al Bashir and the other high-ranking Sudanese political and military leaders directed the branches of the apparatus of the State of Sudan and, in a coordinated manner, could jointly implement the common plan.

To sum up, indirect co-perpetration requires the combined objective and subjective elements of co-perpetration based on joint control and indirect perpetration.

**4.3 Critique of the “Control of the Crime Theory”: Judicial and Scholarly Positions**

The theory of “control of the crime” and its application in the Court has been criticized from different perspectives. Significant opinions handed down by two judges of the ICC, as well as related criticism from scholars, will be accounted for in this section.

**4.3.1 Critique by Judge Fulford**

In the Lubanga Judgment, presiding Judge Sir Adrian Fulford handed down a separate opinion, dissenting from majority's reliance on the control theory. Judge Fulford argued that relying on the control theory will create problems for the Court due to the necessary element of essential contribution. To establish that the defendant performed an essential contribution, one has to decide if the crime would have still occurred in the absence of the defendant’s

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182 The Prosecutor v. Al bashir, ICC, Decision on the Issuance of a Warrant of Arrest, supra note 139, paras. 209-223. Al Bashir is still not under arrest and there has therefore been no Decision on the Confirmation of Charges.

183 Ibid., para. 216.

184 Katanga and Ngudjolo Decision, supra note 138, paras. 495-539.
contribution, which His Honour argued falls outside the scope of the Rome Statute.\textsuperscript{185} His Honour further argued that it is not necessary that the required contribution for co-perpetration must be essential, and that the word “commits” simply requires an operative link between the individual’s contribution and the commission of the crime.\textsuperscript{186} Judge Fulford found that the modes of commission under Article 25(3)(a)-(d) of the Statute were not designed to be mutually exclusive. Therefore, there was no need to distinguish between principal and accessory liability.\textsuperscript{187}

Regarding the control theory, His Honour held that it's not appropriate for the Court to rely on the theory since it is derived from German legal tradition, where the distinction between principals and accomplices is central. In German law, statutory sentencing for principals and accomplices differ significantly, whereas, at the ICC there are no statutory sentencing guidelines. Here his Honour remarked that:

“It would be dangerous to apply a national statutory interpretation simply because of similarities of language, given the overall context is likely to be significantly different”.\textsuperscript{188}

\textbf{4.3.2 Critique by Judge Wyngaert}

Judge Christine Van den Wyngaert wrote a concurring opinion in the verdict against Ngudjolo Chui where she nonetheless criticized the reliance on the control theory by the Court. Her Honour agreed to a large extent with Judge Fulford's arguments but also added several of her own arguments, including, importantly, a criticism of the notion of indirect co-perpetration.

Her Honour argued that the control theory wasn’t consistent with Article 22(2) of the Statute nor with the ordinary meaning of Article 25(3)(a) and that there was no hierarchy to be found in the modes of liability listed in Article 25(3)(a)-(d). Furthermore, her Honour opposed the control theory's treatment of the common plan as an 'objective' as opposed to a ‘subjective’

\textsuperscript{185} Lubanga Trial Judgment, supra note 4, Separate Opinion of Judge Adrian Fulford, para. 15.
\textsuperscript{186} Ibid.
\textsuperscript{187} Ibid., para 7.
\textsuperscript{188} Ibid., para. 10.
element, which unduly focused on the accused's link to the common plan as opposed to the crime and that there was no legal basis for the essential contribution requirement.\textsuperscript{189}

Her Honour argued that the common plan in the context of Article 25(3)(a) pertains to the subjective rather than to the objective element of joint perpetration, and that a combined reading of Articles 25(3)(a) and 30 clearly suggested that the mental element of joint perpetration is the existence among the joint perpetrators of a shared intent. Here, Judge Van den Wyngaert stated that:

\begin{quote}
"If the mental element is linked to a contribution towards a broadly defined common plan, as the control theory does, then the connection to the crime might be almost entirely lost. When this happens, we come dangerously close to treating the mode of criminal responsibility as a crime in itself."\textsuperscript{190}
\end{quote}

Judge Van den Wyngaert argued that the notion of Organisationsherrschaft, control over an organisation, is not consistent with 25(3)(a), which only provides for indirect perpetration through another person, not through an organisation.\textsuperscript{191}

According to Her Honour, "indirect co-perpetration", as interpreted by the PTC, has no place under the Statute as it is currently worded. She argued that the concept is based on an expansive interpretation of Article 25(3)(a) of the Statute, which is inconsistent with Article 22(2) of the Statute.\textsuperscript{192}

\subsection*{4.3.3 Critique by Legal Scholars}

Like Judge Van den Wyngaert, legal scholar Jens Ohlin has argued that the "control of the crime" theory is too focused on the objective elements of the crime and disregards the joint intention of the participants in the collective crimes. He reasoned that:

\begin{thebibliography}{99}
\bibitem{190} \textit{Ibid.}, paras. 32-35.
\bibitem{191} \textit{Ibid.}, paras. 52-57.
\bibitem{192} \textit{Ibid}, para. 64.
\end{thebibliography}
American scholar Mark Osiel argues that control over the crime through an organisation does not reflect the reality of mass atrocity. Osiel argues that Roxin’s theories are best suited for a structured and hierarchical organizational apparatus that is controlled by the military or civilian superior to commit the crimes he intends. Such an organisational form is not present where mass atrocity is planned, incited, and perpetrated. Informal networks of power are often a more potent force of killings and destruction than hierarchical organisations. Therefore, in situations of mass conflict, no individual or even set of individuals completely exercises authority over the conduct of individuals at the lower levels of the hierarchy. Hence, control of the crime might not be too evident to establish in situations of widespread mass conflict.

Italian scholar Chantal Meloni holds a similar view, arguing that the control of the crime through an organisation appears to be better fitting to regulate participation in crimes committed in the framework of strictly hierarchically structured contexts. The theory was developed in such context, of the crimes committed within Nazi and Communist Germany and not in the context of informal African conflicts where the Court has been applying the theory.

4.4 Contribution to the Commission by a Group of Persons under Article 25(3)(d)

Article 25(3)(d) provides for criminal responsibility for a person who 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. It adds that:

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.

The Chambers has established that only Article 25(3)(a) provides for principal responsibility and Article 25(3)(a-d) provides for accessorial liability. Therefore, it has concluded that only accomplices can be attributed with responsibility under Article 25(3)(d).

In the *Lubanga* Decision, the PTC stated that Article 25(3)(d) codifies a residual form of liability which cannot be characterised as ordering, soliciting, inducing, aiding and abetting or assisting within the meaning of article 25(3)(b-c).\(^\text{196}\) Hence, the paragraph requires less of a threshold than any other form of liability under the Rome Statute and is therefore a catchall provision.\(^\text{197}\)

Callixte Mbarushimana,\(^\text{198}\) a suspect of war crimes and crimes against humanity, was accused under Article 25(3)(d). In the Decision on the Prosecutor’s Application for a Warrant of Arrest, the PTC held that it did not have reasonable grounds to believe that Mbarushimana’s contribution to the common plan was essential enough to characterize him as a co-perpetrator, instead, his contributions would fall under Article 25(3)(d).\(^\text{199}\)

PTC set out the requirements for liability under Article 25(3)(d) ICC Statute:
The objective elements are: (i) a crime within the jurisdiction of the Court is attempted or committed; (ii) the commission or attempted commission of such a crime was carried out by a group of persons acting with a common purpose; (iii) the individual contributed to the crime in any way other than those set out in Article 25(3)(a) to (c) of the Statute.\(^\text{200}\)

\(^\text{196}\) *Lubanga* Decision, *supra* note 137, para. 335.
\(^\text{197}\) J.D. Ohlin, 'Joint Intentions to Commit International Crimes', *supra* note 193, p. 409.
\(^\text{198}\) Later on, the PTC declined the confirmation of charges and released Mbarushimana from ICC custody, See *The Prosecutor v. Callixte Mbarushimana*, ICC, Decision declining to confirm the Charges, Case no. ICC-01-04-01-10, 16 December 2011, (PTC I), para. 135.
\(^\text{200}\) Ibid., para. 39.
The subjective elements are: (i) the contribution shall be intentional; and (ii) shall either (a) be made with the aim of furthering the criminal activity or criminal purpose of the group; or (b) in the knowledge of the intention of the group to commit the crime.\textsuperscript{201} The meaning of ‘intentional’ followed by ‘and’ has been discussed by many legal scholars. ‘Intentional’ in this context could be a reference to the mental elements in Article 30; it could also be a reference to the two specific subjective requirements set out in subparagraphs (i) and (ii) in Article 25(3)(d); another suggestion is that it could be a reference the contribution and subparagraphs (i) and (ii) in Article 25(3)(d) to the underlying crime.\textsuperscript{202} The Trial Chamber in \textit{Mbarushimana} did not elaborate on the meaning of the wording.

The subjective element for Article 25(3)(d)(i) is the intention to further the criminal activity or the purpose of the group. In accessorius forms of liability, it is not necessary that the participant shares the particular mental elements of the crime committed by the group.\textsuperscript{203} The subjective elements for Article 25(3)(d)(ii) requires knowledge of the intention of the group to commit the crime; knowledge in Article 30, it has been found, requires awareness that a circumstance exists or a consequence will occur in the ordinary course of events.

The language in Article 25(3)(d) has been criticized by many and has been considered confusing both in itself and in relation to the other provisions in the Article. Legal scholar Jens Ohlin argues that Article 25(3)(d) is “hopelessly tangled because no coherent interpretation of the provision is possible” and, as such, argues that the Statute should be amended in this regard.\textsuperscript{204}

\begin{flushleft}
\textsuperscript{201} \textit{Ibid.}
\textsuperscript{202} B. Goy ‘Individual Criminal Responsibility before the International Criminal Court A Comparison with the Ad Hoc Tribunals’, \textit{supra} note 60, p. 67. \textit{See also} J.D. Ohlin, ‘Joint Criminal Confusion’, \textit{supra} note 5.
\textsuperscript{203} B. Goy ‘Individual Criminal Responsibility before the International Criminal Court A Comparison with the Ad Hoc Tribunals’, \textit{supra} note 60, p. 69.
\textsuperscript{204} J.D. Ohlin, \textit{Joint Intentions to Commit International Crimes}, \textit{supra} note 193, p. 208.
\end{flushleft}
5. Comparison between the Modes of liability under the Rome Statute and JCE

In this chapter, a comparison will be made between JCE and those modes of liability under the Rome Statute that have been accounted for. The Rome Statute was adopted in 1998, hence prior to the establishment of the JCE doctrine by the ICTY. The different modes of enabling liability for individuals who commit crimes in groups have therefore developed side by side, though as earlier stated, the Appeals Chamber in Tadić referred to the Rome Statute as an example that JCE was customary international law. Hence, the provision under the Rome Statute influenced the Chamber in the application of JCE in the ICTY.

As this study has shown, it could be argued that both Article 25(3)(a) and (d) hold certain characteristics of JCE. In what follows, these modes of liability will be compared and contrasted to the doctrine of JCE.

Thereafter, a discussion of the possibility for the ICC to apply JCE as a mode of liability will be given. Furthermore, a comparison of the different modes of liability and their compatibility with the principle of nulla poena sine culpa as well as the context of modern day armed conflict will be laid out.

5.1 Comparison between JCE and Co-perpetration/Indirect Perpetration

The late Antonio Cassese argued that JCE liability is implicitly permitted by Article 25(3)(a) because of the reference to ‘committing a crime’ ‘jointly with another’.

This argument was also supported by the Legal Representatives of the victims in the Lubanga Decision who argued that the concept of co-perpetration in Article 25(3)(a) pertains to the

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205 In this Chapter, the reference to co-perpetration and indirect perpetration will be those modes as stated in Article 25(3)(1) in the Rome Statute, and not to the use of these modes of liabilities in other courts and tribunals.
The PTC disagreed and held that JCE was more similar to the mode of liability laid down in Article 25(3)(d) arguing that:

“The Chamber considers that this latter concept -which is closely akin to the concept of joint criminal enterprise or the common purpose doctrine adopted by the jurisprudence of the ICTY – would have been the basis of the concept of co-perpetration within the meaning of Article 25(3)(a), had the drafters of the Statute opted for a subjective approach for distinguishing between principals and accessories.”

The distinction between the principal modes of liability in Article 25(3)(a) and accessorial modes of liability in Article 25(3)(b-d), according to the PTC, is, therefore, the reason why the Court cannot rely on the common purpose doctrine in Article 25(3)(d) as a principal mode of liability, in a manner that the ICTY and ICTR apply JCE.

5.1.1 The Objective Elements

Co-perpetration/indirect perpetration and JCE are both forms of committing where co-perpetrators are mutually responsible for the conduct of the other co-perpetrators. Co-perpetration can be regarded as similar to basic JCE in the sense that both require two or more perpetrators, a common plan and contribution to that plan. However, whereas co-perpetration and indirect perpetration focuses on the objective elements through the control of the crime, JCE focuses on the shared intent for the common criminal plan. This difference provides all other elements of JCE and co-perpetration/indirect perpetration to be different as well.

Co-perpetration requires an essential contribution to the crime and control over the crime. In contrast, basic and systemic JCE require only a substantial contribution to the crime. The contribution in JCE need not be criminal in itself, as long as the common criminal plan has a criminal objective. In extended JCE, the perpetrator only need to contribute to the criminal plan, and not to the crime committed outside the criminal plan. Indirect perpetration requires control of an organisation that is formal and hierarchal, whereas basic or extended JCE has no such requirements. However, in systemic JCE, an organized system of ill-treatment is

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207 Lubanga Decision, supra note 137, para.325.
208 Ibid., para. 335.
required. The perpetrator needs to be aware of the system and in some way actively participate in enforcing the system. Therefore, systemic JCE has clear similarities with indirect perpetration, though they differ in that for systemic JCE, there is no requirement to have control over the organisation.

In co-perpetration, the control of the crime links the perpetrator with the crime committed in an apparent manner, even though the perpetrator might be physically far away from where the crime is committed. The same conclusion could be drawn for indirect perpetration, where the perpetrator controls the actions of the perpetrator behind the perpetrator. In basic and systemic JCE, the link between the perpetrator and the crime committed is somewhat more diffuse as a JCE can be of large scale and the perpetrator can be far removed from the scene of the crime. In extended JCE, the link between the perpetrator and the crime is even more diffuse as the crime does not have to be at the outset a part of the common purpose but only a natural and foreseeable consequence of that common purpose.

Taking these into account, it could, therefore, be argued that the objective requirements in co-perpetration are higher than in JCE, particularly with regards to extended JCE where the link between the members of the JCE and the crime committed is particularly weak.

5.1.2 The Subjective Elements

The mental elements for basic JCE are that the participant in the JCE voluntarily participate and share the intent for the crime. The mental elements for systemic JCE are that the participant have knowledge of the system of ill-treatments and intend to further that common design. For extended JCE, it is sufficient that the participant voluntarily participates and shares the intent for the purpose and original crime. Intent for the crime committed outside the scope for the JCE is not necessary. The mens rea required for basic and systemic JCE is dolus directus of first degree; the members of the JCE must share the intent for the crime committed and must therefore possess any specific intent that is required for that specific crime. The mens rea requirement for extended JCE is however only advertent recklessness, or dolus
eventualis; that is sufficient that the accused is aware that the crime is a possible consequence and willingly takes that risk.

In co-perpetration, the subjective requirements include; awareness of the factual circumstances enabling joint control of the crime, awareness that the co-perpetrator provided an essential contribution to the implementation of the common plan and awareness that there was a substantial risk that the crimes would be carried out. The mens rea required is therefore dolus eventualis, the same requirement that is also sufficient for individual commission. As such, no elevated mens rea is required. The subjective elements for indirect perpetration are the same as for indirect perpetration. In addition, the accused must be aware of the factual circumstances enabling him or her to exercise control over the crime through another person

Consequently, it could be concluded that the mens rea requirement for basic and systemic JCE is higher than that for co-perpetration and indirect perpetration.

The mens rea requirements for extended JCE are the same as for co-perpetration and indirect co-perpetration. However, it could be argued that the mental elements are higher in extended JCE as since Article 30 under the Rome Statute provides for ‘intent and knowledge’, where knowledge is defined as ‘awareness of a possibility and willingly taking that risk’, a requirement that is higher than that in extended JCE, where no intent is required, and a foreseeable risk that the crime might occur is the only requirement.

5.1.3 Conclusions regarding the Comparison between Co-Perpetration/Indirect Perpetration and JCE

In conclusion, while co-perpetration and indirect perpetration shares some characteristics with basic and systemic JCE, the objective elements for co-perpetration and indirect perpetration are higher and the subjective elements are lower. For extended JCE, the subjective elements required are similar to co-perpetration and indirect perpetration, with the exception that extended JCE does not require intent. The objective elements are considerably lower.
Principal responsibility in article 25(1)(3) requires intent, and therefore, extended JCE is inconsistent with the provision and cannot be applied by the Court.

5.2 Comparison between JCE and Article 25(3)(d)

As discussed in chapter 3.2, The Appeals Chamber in \textit{Tadić} referred to Article 25(3)(d) as incorporating a substantially similar concept to JCE.\footnote{209} As stated in the previous sub-chapter, the PTC in the \textit{Lubanga} Decision affirmed that Article 25(3)(d) was closely akin to the doctrine of JCE.\footnote{210}

The language of the paragraph clearly resembles JCE. Both provides for responsibility and for contribution to the commission of a crime by a group of persons acting with a common purpose.

Late Judge Cassese, the Presiding Judge in \textit{Tadić}, a firm advocate of JCE, held his position from \textit{Tadić} regarding the relationship between JCE and Article 25(3)(d) for a long time. He has previously held that JCE is not only provided for in customary international law:

\[\ldots\] but also does not appear to be inconsistent with a broad interpretation of the provision of the ICC Statute governing individual criminal responsibility, i.e. Article 25, in particular 25(3)(d)\footnote{211}

However, he later changed his opinions and argued that Article 25(3)(d) is not equivalent to JCE and instead was a residual form of accessory liability.\footnote{212} The paragraph is in one way broader than JCE as it includes attempted crimes, while liability under JCE requires that the crime is completed.

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\footnote{209} \textit{Tadić} Appeal Judgment, \textit{supra} note 2, para. 222.
\footnote{210} \textit{Lubanga} Decision, \textit{supra} note 137, para 335.
\footnote{211} A. Cassese, \textit{The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise}, \textit{supra} note 124, p. 132.
\footnote{212} A. Cassese and P. Gaeta, \textit{International Criminal Law}, \textit{supra} note 7, page 175.
5.2.1 Objective Elements

The objective elements for Article 25(3)(d) include that the commission or attempted commission of a crime under the jurisdiction of the Court was carried out by a group of persons acting with a common purpose. This is very similar to the objective elements of JCE, however, while Article 25(3)(d) provides derivative liability for accomplices, JCE provides responsibility for participants in the common plan where all are co-perpetrators, i.e. principal perpetrators.

The language in the paragraph implies that the perpetrator need not be a member in the group; he or she only needs to contribute to it. In JCE, the jurisprudence for a long time held that the perpetrator needs to be a member, but in Brđanin, the Appeals Chamber came to the conclusion that the perpetrator need not be a member of the JCE.\(^\text{213}\) Hence, the recent development in JCE has made the doctrine more similar to the Article 25(3)(d) in that way.

5.2.2 Subjective Elements

The subjective elements for both Article 25(3)(d) (i) and (ii) are that they have to be intentional. As stated earlier, there is, however, confusion in the interpretation of the meaning of ‘intentional’.\(^\text{214}\)

The subjective requirement in Article 25(3)(d)(i) is that the accused must have the aim to further the criminal activity or purpose of the group, but does not have to share the intent required for the crime. This is a similar subjective element as for extended JCE. In contrast, basic and systematic JCE requires intent for the crime committed. The subjective elements are therefore higher in basic and systemic JCE, but similar to that of extended JCE.

In Article 25(3)(d)(ii), the accused need only have knowledge (awareness) of the group’s intention to commit the crime. This is contrary to basic JCE, where intent is required, and

\(^{213}\) Prosecutor v. Radoslav Brđanin, ICTY, Judgment, Case No. IT-98-36-A, 3 April 2007, (Appeals Chamber) paras. 410-413.

\(^{214}\) See section 4.4.2.
extended JCE, where intent to furthering the common criminal objective is required, but not intent to the actual crime committed. The subparagraph is similar to systemic JCE, where the accused need to have knowledge of the nature of the system of ill-treatment and further the common design of ill-treatment. The difference between the two modes, however, is that systemic JCE requires intent to further the system of ill-treatment and there is no such requirement in Article 25(3)(d)(ii).

5.2.3 Conclusions regarding the Comparison between Article 25(3)(d) and JCE

There are many similarities and differences between Article 25(3)(d) and all forms of JCE. The language in the paragraph is, however, rather confusing and due to the lack of jurisprudence from the Court, no interpretations are available. It is, therefore, difficult to argue how similar the two modes of liabilities are. The main difference between them is, nevertheless, that JCE provides for principal liability and Article 25(3)(d) for accessorial liability.

5.3 Can the ICC apply JCE as a Mode of Liability?

From the comparisons made, the main difference between JCE and co-perpetration-/indirect perpetration is the interpretation of article Article 25(3)(a) in the light of the “control of the crime” theory and thus focusing on the objective elements of the crime. Should the Court in the future instead interpret the provision in the light of shared intent, the provision would be very similar to basic and systemic JCE, and basic and systemic JCE, or aspects of them, could therefore be applied by the Court. The critique against the reliance on the control of the crime theory by Judge Fulford and Judge Van der Wyngaert suggests that a different interpretation of the Statute could be made by the Court in the future.

As for extended JCE, however, the principle modes of liability under the Rome Statue requires intent, whereas JCE only requires intent to furthering the common criminal objective is required, but not intent to the actual crime committed. JCE is therefore never applicable before the Court.
Had the Court not distinguished between principal responsibility in Article 25(3)(a) and accessorial liability in 25(3)(b)-(d), as suggested by Judge Fulford and Judge Van den Wyngaert, then perhaps Article 25(3)(d) could have been used as a principal mode of liability and interpreted as similar to basic and systemic JCE. Here as well, the different opinions within the Chamber may result in a different interpretation in the future.

If JCE is considered customary international law, the ICC could possibly use it as a mode of liability, however, according to the sources of the Court laid out in Article 21(2), customary international law can only be relied on once the Statute and the Rules of Procedure and Evidence has failed to provide a solution. Hence; the Statute is lex specialis in relation to customary international law. Given that the modes of liability for the Court are carefully laid out in Article 25(3), it is highly unlikely that the Court would rely on customary international law and apply a mode of liability that falls outside of the scope of the Statute.

In conclusion, there is a possibility that the Court in the future may apply basic or systemic JCE, or a notion similar to them, if the current interpretation of the Rome Statute changes. Extended JCE cannot, however, be applied.

5.4 A Comparison between Co-perpetration/Indirect perpetration in ICL: Two Issues

As this study has shown, the ICC has a different approach of attributing liability for cases of joint commissions of crimes than international criminal tribunals and the UN hybrid courts. There need not be a problem with two different approaches, as ICL is not (yet) a unified legal body. If one method is better than the other, there might, however, be reason to set aside one and rely on the other. There are two main questions at stake to be mindful of; 1. is any theory more compatible with the principle of nulla poena sine culpa? 2. Is anyone better for holding those most responsible for international crimes liable?
5.4.1 Nulla poena sine culpa; a Comparison between the Modes under the Rome Statute and JCE

The principle *nulla poena sine culpa* is very important principle in ICL. If the courts and tribunals expands the notion of individual criminal responsibility too far they won’t have legitimacy as fair and just, and the goals of international criminal justice will be jeopardised.

As earlier stated, extended JCE has been criticised for expanding individual criminal responsibility in an unaccepted manner and enabling guilt by association as it does not require intent to the crime committed. Co-perpetration and indirect perpetration requires intent, and could therefore be argued, better uphold the principle of *nulla poena sine culpa* than does extended JCE. It could, nevertheless, be argued that the *mens rea* standard applied in the *Lubanga Judgment*, *dolus eventualis* (awareness of the possibility), that the Trial Chamber argued was consistent with the mental elements in Article 30, also is a very low level of *mens rea*. Future case law of the Court may apply a higher standard of *mens rea*, which would better protect the principle of *nulla poena sine culpa*. The requirement of control of the crime does create a link between the perpetrator and the crime committed in a way which better serves the principle of *nulla poena sine culpa*, than does JCE where the common plan of the JCE can be nation-wide without requiring an essential contribution to the crime. Hence, there is a stronger link between the perpetrator and the crime committed in the principle modes of liability in the Rome Statute than JCE, at least in the large scale common purposes.

In conclusion, it appears that the modes of liability in the Rome Statute interpreted by the “control of the crime” theory better upholds the principle of *nulla poena sine culpa* than does JCE, though the *dolus eventualis* standard applied in *Lubanga* is still a somewhat low level of *mens rea* that ought to be raised.
4.5.2 The Context of International Crimes

International crimes today are committed in various contexts. However, they are almost always committed by groups and are often committed in chaotic, informal contexts,\(^\text{215}\) where there are plenty of armies and para-military groups. They often occur where the state has broken down, at least in the most conflict affected regions and where the armed groups are financed through organised crime.\(^\text{216}\) There is a need to have modes of liability to hold perpetrators of international crimes that is appropriate in such contexts. The “control of the crime” in co-perpetration and its version of “control over an organisation” in indirect perpetration is more consistent and better structured than JCE, however, as stated earlier, it was developed with the crimes committed by the German Nazi-regime and the crimes committed in mind. The Nazi-regime where incredibly well organised had a clear structure of hierarchy. Control over an organisation might be difficult to prove in such conflicts that are common today. In *Ngudjolo*\(^\text{217}\) the Trial Chamber could not find sufficient evidence in establishing Ngudjolo’s role in the military organisation. Though there were many different issues with evidence, the judgment could indicate that “control over an organisation” is not an appropriate theory in all armed conflicts. JCE, on the other hand, is more flexible as it only concerns a common criminal plan, and the enterprise does neither need to be organised nor hierarchal, is flexible in the sense that it can provide liability for crimes committed in various contexts and by groups of individuals whose relationships might vary. Extended JCE, regardless of all the criticism it has been subject to, does enable the courts and tribunals to hold those responsible that cannot otherwise be held responsibly under any other mode of liability, and thus ensures criminal liability.

In Conclusion, JCE does appear to be better suited as a mode of liability in such armed conflict where the Court currently operates due to its flexibility. However, there are too few decisions and judgments delivered by the Court to truly establish how well the “control of the


crime” theory and the “control over an organisation” theory can be applied in the context of armed conflict today.
6. Concluding Remarks

The modes of liability for group crime under the Rome Statute and JCE do share many characteristics, but also have many differences. The main difference is that the modes of liability in the Rome Statute, interpreted with the theory of “control of the crime” focuses on the objective elements, and JCE focuses on the subjective elements.

It is not likely that the Court will apply basic or systematic JCE as a mode of liability if it continues to rely on the theory of “control of the crime”. It is highly unlikely that the Court will apply extended JCE as it clearly falls outside the scope of the Statute. This must be considered a good thing, as it has been concluded in this study that extended JCE has low subjective and objective requirements, and therefore threatens the principle of nulla poena sine culpa.

The ICC has only recently given its first verdicts and the coming years will give its Chambers opportunity to further the interpretation of its Statute regarding the modes of liabilities for crimes committed by groups. Given the separate and concurring opinions that have so far appeared criticising the reliance on the control theory, it is likely that the Court might change some of its initial interpretations.

While the ICTY and the ICTR are preparing to close down, and with the ECCC refusing to apply extended JCE, its controversial application in SCSL and its broader use under constant criticism, JCE, one of the most commonly used modes of liability for international crimes today, also has an uncertain future.
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