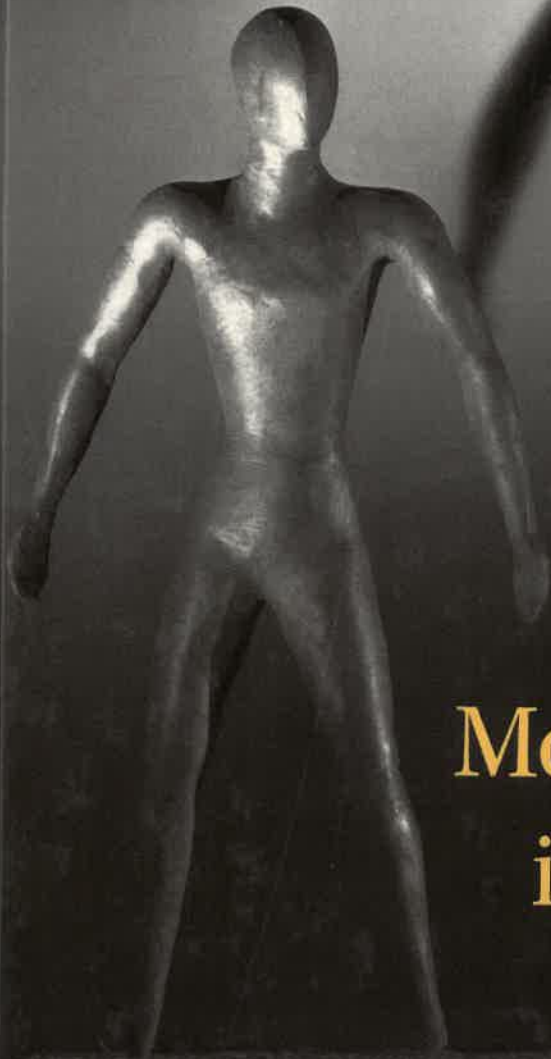


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# Modes of Liability in International Criminal Law

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## Group Acting with a Common Purpose

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### 10.1 Introduction

1. Criminal responsibility for contributing to a group acting with a common purpose is a key – yet controversial – issue in ICL. On the one hand, it is well-known that international crimes are normally committed by groups of people acting pursuant to joint plans or agreements.<sup>1</sup> This calls for liability theories that establish responsibility based on the accused's participation in a collective criminal effort. On the other hand, the principles of individual criminal responsibility and personal guilt proscribe the attribution of crimes committed by others to the accused merely because of his/her membership in a group or organization.<sup>2</sup>

2. The question of how to establish *individual* liability for *group* criminality yielded extensive discussions during the negotiations of the ICC Statute.<sup>3</sup> Whilst some delegations opposed any type of group responsibility, others were determined to include at least some collective element in Article 25(3) of the ICC Statute.<sup>4</sup> In particular, the drafters debated whether or not to implement the notion of conspiracy.<sup>5</sup> Conspiracy establishes responsibility for agreeing with others to commit a crime, without requiring that this crime actually be carried out (or even attempted).<sup>6</sup> The conspiracy concept was incorporated

<sup>1</sup> See the different chapters in H. Van der Wilt and A. Nolkaemper (eds.), *System Criminality in International Law* (Cambridge: Cambridge University Press, 2009). See also, G.P. Fletcher and J.D. Ohlin, 'Reclaiming Fundamental Principles of Criminal Law in the Darfur Case', 3 *Journal of International Criminal Justice* (2005) 539, at 542–550; J.D. Ohlin, 'Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise', 5 *Journal of International Criminal Justice* (2007) 69, 72–74; E. van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford: Oxford University Press, 2012), at 20–22.

<sup>2</sup> Fletcher and Ohlin, 'Joint Criminal Enterprise', supra n. 1, at 542–550. Many domestic jurisdictions have criminalized membership of a criminal organization as a separate crime. See van Sliedregt, supra n. 1, at 22–37.

<sup>3</sup> E.g. Ohlin, 'Joint Criminal Enterprise', supra n. 1, at 78–88.

<sup>4</sup> Preparatory Committee on the Establishment of the International Criminal Court, *Decisions Taken by the Preparatory Committee at Its Session Held from 11 to 21 February 1997*, 12 March 1997, UN Doc. A/AC.249/1997/L.5, 21–22; Preparatory Committee on the Establishment of the International Criminal Court, *Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands*, 4 February 1998, UN Doc. A/AC.249/1998/L.13, 52–53; Preparatory Committee on the Establishment of an International Criminal Court, *Proceedings of the Preparatory Committee, Draft Summary*, 8 April 1996, UN Doc. A/AC.249/CRP.3/Add.1, paras. 3, 14.

<sup>5</sup> G. Werle, 'Individual Criminal Responsibility in Article 25 ICC Statute', 5 *Journal of International Criminal Justice* (2007) 953, at 970; P. Saland, 'International Criminal Law Principles', in R.S. Lee (ed.), *The International Criminal Court, The Making of the Rome Statute* (The Hague: Kluwer Law International, 1999) 189, at 199; A. Eser, 'Individual Criminal Responsibility', in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), Vol. I, 767, at 802.

<sup>6</sup> See Ch. 13 of the Study.

in the Statutes of the Nuremberg<sup>7</sup> and Tokyo<sup>8</sup> Tribunals, the 1996 Draft Code of Crimes,<sup>9</sup> and the Draft Statute for an International Criminal Court.<sup>10</sup> Nevertheless, several delegations in Rome opposed its inclusion in the ICC Statute, considering that the notion of conspiracy violates the principle of individual responsibility.<sup>11</sup> In the search for alternative forms of criminal responsibility for group criminality, the drafters agreed upon a concept that criminalizes contributions to crimes committed by a group acting with a common purpose (hereinafter 'common purpose liability'). This concept was defined in Article 25(3)(d) of the ICC Statute.

3. The present chapter discusses common purpose liability as comprised in Article 25(3)(d) of the ICC Statute. It does not address conspiracy, which is examined in elsewhere in this Study.<sup>12</sup> Having said that, the chapter will refer to (case law on) conspiracy in so far as it helps to understand the background and scope of common purpose liability. The present chapter examines four main issues, namely the meaning and scope of application of common purpose liability (Section 10.2); its constitutive elements (Section 10.3); its status under ICL (Section 10.4); and the evidentiary factors that are relevant for proving common purpose liability (Section 10.5). Based on these findings, the chapter will then establish general principles (Section 10.6).

## 10.2 Meaning and Application

### 10.2.1 Definition and Related Concepts

4. After defining common purpose liability (Subsection (a)), the concept will be distinguished from the related notions of joint perpetration, JCE, conspiracy, and aiding and abetting (Subsection (b)).

#### (a) Definition

5. Common purpose liability is defined in Article 25(3)(d) of the ICC Statute, which reads as follows:

a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person [i]n 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.

<sup>7</sup> Art. 6(2)(a) Nuremberg Charter.

<sup>8</sup> Art. 5(2)(a) Tokyo Charter.

<sup>9</sup> Art. 2(2)(e) Draft Code of Crimes.

<sup>10</sup> Draft Statute for an International Criminal Court, *Yearbook of the International Law Commission*, 1994, Vol. II, Part Two, Art. 3(1)(c)(iv).

<sup>11</sup> Preparatory Committee on the Establishment of an International Criminal Court, 25 March–12 April 1996, *Proceedings of the Preparatory Committee, Draft Summary*, UN Doc. A/AC.249/CRP.3/Add.1, 8 April 1996, para. 15.

<sup>12</sup> See Ch. 13 of the Study.

6. The definition of common purpose liability is copied from Article 2(3)(c) of the 1997 International Convention for the Suppression of Terrorist Bombings (Terrorist Bombings Convention),<sup>13</sup> which itself is based on Article 3(4) of the 1996 Convention Relating to Extradition between Member States of the European Union (Extradition Convention).<sup>14</sup> Thus, unlike traditional concepts of criminal participation – such as instigating and aiding and abetting – common purpose liability does not stem from domestic criminal law, but has its basis in international conventions. The drafting history of the ICC Statute does not clarify why these conventions were used to define common purpose liability.<sup>15</sup> Most likely, they were considered particularly fit because – just like the ICC Statute – the Terrorist Bombings and Extradition Conventions apply to complex, organized crimes in which groups of people act together in a joint criminal endeavour.

7. The central element of Article 25(3)(d) of the ICC Statute is the common purpose amongst a group of persons who engage in criminal activities together. The common purpose constitutes a 'collective element' that ties the contributions of different participants together, thus allowing for the mutual attribution of crimes to all persons who contribute to a joint criminal effort.<sup>16</sup> The definition of common purpose liability in the ICC Statute does not require that the accused supports the common purpose, in the sense that he/she shares the group's goals or intentions,<sup>17</sup> or that he/she intends to commit the crimes for which he/she is charged. It suffices that the accused makes an intentional contribution to group crimes, whilst at least knowing of the group's criminal purpose. Hence, common purpose liability can be applied to persons who act from a remote position.<sup>18</sup>

<sup>13</sup> UNGA Res 52/164, 15 December 1997. Article 2(3)(c) reads as follows: 'any person also commits an offence if that person [i]n any other way contributes to the commission of one or more offences as set forth in paragraph 1 or 2 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'.

<sup>14</sup> OJEU C313/12, 27 September 1996. Article 3(4) allows for extraditing persons for conduct 'which contributes to the commission by a group of persons acting with a common purpose of one or more offences in the field of terrorism as in Articles 1 and 2 of the European Convention on the Suppression of Terrorism, drug trafficking and other forms of organized crime or other acts of violence against the life, physical integrity or liberty of a person, or creating a collective danger for persons, punishable by deprivation of liberty or a detention order of a maximum of at least 12 months, even where that person does not take part in the actual execution of the offence or offences concerned; such contribution shall be intentional and made having knowledge either of the purpose and the general criminal activity of the group or of the intention of the group to commit the offence or offences concerned'.

<sup>15</sup> Saland, *supra* n. 5, at 199–200.

<sup>16</sup> This has been clarified in case law on the common plan element of joint perpetration. ICC, *Lubanga*, Appeals Chamber Judgment, ICC-01/04-01/06, 1 December 2014, para. 445; ICC, *Lubanga*, Trial Chamber Judgment, ICC-01/04-01/06, 14 March 2012, para. 981; ICC, *Blé Goudé*, Pre-Trial Chamber Decision on the Confirmation of Charges, ICC-02/11-02/11, 11 December 2014, para. 134.

<sup>17</sup> ICC, *Katanga*, Trial Chamber Judgment, ICC-01/04-01/07, 7 March 2014, para. 1631; ICC, *Mbarushimana*, Pre-Trial Chamber Decision on the Confirmation of Charges, ICC-01/04-01/10, 16 December 2011, para. 272–275.

<sup>18</sup> *Mbarushimana* Decision on the Confirmation of Charges, *supra* n. 17, para. 289; ICC, *Lubanga*, Pre-Trial Chamber Decision on the Confirmation of Charges, ICC-01/04-01/06, 29 January 2007, para. 337; *Lubanga* Trial Judgment, *supra* n. 16, paras. 996–999; ICC, *Ruto et al.*, Pre-Trial Chamber Decision on the Confirmation of Charges, ICC-01/09-01/11, 23 January 2012, para. 354.



## (b) Related concepts

8. Common purpose liability constitutes a new form of criminal participation in ICL that was first introduced in the Statute of the ICC.<sup>19</sup> Having said that, common purpose liability is related to other – more common – modes of liability.

9. First, common purpose liability is connected to *joint perpetration*. According to the Trial Chamber majority in *Katanga*, the finding that joint perpetrators acted pursuant to a common plan may help to establish the existence of a group acting with common purpose.<sup>20</sup> The majority even suggested that the facts that need to be proven for common purpose liability are an integral part of joint perpetration, so much so that the former concept is subsumed by the latter.<sup>21</sup> Indeed, common purpose liability and joint perpetration are similar in so far as both concepts relate to group criminality and establish responsibility for acting pursuant to a common (criminal) plan. Yet, the *actus reus* and *mens rea* elements of common purpose liability and joint perpetration also display important differences.

10. First, joint perpetration requires that the accused exercises control over the crime by making an *essential* contribution,<sup>22</sup> which means that the accused can frustrate the commission of the crime by withdrawing his/her support.<sup>23</sup> By contrast, as provided by Article 25(3)(d), common purpose liability can be established when the accused contributes to the commission of crimes 'in any other way'. According to ICC case law, this element is met when the accused makes a *significant* contribution<sup>24</sup> by influencing the group's criminal purpose – a *conditio sine qua non* relation is not required.<sup>25</sup> Thus, common purpose liability can be applied to persons who play a more marginal role in the commission of crimes than joint perpetrators.

11. Second, whilst Article 25(3)(d) of the ICC Statute requires that the accused contributes to the commission of crimes specifically, it is not yet clear whether joint perpetration entails a similar requirement. Indeed, the *Lubanga* Appeal Judgment may be interpreted as requiring a material link between the accused's actions and the commission

<sup>19</sup> G. Werle, *Principles of International Criminal Law* (The Hague: Asser Press, 2009), at 498.

<sup>20</sup> *Katanga* Trial Judgment, supra n. 17, para. 1629. In her minority opinion, Judge Van den Wyngaert argued that the group acting with a common purpose is *by definition* a group of joint perpetrators. ICC, *Katanga*, Minority Opinion of Judge Christine Van den Wyngaert, ICC-01/04-01/07, 7 March 2014, para. 284. For a different view, see J.D. Ohlin, 'Joint Criminal Confusion', 12 *New Criminal Law Review* (2009) 406, at 416.

<sup>21</sup> ICC, *Katanga and Ngudjolo Chui*, Trial Chamber Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges against the Accused Persons, ICC-01/04-01/07, 21 November 2012, para. 33. This finding has been criticized by Judge Van den Wyngaert in her dissenting opinion to the decision. ICC, *Katanga and Ngudjolo Chui*, Dissenting Opinion Judge Christine Van den Wyngaert, ICC-01/04-01/07, 21 November 2012, paras. 42–43. Yet, the Trial Chamber's decision was confirmed on appeal. ICC, *Katanga*, Judgment on the Appeal of Mr Germain Katanga against the Decision of Trial Chamber II of 21 November 2012 entitled 'Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges against the Accused Persons', ICC-01/04-01/07 OA 13, 27 March 2013.

<sup>22</sup> *Lubanga* Decision on the Confirmation of Charges, supra n. 18, paras. 346–348.

<sup>23</sup> *Ibid.*, para. 330; *Lubanga* Appeal Judgment, supra n. 16, para. 473; *Blé Goudé* Decision on the Confirmation of Charges, supra n. 16, para. 135.

<sup>24</sup> *Katanga* Trial Judgment, supra n. 17, para. 1632; *Mbarushimana* Decision on the Confirmation of Charges, supra n. 17, paras. 276–277, 282–283.

<sup>25</sup> *Katanga* Trial Judgment, supra n. 17, paras. 1632–1633.

of crimes,<sup>26</sup> but other ICC case law presents a more liberal interpretation of joint perpetration, which focuses on the accused's contribution to the *common plan* more generally.<sup>27</sup>

12. Third, on a *mens rea* level, common purpose liability stipulates that the accused makes an *intentional* contribution to crimes, whilst at least *knowing* of the group's criminal intentions.<sup>28</sup> Thus – unlike joint perpetration<sup>29</sup> – common purpose liability does not demand that the accused intends to commit the crimes for which he/she is charged, nor that he/she shares the group's criminal objective.<sup>30</sup> On this account, Judge Van den Wyngaert submitted that joint perpetration and common purpose liability display distinct narratives.<sup>31</sup> Whilst joint perpetration articulates that the accused acts as a principal architect who orchestrates the commission of crimes, common purpose liability conveys that the accused plays a marginal role by facilitating criminal conduct from a remote position (on this issue see Section 10.3.2 Subsection (a)).<sup>32</sup>

13. Common purpose liability is also related to the notion of JCE. Both concepts regulate group criminality and criminalize contributions to a common criminal endeavour.<sup>33</sup> The ICC has therefore relied upon ICTY case law on JCE liability to define the legal requirements of common purpose liability.<sup>34</sup> In particular, in the *Katanga* Judgment, the Trial Chamber referred to the ICTY's interpretation of JCE to determine the meaning of a 'common purpose' under Article 25(3)(d) of the ICC Statute.<sup>35</sup> At the same time, the ICC has made efforts to distance itself from the controversial features of JCE liability by emphasizing that common purpose liability and JCE entail distinct *actus reus* and *mens rea* requirements.<sup>36</sup> Indeed, there are several important differences between these liability theories, both in terms of their nature and scope.

<sup>26</sup> ICC, *Blé Goudé*, Partly Dissenting Opinion of Judge Christine Van den Wyngaert, ICC-02/11-02/11-186-Anx 11-12-2014 1/7 EC PT, 11 December 2014, para. 8.

<sup>27</sup> ICC, *Ngudjolo Chui*, Concurring Opinion of Judge Christine Van den Wyngaert, ICC-01/04-02/12, 18 December 2012, paras. 34–35.

<sup>28</sup> *Blé Goudé* Decision on the Confirmation of Charges, supra n. 16, para. 173; *Mbarushimana* Decision on the Confirmation of Charges, supra n. 17, para. 289.

<sup>29</sup> *Lubanga* Decision on the Confirmation of Charges, supra n. 18, para. 349; ICC, *Bemba*, Pre-Trial Chamber Decision on the Confirmation of Charges, ICC-01/05-01/08, 15 June 2009, para. 351.

<sup>30</sup> *Mbarushimana* Decision on the Confirmation of Charges, supra n. 17, para. 289.

<sup>31</sup> *Katanga and Ngudjolo Chui* Dissenting Opinion Judge Christine Van den Wyngaert, supra n. 21, paras. 18–22; ICC, *Katanga*, Dissenting Opinion Judge Christine Van den Wyngaert, ICC-01/04-01/07, 20 May 2013, paras. 21–26.

<sup>32</sup> *Katanga and Ngudjolo Chui* Trial Decision on the Implementation of Regulation 55, supra n. 21, para. 32; *Katanga* Appeal Judgment on the Implementation of Regulation 55, supra n. 21, para. 58. The status of common purpose liability as a residual liability theory has been extensively debated in scholarship and case law.

<sup>33</sup> According to the ICTY Appeals Chamber in *Tadić*, Article 25(3)(d) constitutes a 'substantially similar notion' to JCE. ICTY, *Tadić*, Appeals Chamber Judgment, IT-94-I, 15 July 1999, para. 222. This has been affirmed in scholarship, where JCE and common purpose liability are both discussed as similar ways of dealing with group criminality. E.g. C. Damgaard, *Individual Criminal Responsibility for Core International Crimes, Selected Pertinent Issues* (Berlin: Springer, 2008), at 168. See also – more implicitly – Ohlin, 'Joint Criminal Enterprise', supra n. 1, at 70.

<sup>34</sup> *Katanga* Trial Judgment, supra n. 17, para. 1625; *Mbarushimana* Decision on the Confirmation of Charges, supra n. 17, para. 280–283; *Lubanga* Decision on the Confirmation of Charges, supra n. 18, para. 335.

<sup>35</sup> *Katanga* Trial Judgment, supra n. 17, para. 1625.

<sup>36</sup> *Mbarushimana* Decision on the Confirmation of Charges, supra n. 17, para. 282.



14. First, it is noteworthy that JCE constitutes a *sui generis* type of criminal participation that depicts senior military and political figures as the principal orchestrators of international crimes.<sup>37</sup> Meanwhile, common purpose liability is considered a residual type of accomplice liability that applies to persons who make a mere marginal contribution to the crimes of others.<sup>38</sup>

15. Second, JCE liability requires that the accused contributes to a *common plan*.<sup>39</sup> Thus, once it is proven that the accused participated in (a part of) a common plan, he/she can be held responsible for all crimes included in and following from such a plan. By contrast, Article 25(3)(d) of the ICC Statute requires that a contribution is made to a *crime* specifically.<sup>40</sup> Accordingly, 'a person who stands charged pursuant to article 25(3)(d) will not incur individual criminal responsibility for those crimes which form part of the common purpose but to which he or she did not contribute'.<sup>41</sup> Thus, common purpose liability warrants a closer connection between the acts of the accused and the crimes for which he is tried than JCE.

16. Third, JCE and common purpose liability stipulate different *mens rea* requirements. JCE encompasses three categories, which all entail that the accused shares the group's intent to pursue a common criminal purpose.<sup>42</sup> In addition, the first and second category of JCE require intent/knowledge in relation to the crimes charged, whilst the third JCE category establishes criminal responsibility based on *dolus eventualis* (the crimes constitute a natural and foreseeable outcome of the common plan, which the accused accepted).<sup>43</sup> By contrast, Article 25(3)(d) of the ICC Statute requires that the accused acts (i) with the aim of furthering the group's criminal activity or purpose, or (ii) with knowledge of the group's intention to commit crimes.<sup>44</sup> Whilst aiming to further a group activity (alternative (i)) may correspond to JCE's requirement of sharing the group's intent, acting with mere knowledge of a group's criminal purpose (alternative (ii)) certainly does not imply shared intent. Furthermore, it is clear that Article 25(3)(d) of the ICC Statute does not allow for establishing criminal responsibility based on *dolus eventualis*. The accused should at least be aware of the *actual* commission of crimes, rather than merely accept the foreseeable *risk* that crimes

<sup>37</sup> ICTY, *Milutinović et al.*, Trial Chamber Decision on Dragoljub Ojdanić Motion Challenging Jurisdiction – Joint Criminal Enterprise, IT99-37-AR72, 21 May 2003, para. 20. On the nature of JCE, see E. van Sliedregt, 'Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide', 5 *Journal of International Criminal Justice* (2007) 184.

<sup>38</sup> *Lubanga* Decision on the Confirmation of Charges, supra n. 18, para. 337; *Katanga* Trial Judgment, supra n. 17, para. 1618; *Ruto et al.* Decision on the Confirmation of Charges, supra n. 18, para. 354. See also, L. Engvall, 'The Future of Extended Joint Criminal Enterprise – Will the ICTY's Innovation Meet the Standards of the ICC?', 76 *Nordic Journal of International Law* (2007) 241, at 258.

<sup>39</sup> *Tadić* Appeal Judgment, supra n. 33, para. 227.

<sup>40</sup> *Katanga* Trial Judgment, supra n. 17, para. 1632.

<sup>41</sup> *Ibid.*, para. 1619.

<sup>42</sup> *Tadić* Appeal Judgment, supra n. 33, para. 228.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Blé Goudé* Decision on the Confirmation of Charges, supra n. 16, para. 1733; *Ruto et al.* Decision on the Confirmation of Charges, supra n. 18, para. 351; ICC, *Mbarushimana*, Pre-Trial Chamber Decision on the Warrant of Arrest, ICC-01/04-01/10, 28 September 2010, para. 39; *Mbarushimana* Decision on the Confirmation of Charges, supra n. 17, para. 270; ICC, *Ntaganda*, Pre-Trial Chamber Decision on the Confirmation of Charges, ICC-01/04-02/06, 9 June 2014, para. 158.

will be perpetrated.<sup>45</sup> On this account, it is generally held that only the first and second categories of JCE are analogous to common purpose liability, not the third.<sup>46</sup>

17. A fourth distinction between JCE and common purpose liability relates to the question of whether the accused and the direct – i.e. physical – perpetrators should be part of the same group acting with a common purpose. With respect to the accused's membership, JCE requires that the accused shares the group's criminal intent, which presupposes his/her membership of this group.<sup>47</sup> Meanwhile, Article 25(3)(d) of the ICC Statute can also be applied to outside participants.<sup>48</sup> Cassese even held that the criminal responsibility of outside participants is the *essence* of common purpose liability.<sup>49</sup> In relation to the issue of whether the direct perpetrators should be part of the group with a common purpose, the ICTY Appeals Chamber in *Brđanin* held that 'what matters ... is not whether the person who carried out the *actus reus* of a particular crime is a member of the JCE, but whether the crime in question forms part of the common purpose'.<sup>50</sup> By contrast, in the *Katanga* Judgment, the Trial Chamber majority decided that the persons who commit the crime – directly, indirectly or jointly with another – must be part of the group.<sup>51</sup> However, this decision has not been the subject of appeal, and it is therefore possible that it is revised in future cases.

18. As became clear in the introduction, common purpose liability has often been linked to conspiracy,<sup>52</sup> which is similarly premised on the agreement between a group of persons to commit a crime. Yet, the drafters of the ICC Statute explicitly wished to distance themselves from the controversial conspiracy theory and presented common purpose liability as a more legitimate alternative. Indeed, when looking at the nature and scope of common purpose liability and conspiracy, important differences emerge.

19. First, common purpose liability requires the (attempted) commission of a crime.<sup>53</sup> By contrast, for conspiracy, which is an inchoate offence, it suffices that two or more persons *agree* to commit a crime.<sup>54</sup> Although the agreement must normally be complemented by an overt act, it is not necessary that the conspirators took substantial steps to execute a crime, as is required for common purpose liability.

<sup>45</sup> *Dolus eventualis* is generally not recognized by the ICC. See *Lubanga* Trial Judgment, supra n. 16, para. 1011; *Katanga* Trial Judgment, supra n. 17, paras. 775–777.

<sup>46</sup> E.g. van Sliedregt, supra n. 1, at 146; Engvall, supra n. 38, at 259–260; R. Cryer *et al.*, *An Introduction to International Criminal Law and Procedure* (3rd edn, Cambridge: Cambridge University Press, 2014) at 362.

<sup>47</sup> ICTY, *Milutinović et al.*, Trial Chamber Judgment, IT-05-87-T, 26 February 2009, Vol. I, para. 98.

<sup>48</sup> *Katanga* Trial Judgment, supra n. 17, para. 1631.

<sup>49</sup> A. Cassese, *International Criminal Law* (2nd edn, Oxford: Oxford University Press, 2008) at 213.

<sup>50</sup> ICTY, *Brđanin*, Appeals Chamber Judgment, IT-99-36-A, 3 April 2007, para. 410.

<sup>51</sup> *Katanga* Trial Judgment, supra n. 17, paras. 1624, 1628.

<sup>52</sup> K. Ambos, 'Article 25: Individual Criminal Responsibility', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2nd edn, Munich: C.H. Beck, 2008) 743, at 757; van Sliedregt, supra n. 1, at 98; Ohlin, 'Joint Criminal Enterprise', supra n. 1, at 70; Damgaard, supra n. 33, at 168.

<sup>53</sup> *Katanga* Trial Judgment, supra n. 17, para. 1620; *Blé Goudé* Decision on the Confirmation of Charges, supra n. 16, para. 172; *Ruto et al.* Decision on the Confirmation of Charges, supra n. 18, para. 351; *Mbarushimana* Decision on the Warrant of Arrest, supra n. 44, para. 39; *Mbarushimana* Decision on the Confirmation of Charges, supra n. 17, para. 270; *Ntaganda* Decision on the Confirmation of Charges, supra n. 44, para. 158.

<sup>54</sup> J. Ohlin, 'Conspiracy', in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009) 279, at 279. See further Ch. 13 of this Study.



20. Second, the *actus reus* element of common purpose liability entails that the accused participates in the (attempted) commission of a crime.<sup>55</sup> By contrast, conspiracy liability does not require that the accused contributes to the commission of crimes directly – carrying out an overt act directed towards the implementation of a *common plan* usually suffices.<sup>56</sup>

21. Finally, it is noteworthy that the conspiracy concept is considered particularly appropriate for prosecuting senior political and military officials who act as the criminal masterminds of international crimes.<sup>57</sup> By contrast, common purpose liability is characterized as a residual mode of liability that applies to marginal figures who play a minor role in the commission of crimes (although practice on this point seems to be changing; see Section 10.3.2(a)).<sup>58</sup>

22. Finally, common purpose liability is related to *aiding and abetting*. Both these concepts apply to persons who play an auxiliary role in the commission of crimes. However, when looking at the legal elements of common purpose liability and aiding and abetting, important differences emerge.

23. First, regarding the *actus reus*, aiding and abetting requires that the accused assists other persons in committing a crime, whereas common purpose liability entails that the accused supports a group acting with a common purpose.<sup>59</sup>

24. Second, aiding and abetting requires that the accused contributes to a crime in a *substantial way*,<sup>60</sup> which means that the criminal act ‘most probably would not have occurred in the same way had not someone acted in the role that the accused in fact assumed’.<sup>61</sup> By contrast, common purpose liability can be established when the accused makes a *significant* contribution, which entails that the accused’s conduct influences the commission of crimes.<sup>62</sup> In theory, the significant contribution criterion sets a lower threshold, yet it remains unclear whether this theoretical difference also has an effect on legal practice. It is not immediately evident that the substantial contribution criterion indeed requires a more direct and closer involvement of the accused in the commission of crimes than the significant contribution criterion.<sup>63</sup>

25. Third, aiding and abetting and common purpose liability entail different *mens rea* requirements. On the one hand, Article 25(3)(c) of the ICC Statute stipulates that aiders

<sup>55</sup> *Mbarushimana* Decision on the Warrant of Arrest, supra n. 44, para. 39; *Mbarushimana* Decision on the Confirmation of Charges, supra n. 17, para. 276; *Ntaganda* Decision on the Confirmation of Charges, supra n. 44, para. 158.

<sup>56</sup> Ohlin, ‘Conspiracy’, supra n. 54, at 279.

<sup>57</sup> ILC, Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May–26 July 1996, UN Doc. A/51/10, *Yearbook of the International Law Commission* (1996), Vol. II, Part Two, at 21.

<sup>58</sup> *Lubanga* Decision on the Confirmation of Charges, supra n. 18, para. 337; *Katanga* Trial Judgment, supra n. 17, para. 1618; *Ruto et al.* Decision on the Confirmation of Charges, supra n. 18, para. 354.

<sup>59</sup> Cassese, supra n. 49, at 213. More critically on this issue: Ohlin, ‘Joint Criminal Confusion’, supra n. 20, 415–416.

<sup>60</sup> *Tadić* Appeal Judgment, supra n. 33, para. 229.

<sup>61</sup> ICTY, *Tadić*, Trial Chamber Judgment, IT-94-I-T, 7 May 1997, para. 688.

<sup>62</sup> *Katanga* Trial Judgment, supra n. 17, paras. 1632–1633; *Mbarushimana* Decision on the Confirmation of Charges, supra n. 17, paras. 276–277, 282–283.

<sup>63</sup> ICC, *Mbarushimana*, Defence Written Submissions Pursuant to the Oral Order of Pre-Trial Chamber I of 16 September 2011, ICC-01/04-01/10, 21 October 2011, para. 27.

and abettors *knowingly* contribute to the commission of crimes and act with the *purpose* of facilitating such crimes. On the other hand, common purpose liability can be established when the accused makes an *intentional* contribution to the commission of crimes by a group of persons acting with a common purpose. In addition, the accused must either (i) *aim* to further the group’s criminal activity or (ii) *know* of the group’s criminal intentions. Both aiding and abetting and common purpose liability thus refer to the accused’s knowledge and purpose/aim. However, whilst common purpose liability formulates these requirements in an alternative way, aiding and abetting stipulates a cumulative test, i.e. the accused must act knowingly *and* purposely.<sup>64</sup>

26. Finally, based on a textual interpretation of the ICC Statute, it can be argued that the *mens rea* elements of aiding and abetting are directly linked to the commission of crimes, whilst those of common purpose liability relate to the group’s criminal activities and intentions in a more general way. However, in early case law on Article 25(3)(d) of the ICC Statute, the ICC has emphasized that the accused must have knowledge of the commission of specific crimes.<sup>65</sup> In this sense, common purpose liability and aiding and abetting lay down a similar *mens rea* requirement.

### 10.2.2 Scope of Application

27. Common purpose liability specifically applies to the ICC and has not been included in the Statutes of other international criminal courts, which instead relied upon conspiracy (IMT) and JCE liability (modern ad hoc Tribunals and hybrid courts) to establish criminal responsibility for group criminality.

28. At the ICC, common purpose liability applies to all crimes listed in the ICC Statute, i.e. war crimes, crimes against humanity, genocide and the crime of aggression. In this sense, the concept has a broad scope of application.

29. At the same time, one should be aware that the ICC has qualified common purpose liability as a *residual* type of criminal responsibility that will only be used when the liability theories under Article 25(3)(a)–(c) of the ICC Statute do not apply (see Section 10.3.2(a)).<sup>66</sup> In light of this qualification, one would expect that the ICC only rarely resorts to common purpose liability and favours concepts such as (indirect) co-perpetration or ordering, which arguably better capture the criminal liability of senior ICC defendants.<sup>67</sup> Indeed, early case law displayed a preference for charging and convicting accused under Article 25(3)(a) of the ICC Statute, which diminished the scope of application of Article 25(3)(d).<sup>68</sup> However, more recently, there has been a development in ICC practice towards alternative charging whereby the ICC also relies upon common purpose liability to assess the criminal responsibility of leadership figures, like Ahmed Harun (the Sudanese Minister of State for the

<sup>64</sup> *Mbarushimana* Decision on the Confirmation of Charges, supra n. 17, para. 289.

<sup>65</sup> *Katanga* Trial Judgment, supra n. 17, para. 1642.

<sup>66</sup> *Lubanga* Decision on the Confirmation of Charges, supra n. 18, para. 337; *Katanga* Trial Judgment, supra n. 17, para. 1618; *Ruto et al.* Decision on the Confirmation of Charges, supra n. 18, para. 354.

<sup>67</sup> W.A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2010), at 431, 436.

<sup>68</sup> van Sliedregt, supra n. 1, at 59; Schabas, supra n. 67, at 430–431.



Interior)<sup>69</sup> and Germain Katanga (a senior Congolese militia leader).<sup>70</sup> This development is connected to the strict definition and interpretation of (indirect) co-perpetration and aiding and abetting in ICC case law. In particular, it is often hard to prove that the accused controlled the commission of crimes by making an *essential* contribution (as is required for co-perpetration under Article 25(3)(a) of the ICC Statute) or that he/she acted with the *purpose* of facilitating criminal conduct (as is required for aiding and abetting under Article 23(3)(c) of the ICC Statute). Thus, as long as these strict requirements are upheld, common purpose liability will likely continue to play an increasingly pivotal role in holding leadership figures accountable for contributing to international crimes.

### 10.3 Constitutive Elements

30. Article 25(3)(d) of the ICC Statute does not provide for a straightforward, well-regulated liability theory. Up until today, the constitutive elements of common purpose liability have raised many open questions. In fact, according to Ohlin, no one can be completely assured that his/her interpretation of common purpose liability is entirely correct,<sup>71</sup> because

it is impossible to construct a coherent and non-redundant interpretation of Article 25(3)(d). Because of unfortunate drafting, both the required contribution and the required mental element are impossible to discern from the inscrutable language. As a result, it is nearly impossible to devise a holistic interpretation of Article 25(3)(d) that fits together with the rest of Article 25 and Article 30 on mental elements.<sup>72</sup>

31. Indeed, it is still too early to discern a clear *jurisprudence constante* in which the elements of common purpose liability are consistently explained. Thus, although it is possible to determine which *actus reus* and *mens rea* elements should be met on a basic level (Section 10.3.1), important questions emerge when we look more closely at how these elements must be interpreted (Section 10.3.2).

#### 10.3.1 Uncontested Elements

32. The *actus reus* of common purpose liability entails that the accused makes a significant contribution to the (attempted) commission of a crime by a group of persons acting with a common purpose (Subsection (a)). On the *mens rea* level, it is required that the accused acts intentionally and knows that his/her conduct contributes to the activities of a group of persons. In addition, the accused must act (i) with the aim of furthering the group's criminal purpose or (ii) with knowledge of the group's criminal intentions (Subsection (b)).

##### (a) Material elements

33. The first commonly agreed material element of common purpose liability is that a crime within the jurisdiction of the ICC must be committed or at least

<sup>69</sup> ICC, *Harun and Kushayb* Case, ICC-02/05-01/07.

<sup>70</sup> *Katanga* Trial Judgment, supra n. 17.

<sup>71</sup> J.D. Ohlin, 'ICC Decision on Complicity for Collective Crimes', *LieberCode*, 21 December 2011, available at [www.liebercode.org/2011\\_12\\_01\\_archive.html](http://www.liebercode.org/2011_12_01_archive.html), last consulted 24 March 2017.

<sup>72</sup> Ohlin, 'Joint Criminal Confusion', supra n. 20, at 406.

attempted.<sup>73</sup> Second, it must be established that the (attempted) commission of the crime is carried out by a group of persons who act together pursuant to a common purpose.<sup>74</sup> With regard to the common purpose element, the ICC has consistently held that:

- The common purpose entails an agreement or common plan between two or more persons.<sup>75</sup>
- The common purpose does not have to be embedded in a military, political or administrative organization, nor must it be previously arranged or formulated.<sup>76</sup>
- Establishing the common purpose of a group entails specifying the criminal goal; the temporal and geographical scope of the plan; the type, origins or characteristics of the victims pursued; and the identity of the members of the group. Although it is not required that each person is identified by name, it has to be established that the persons who commit the crime – directly, indirectly or jointly with another – are part of the group.<sup>77</sup>

34. The third – and final – material element of common purpose liability constitutes that the accused contributes to the commission of a crime 'in any other way'.<sup>78</sup> In this regard, ICC case law has clarified that:

- The terms 'in any way' entail that the accused makes at least a *significant* contribution to the crime.<sup>79</sup> Although the significant contribution standard is criticized in literature and case law (see Section 10.3.2(b)), it has been accepted in the only Trial Chamber judgment on the matter and should therefore be considered as a valid interpretation of Article 25(3)(d).<sup>80</sup>
- The significant contribution standard entails that the accused *influences/has a bearing on* if and how the crime is committed.<sup>81</sup> It is not required that the commission of the crime *depends* on the accused's contribution.

<sup>73</sup> *Katanga* Trial Judgment, supra n. 17, para. 1620; ICC, *Katanga*, Trial Chamber Decision Transmitting Additional Legal and Factual Material (Regulation 55(2) and 55(3) of the Regulations of the Court), ICC-01/04-01/07, 15 May 2013, para. 16; *Blé Goudé* Decision on the Confirmation of Charges, supra n. 16, para. 172; *Ruto et al.* Decision on the Confirmation of Charges, supra n. 18, para. 351; *Mbarushimana* Decision on the Warrant of Arrest, supra n. 44, para. 39; *Mbarushimana* Decision on the Confirmation of Charges, supra n. 17, para. 270; *Ntaganda* Decision on the Confirmation of Charges, supra n. 44, para. 158.

<sup>74</sup> *Ruto et al.* Decision on the Confirmation of Charges, supra n. 18, para. 351; *Mbarushimana* Decision on the Warrant of Arrest, supra n. 44, para. 39; *Mbarushimana* Decision on the Confirmation of Charges, supra n. 17, para. 271; *Ntaganda* Decision on the Confirmation of Charges, supra n. 44, para. 158; *Katanga* Decision Transmitting Additional Material, supra n. 73, para. 16.

<sup>75</sup> *Mbarushimana* Decision on the Confirmation of Charges, supra n. 17, para. 271; *Mbarushimana* Decision on the Warrant of Arrest, supra n. 44, para. 39.

<sup>76</sup> *Katanga* Trial Judgment, supra n. 17, para. 1626; *Mbarushimana* Decision on the Confirmation of Charges, supra n. 17, para. 271.

<sup>77</sup> *Katanga* Trial Judgment, supra n. 17, paras. 1624, 1628; *Katanga* Decision Transmitting Additional Material, supra n. 73, para. 16.

<sup>78</sup> *Mbarushimana* Decision on the Warrant of Arrest, supra n. 44, para. 39; *Mbarushimana* Decision on the Confirmation of Charges, supra n. 17, para. 276; *Ntaganda* Decision on the Confirmation of Charges, supra n. 44, para. 158.

<sup>79</sup> *Katanga* Trial Judgment, supra n. 17, para. 1632; *Mbarushimana* Decision on the Confirmation of Charges, supra n. 17, paras. 276–277, 282–283; *Katanga* Decision Transmitting Additional Material, supra n. 73, para. 16.

<sup>80</sup> *Katanga* Trial Judgment, supra n. 17, para. 1632.

<sup>81</sup> *Ibid.*, paras. 1632–1633.



- The accused's contribution should relate to the commission of a specific crime, not solely to the common purpose of the group.<sup>82</sup> Thus, the accused can only be held accountable for crimes to which he/she contributed and is not automatically responsible for all crimes within the common purpose.<sup>83</sup>
- The contribution may be connected to the material or mental elements of the crime.<sup>84</sup> Hence, a contribution can consist in the objective facilitation (e.g. provision of resources) or the subjective support (e.g. tacit or explicit encouragement) of the crime.<sup>85</sup>

#### (b) Mental elements

35. The first commonly agreed mental element<sup>86</sup> of common purpose liability is that the accused makes an intentional contribution to a group crime.<sup>87</sup> 'Intention' should be understood as general intent within the meaning of Article 30 of the ICC Statute, i.e. 'meaning to engage in the conduct'.<sup>88</sup>

36. Second, it must be established that the accused knows that his/her conduct contributes to the activities of the group of persons, i.e. he/she knows that crimes will be committed as a result of his/her conduct.<sup>89</sup> Thus, the accused cannot be held accountable for actions that have an unanticipated influence on the group's common purpose.

37. Finally, the accused must act either (i) with the aim of furthering the group's criminal purpose, or (ii) with knowledge of the group's criminal intentions.<sup>90</sup> In this respect, it follows that:

- The first alternative entails a specific intent, which means that the accused must act with the purpose of promoting the activities or objectives of the group.<sup>91</sup>
- The second alternative requires that the accused has positive knowledge of the commission of the crime. So it does not suffice to merely be aware and accept a foreseeable risk that a crime will be committed (*dolus eventualis*).

<sup>82</sup> Ibid., para. 1632.

<sup>83</sup> Ibid., paras. 1619, 1632.

<sup>84</sup> Ibid., para. 1635.

<sup>85</sup> Ibid.

<sup>86</sup> For a critical assessment of these *mens rea* requirements in light of Article 30 of the ICC Statute, see Ohlin, 'Joint Criminal Confusion', supra n. 20, at 417–418.

<sup>87</sup> *Blé Goudé* Decision on the Confirmation of Charges, supra n. 16, para. 173; *Ruto et al.* Decision on the Confirmation of Charges, supra n. 18, para. 351; *Mbarushimana* Decision on the Warrant of Arrest, supra n. 44, para. 39; *Ntaganda* Decision on the Confirmation of Charges, supra n. 44, para. 158; *Katanga* Decision Transmitting Additional Material, supra n. 73, para. 16.

<sup>88</sup> *Mbarushimana* Decision on the Confirmation of Charges, supra n. 17, para. 288.

<sup>89</sup> Ibid.; *Katanga* Trial Judgment, supra n. 17, para. 1639; *Katanga* Decision Transmitting Additional Material, supra n. 73, para. 16.

<sup>90</sup> *Blé Goudé* Decision on the Confirmation of Charges, supra n. 16, para. 173; *Ruto et al.* Decision on the Confirmation of Charges, supra n. 18, para. 351; *Mbarushimana* Decision on the Warrant of Arrest, supra n. 44, para. 39; *Ntaganda* Decision on the Confirmation of Charges, supra n. 44, para. 158. For a critical evaluation of the equation between knowledgeable and purposeful actions, see e.g. Ohlin, 'Joint Criminal Enterprise', supra n. 1, at 78–81; A. Gil Gil and E. Maculan, 'Current Trends in the Definition of "Perpetrator" by the International Criminal Court: From the Decision on the Confirmation of Charges in the Lubanga Case to the Katanga Judgment', 28 *Leiden Journal of International Law* (2015) 349, at 360–361.

<sup>91</sup> Ambos, supra n. 52, at 759.

- The accused's knowledge must be established in relation to each of the crimes the group intended to commit.<sup>92</sup> Knowledge may be inferred from relevant facts and circumstances.<sup>93</sup>
- It does not have to be established that the accused intends to commit the crimes charged,<sup>94</sup> nor that he/she shares the group's common purpose. This means that common purpose liability can be applied to persons who do not belong to the group, i.e. outside contributors.<sup>95</sup>

#### 10.3.2 Open Questions

38. Whilst it is largely clear which material and mental elements must be established under Article 25(3)(d) of the ICC Statute, there is disagreement about how these elements should be interpreted. In particular, it is debated whether (i) there is a minimum *actus reus* threshold; (ii) the common purpose should be specifically directed at the commission of crimes; and (iii) common purpose liability is limited to outside contributors. In addition, there is disagreement about the status of common purpose liability as a residual mode of liability that applies to marginal figures rather than senior leaders.

##### (a) Residual mode of liability

39. Discussions about the precise role of common purpose liability are connected to disagreements about the structure of Article 25(3) of the ICC Statute and about the position of common purpose liability within this provision. It is clear that the liability theories in Article 25(3) of the ICC Statute can be divided into principal forms of perpetration (subparagraph (a)) and accessory forms of participation (subparagraph (b)–(d)). Whilst principals *commit* the crime themselves and are thus responsible in their own right, accessories *contribute* to the crimes of others.<sup>96</sup> Their responsibility is derivative of – i.e. dependent on – the commission of the crime by a principal.<sup>97</sup>

40. As a starting point, the majority of ICC case law notes that the distinction between principal and accessory liability is not merely terminological, but also entails 'a value-oriented hierarchy'.<sup>98</sup> This means that 'the forms of perpetration in subparagraph (a) prevail over the forms of (secondary) participation (subparagraphs (b)–(d)) in terms of the level of responsibility of the perpetrators and the blame to be imposed on them'.<sup>99</sup> In fact, according to the ICC Appeals Chamber in *Lubanga*:

<sup>92</sup> *Katanga* Trial Judgment, supra n. 17, para. 1642.

<sup>93</sup> Ibid.

<sup>94</sup> *Mbarushimana* Decision on the Confirmation of Charges, supra n. 17, para. 289.

<sup>95</sup> Ibid., paras. 273–274; *Katanga* Trial Judgment, supra n. 17, para. 1631.

<sup>96</sup> E.g. J. Ohlin et al., 'Assessing the Control-Theory', 26 *Leiden Journal of International Law* (2013) 725, at 742; Gil Gil and Maculan, supra n. 90, at 363, 365–366; van Sliedregt, supra n. 1, at 66–68; R. Rastan, 'Review of ICC Jurisprudence 2008', 7 *Northwestern University Journal of International Human Rights* (2009) 261, at 266–269.

<sup>97</sup> *Katanga* Trial Judgment, supra n. 17, para. 1384.

<sup>98</sup> *Lubanga* Appeal Judgment, supra n. 16, para. 462; *Lubanga* Trial Judgment, supra n. 16, para. 999; *Mbarushimana* Decision on the Confirmation of Charges, supra n. 17, para. 279.

<sup>99</sup> K. Ambos, *Treatise on International Criminal Law – Volume I: Foundations and General Part* (Oxford: Oxford University Press, 2013) 147. See also Werle, supra n. 5, at 956–957; van Sliedregt, supra n. 1, 79–80; G. Werle and B. Burghardt, 'Indirect Perpetration: A Perfect Fit for International Prosecution of Armchair Killers?', 9 *Journal of International Criminal Justice* (2011) 85, at 88; K. Ambos, 'The First Judgment of the International

[g]enerally speaking and all other things being equal, a person who is found to commit a crime him- or herself [under subparagraph (a)] bears more blameworthiness than a person who contributes to the crime of another person or persons [under subparagraphs (b)–(d)]. Accordingly, it contributes to a proper labelling of the accused person's criminal responsibility.<sup>100</sup>

41. In addition to distinguishing between principal and accessorial liability, ICC case law is based on the (implicit) premise that the different forms of accessorial liability in Article 25(3)(b)–(d) of the ICC Statute are hierarchically structured *inter se*.<sup>101</sup> The Court seems to take the position that the level of responsibility decreases as one moves down the liability theories presented in the different subparagraphs of Article 25(3).<sup>102</sup>

42. Within the hierarchy of Article 25(3) of the ICC Statute, common purpose liability allegedly constitutes a residual – or subsidiary – mode of participation. It provides a 'catch all form of liability'<sup>103</sup> that 'is triggered only when subparagraphs (a)–(c) are not satisfied'.<sup>104</sup> This means that common purpose liability will only be used when other modes of liability – such as joint perpetration, ordering or aiding and abetting – do not apply.<sup>105</sup> Moreover, the residual status of common purpose liability is thought to imply that Article 25(3)(d) establishes a specifically low level of blameworthiness,<sup>106</sup> and thus 'yields the weakest form of liability'.<sup>107</sup>

43. The ICC's construction of a hierarchy of liability theories and the resulting qualification of common purpose liability as residual are heavily criticized in scholarship and by a significant minority of ICC judges.<sup>108</sup> In his separate opinion to the *Lubanga* Trial Judgment, Judge Fulford argued that it is impossible and unhelpful 'to establish a hierarchy of seriousness that is dependent on creating rigorous distinctions between the modes of liability within Article 25(3)'.<sup>109</sup> He specifically contended that persons contributing to a group's common purpose are not necessarily less responsible than aiders and abettors, 'since many of history's most serious crimes occurred as the result of the coordinated action of groups of individuals, who jointly pursued a common goal'.<sup>110</sup>

Criminal Court (Prosecutor v. *Lubanga*): A Comprehensive Analysis of the Legal Issues', 12 *International Criminal Law Review* (2012) 115, at 141; H. Vest, 'Problems of Participation – Unitarian, Differentiated Approach, or Something Else?', 12 *Journal of International Criminal Justice* (2014) 295, at 296–297; Gil Gil and Maculan, *supra* n. 90, at 363.

<sup>100</sup> *Lubanga* Appeal Judgment, *supra* n. 16, para. 462.

<sup>101</sup> Vest, *supra* n. 99, at 305.

<sup>102</sup> Werle and Burghardt, *supra* n. 99, at 88.

<sup>103</sup> *Ruto et al.* Decision on the Confirmation of Charges, *supra* n. 18, para. 354.

<sup>104</sup> *Ibid.*

<sup>105</sup> E.g. *Lubanga* Decision on the Confirmation of Charges, *supra* n. 18, para. 337; *Ruto et al.* Decision on the Confirmation of Charges, *supra* n. 18, para. 354; *Mbarushimana* Decision on the Confirmation of Charges, *supra* n. 17, para. 278.

<sup>106</sup> *Lubanga* Decision on the Confirmation of Charges, *supra* n. 18, para. 337; *Ruto et al.* Decision on the Confirmation of Charges, *supra* n. 18, para. 354; *Katanga* Trial Judgment, *supra* n. 17, para. 1618.

<sup>107</sup> Werle, *supra* n. 5, at 971.

<sup>108</sup> Ohlin *et al.*, 'Control-Theory', *supra* n. 96, at 740–745; *Katanga* Trial Judgment, *supra* n. 17, paras. 1084–1086; *Ngudjolo Chui* Concurring Opinion Judge Van den Wyngaert, *supra* n. 27, paras. 22–30; ICC, *Lubanga*, Separate opinion of Judge Adrian Fulford, ICC-01/04-01/06, 14 March 2012, paras. 8–9.

<sup>109</sup> *Lubanga* Separate Opinion Judge Fulford, *supra* n. 108, para. 9.

<sup>110</sup> *Ibid.*, para. 8. Similarly, Vest, *supra* n. 99, at 305; K. Ambos, 'The International Criminal Court and Common Purpose: What Contribution Is Required under Article 25(3)(d)?', in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford: Oxford University Press, 2015) 592, at 607.

Likewise, in her concurring opinion to the *Ngudjolo* Trial Judgment, Judge Van den Wyngaert stressed that the conceptual difference between principal and accessorial responsibility does not necessarily entail a hierarchy of blameworthiness: '[t]he fact that principals are connected more directly to the bringing about of the material elements of the crime than accessories does not imply that the role of the former should be regarded as inherently more blameworthy'.<sup>111</sup> This finding was confirmed by the majority of the Trial Chamber in *Katanga*, which explicitly dismissed that Article 25(3) of the ICC Statute entails a hierarchy of responsibility:

the distinction between perpetrator of and accessory to a crime inheres in the Statute but does not, nonetheless, entail a hierarchy, whether in respect of guilt or penalty. Each mode of liability has different characteristics and legal ramifications which reflect various forms of involvement in criminality. However, this does not necessarily signify that accused persons will be found less culpable or will incur a lesser penalty.<sup>112</sup>

44. Following a hierarchical reading of Article 25(3), the ICC initially preferred to define and assess the responsibility of senior political and military leaders under (indirect) co-perpetration.<sup>113</sup> It appears that the Court considered common purpose liability an inappropriate venue for prosecuting and convicting intellectual perpetrators who orchestrated international crimes from a remote position. However – as was made clear above<sup>114</sup> – the ICC's strict interpretation of (indirect) co-perpetration has made it difficult to apply this liability theory in cases against senior leaders. To still ascertain the accountability of leadership figures, the Prosecutor has started to bring (alternative) charges under Article 25(3)(d) of the ICC Statute.<sup>115</sup> ICC Chambers have accepted this development and have moved to assess the responsibility of senior figures like Ahmed Harun – the Sudanese Minister of State for the Interior – and Mathieu Katanga – a Congolese militia leader – under common purpose liability.<sup>116</sup>

45. The practice of alternative charging raises questions about the status of common purpose liability as a residual mode of liability. Charging defendants under different modes of liability suggests that there are no strict distinctions between these theories. Judges are simply presented different options and have the freedom to qualify the acts of the accused as they see fit. In this respect, it should be noted that senior leaders are generally not seen as playing a facilitating role in the commission of international crimes. Even though they normally operate from a geographically and structurally remote position and contribute to the commission of crimes in an indirect way, senior leaders are perceived as 'the most responsible' perpetrators, who are by no means less blameworthy than the physical perpetrators of crimes because they orchestrate crimes from a distance. Accordingly, the use of Article 25(3)(d) of the ICC Statute in cases against leadership figures creates further tensions with common purpose liability's alleged residual status.

<sup>111</sup> *Ngudjolo Chui* Concurring Opinion Judge Van den Wyngaert, *supra* n. 27, para. 22.

<sup>112</sup> *Katanga* Trial Judgment, *supra* n. 17, para. 1387.

<sup>113</sup> van Sliedregt, *supra* n. 1, at 80.

<sup>114</sup> See paras. 9–12 and 29.

<sup>115</sup> For example, in the cases against *Ruto et al.*, *Ntaganda*, *Blé Goudé*, *Ongwen*, *Al Mahdi*, and *Harun and Kushayb*.

<sup>116</sup> *Harun and Kushayb*, *supra* n. 69; *Katanga* Trial Judgment, *supra* n. 17.



46. The observations above yield in favour of a flexible interpretation of Article 25(3)(d) of the ICC Statute that allows for an individualized assessment of the accused's criminal responsibility. Rather than maintaining that common purpose liability *by definition* constitutes a weak and indirect type of liability, there is room for arguing that Article 25(3)(d) can entail a variety of conduct and different levels of blameworthiness. This view also corresponds with the intention of the drafters of the ICC Statute, who meant to regulate a range of – partially overlapping – liability theories from which the Court could choose freely.<sup>117</sup> Accordingly, the text of Article 25(3)(d) does not designate any hierarchy of liability theories, nor does the Statute attach a lesser sentence to any of the recognized modes of liability. Following Articles 77 and 78 of the ICC Statute, the Court has to impose an appropriate sentence, taking into account the gravity of the crime and the personal circumstances of the accused. In principle, the liability theory under which the accused is convicted is no ground for mitigation, which means that persons contributing to a common purpose do not necessarily receive a lower punishment than joint perpetrators or aiders and abettors.

47. Admittedly, ICC case law may develop to only apply common purpose liability to marginal figures who made a lesser contribution to a crime. Such practice could justify qualifying Article 25(3)(d) as a residual mode of liability that establishes a low level of blameworthiness. However, this conclusion cannot be drawn from current practice.

#### (b) *Actus reus*

48. In relation to the *actus reus* element of common purpose liability, there is debate in case law and scholarship about whether Article 25(3)(d) of the ICC Statute entails some threshold of participation and, if so, what threshold this should be. Underlying this debate is the question: under which conditions should normal – i.e. per se lawful – economic or social activities (such as supplying food to a concentration camp) be criminalized? Case law on this matter gives two opposing considerations. First, the necessity of limiting criminal responsibility to conduct that is causally connected to the crimes charged; i.e. conduct that had an impact on the commission of crimes. Second, the wish to delineate common purpose liability from other types of principal and accessory liability that allegedly establish a higher level of blameworthiness.

49. The first consideration is well reflected in the findings of the Pre-Trial Chamber in *Mbarushimana*. The Pre-Trial Chamber emphasized that it would be inappropriate to interpret the terms 'in any other way' as including every contribution to a group crime. According to the Pre-Trial Chamber, it would exceed the limits of Article 25(3)(d) of the ICC Statute if any contribution – however small and insignificant – generates liability, considering that:

many members of a community may provide contributions to a criminal organisation in the knowledge of the group's criminality, especially where such criminality is public knowledge. Without some threshold level of assistance, every landlord, every grocer, every utility provider, every secretary, every janitor or even every taxpayer who does anything which contributes to a group committing international crimes could satisfy the elements of 25(3)(d) liability for their infinitesimal contribution to the crimes committed.<sup>118</sup>

<sup>117</sup> van Sliedregt, supra n. 1, at 86.

<sup>118</sup> *Mbarushimana* Decision on the Confirmation of Charges, supra n. 17, para. 277. This argument has been rejected by Judge Fernandez de Gurmendi. ICC, *Mbarushimana*, Separate opinion of Judge Sylvia Fernandez de Gurmendi, ICC-01/04-01/10 OA4, 30 May 2012, para. 10.

50. The second consideration was conveyed by the Pre-Trial Chamber in *Ruto et al.* Taking as a starting point that common purpose liability constitutes a residual type of criminal responsibility, the Pre-Trial Chamber contemplated that common purpose liability entails 'the lowest objective threshold for participation according to article 25'.<sup>119</sup> Accordingly, the Pre-Trial Chamber rejected the arguments of the defence to apply the substantial contribution criterion of aiding and abetting to common purpose liability.<sup>120</sup>

Even assuming, *arguendo*, that the contribution under subparagraph (c), for the mode of participation of aiding and abetting, should be 'substantial', this does not mean that the required contribution under subparagraph (d) must be equally 'substantial'. If both subparagraph (c) and (d) required a 'substantial' contribution, the hierarchical structure of the different modes of participation envisaged by article 25(3) would be rendered meaningless. As a result, the contribution under subparagraph (d) is satisfied by a less than 'substantial' contribution, as far as such contribution results in the commission of the crimes charged.<sup>121</sup>

51. In *Mbarushimana*, the ICC sought to balance the need for excluding *de minimis* contributions against the residual status of common purpose liability by stipulating that the accused must have made a 'significant contribution' to the commission of crimes. This criterion was later confirmed by the Trial Chamber in *Katanga* and should therefore be considered a valid interpretation of Article 25(3)(d).<sup>122</sup> The significant contribution criterion is borrowed from ICTY case law on JCE liability,<sup>123</sup> which explains that a contribution is 'significant' when it makes an organization more efficient or effective.<sup>124</sup> It is not required that the accused committed crimes physically.<sup>125</sup> The contribution may even consist of neutral political or military activities and omissions.<sup>126</sup> ICTY case law also clarifies that the accused's leadership status and the fact that he/she was not readily replaceable weigh in favour of finding that he/she contributed to crimes in a significant way.<sup>127</sup> It is still uncertain whether the ICC will interpret the significant contribution requirement in a similar way.

52. Whilst the significant contribution requirement is valid law,<sup>128</sup> it is not universally accepted. Some ICC Pre-Trial Chambers rejected the requirement – and every other *actus*

<sup>119</sup> *Ruto et al.* Decision on the Confirmation of Charges, supra n. 18, para. 354.

<sup>120</sup> In several cases, the Defence has argued for applying the substantial contribution criterion to both aiding and abetting and common purpose liability, relying on 'the slight semantic difference' between these modes of liability. *Mbarushimana* Defence Written Submissions, supra n. 63, para. 27; ICC, *Katanga*, Defence Observations on Article 25(3)(d), ICC-01/04-01/07, 15 April 2013, para. 47; ICC, *Ruto et al.*, Joshua Arap Sang Defence Brief following the Confirmation of Charges Hearing, ICC-01/09-01/11-354, 24 October 2011, para. 65–74.

<sup>121</sup> *Ruto et al.* Decision on the Confirmation of Charges, supra n. 18, para. 354. Similarly, *Mbarushimana* Decision on the Confirmation of Charges, supra n. 17, paras. 278–282.

<sup>122</sup> *Katanga* Trial Judgment, supra n. 17, paras. 1620, 1632. See also, *Katanga* Decision Transmitting Additional Material, supra n. 73, para. 13.

<sup>123</sup> E.g. ICTY, *Gotovina et al.*, Trial Chamber Judgment, IT-06-90-T, 15 April 2011, para. 1953; ICTY, *Dordević*, Trial Chamber Judgment, IT-05-87/1-T, 23 February 2001, para. 1863.

<sup>124</sup> ICTY, *Kvočka et al.*, Appeals Chamber Judgment, IT-98-30/1-A, 28 February 2006, para. 309.

<sup>125</sup> *Tadić* Appeal Judgment, supra n. 33, para. 227.

<sup>126</sup> ICTY, *Krajišnik*, Appeals Chamber Judgment, IT-00-39-A, 17 March 2009, paras. 695–696; *Milutinović* Decision on Motion Challenging Jurisdiction – JCE, supra n. 126, paras. 103–105.

<sup>127</sup> *Milutinović* Decision on Motion Challenging Jurisdiction – JCE, supra n. 126, paras. 104–105.

<sup>128</sup> *Ibid.*, para. 1620.

*reus* threshold for that matter. In making this determination, the Pre-Trial Chambers considered that the text of the ICC Statute – which refers to *any* other contribution – does not explicitly require that contributions under Article 25(3)(d) of the ICC Statute reach a certain minimum degree.<sup>129</sup> Moreover, in her separate opinion in the *Mbarushimana* case, Judge Fernández de Gurmendi argued that the significant contribution standard is unjustly borrowed from ICTY case law that cannot be directly implemented in case law by the ICC.<sup>130</sup> To nevertheless forestall the unbounded use of Article 25(3)(d), Judge Fernández de Gurmendi suggested the requirement of a normative and causal link between the acts of the accused and the commission of crime(s).<sup>131</sup> In the Judge's view, this requirement is conceptually distinct from the significant contribution standard. Whilst the latter entails a *quantitative* standard that regulates the accused's level of involvement in *factual* terms, the former allegedly sets a *qualitative* standard based on *normative* rather than naturalistic criteria of attribution. Ambos shares this view and has further explained that a normative-causal link can be established when the accused's contribution (i) creates a sufficiently high risk to a protected legal interest by having the potential to substantially impact the commission of crimes and (ii) manifests itself in the commission of crimes in so far as the risk under (i) is fulfilled.<sup>132</sup>

53. It is doubtful whether the significant contribution standard and the requirement of a normative-causal link can indeed be strictly distinguished in terms of their factual/normative nature of assessment and, if so, whether this will generate different outcomes in individual cases. Here, one should be mindful that common purpose liability generally applies to individuals who acted from a remote position, which means that their involvement in crimes is normally indirect. When assessing the accused's contribution to crimes, one thus runs into problems of causality since it is not self-evident to establish that the acts of the accused affected the commission of the crime(s). Some domestic legal systems address this problem by using the theory of objective imputation, which is 'essentially about the *fair* imputation of criminal results to agents who are truly responsible'.<sup>133</sup> The fairness of criminal attribution depends on the factual relation between the acts of the accused and the crimes committed in terms of cause and effect, but at the same time entails a normative assessment based on legal standards of what is a *reasonable* outcome.

54. These domestic insights on causality make clear that the *actus reus* standard for common purpose liability can be based on *both* factual and normative considerations; these considerations are not mutually exclusive. In light of this, it seems unhelpful to continue distinguishing the significant contribution criterion and the requirement of a normative causal link in terms of their factual or normative connotation. Instead, we

<sup>129</sup> *Ruto et al.* Decision on the Confirmation of Charges, supra n. 18, paras. 353–354. See also *Ntaganda* Decision on the Confirmation of Charges, supra n. 44, para. 158; *Blé Goudé* Decision on the Confirmation of Charges, supra n. 16, para. 172; ICC, *Ongwen*, Pre-Trial Chamber Decision on the Confirmation of Charges, ICC-02/04-01/15-422-red, 23 March 2016, para. 44; ICC, *Al Mahdi*, Pre-Trial Chamber Decision on the Confirmation of Charges, ICC-01/12-01/15, 24 March 2016, para. 27.

<sup>130</sup> *Mbarushimana* Separate Opinion Judge Fernandez de Gurmendi, supra n. 118, paras. 9, 14.

<sup>131</sup> *Ibid.*

<sup>132</sup> Ambos, supra n. 110, at 603–607. Ambos has also presented this argument before the court in his position as a special counsel in the *Mbarushimana* case. *Mbarushimana* Defence Written Submissions, supra n. 63, para. 28.

<sup>133</sup> Ambos, supra n. 110, at 603.

could follow De Falco's line of reasoning, which is based on the idea that the significant contribution criterion and the requirement of a normative and causal link are not irreconcilable *per se*, but can 'dictate similar processes and substantially similar outcomes'.<sup>134</sup> On this account, De Falco suggests that the significance of an accused's contribution should be assessed by looking at the normative and causal links between his/her conduct and the commission of the crime(s).<sup>135</sup> Indeed, this seems a practical way to resolve the controversy surrounding the *actus reus* requirement of Article 25(3)(d) of the ICC Statute. Whilst the significant contribution standard fits best with the phrasing of other *actus reus* criteria (such as the requirement of an essential contribution for joint perpetration and a substantial contribution for aiding and abetting), the requirement of a causal and normative contribution provides an open norm that can include both factual and legal assessment criteria. In evaluating these criteria, the ICC can rely upon the domestic theory of objective imputation and use this theory to draw up guidelines for distinguishing the contribution standard of common purpose liability from the *actus reus* threshold of other liability theories. Such guidelines are important from the perspective of legal certainty, as they could clarify when the acts of the accused are sufficiently connected to the crimes committed in factual and normative terms. In this light, it is commendable that the ICC has drawn up a list of evidentiary factors that can be used to assess the relevance of the accused's contribution (see Section E of this chapter).

### (c) Common purpose

55. A third point of debate concerns the common purpose, which is the characteristic element of Article 25(3)(d) of the ICC Statute. In early case law, the ICC generally held that the common purpose is 'functionally identical' to – i.e. has a similar meaning as – the common plan requirement for joint perpetration.<sup>136</sup> However, in *Katanga*, the Trial Chamber majority considered that 'the existence of a "common plan" ... may establish pursuance of a common purpose, without it being necessary to prove the existence of such a "common plan" among the members of the group, or, thereby arrive at a mutual attribution of their acts'.<sup>137</sup> This reflection suggests that the common purpose under Article 25(3)(d) of the ICC Statute differs from the common plan requirement under Article 25(3)(a), which raises questions about the element's precise meaning. Notwithstanding such ambiguity, the majority of ICC case law still seems to accept that the common purpose essentially entails an agreement between a group of people, which

<sup>134</sup> R.C. DeFalco, 'Contextualizing Actus Reus under Article 25(3)(d) of the ICC Statute: Thresholds of Contribution', 11 *Journal of International Criminal Justice* (2013) 715, at 717.

<sup>135</sup> ICC, *Ruto et al.*, Defence Response to Prosecution's Submissions on the Law of Indirect Co-perpetration under Article 25(3)(a) of the Statute and Application for Notice to be Given under Regulation 55(2) with respect to William Samoei Ruto's Individual Criminal Responsibility, ICC-01/09-01/11, 25 July 2012, para. 16.

<sup>136</sup> *Mbarushimana* Decision on the Confirmation of Charges, supra n. 17, para. 271. The common plan and common purpose are also substantiated on the basis of similar factual circumstances. See e.g., *Blé Goudé* Decision on the Confirmation of Charges, supra n. 16, paras. 137, 175; ICC, *Gbagbo*, Pre-Trial Chamber Decision on the Confirmation of Charges, ICC-01/11-01/11, 12 June 2014, paras. 231, 254. In *Katanga and Ngudjolo*, the Court reframed the charges from joint perpetration to common purpose liability, considering that the original common plan between the alleged joint perpetrators was consistent with the newly formulated common purpose of a militia group. *Katanga and Ngudjolo* Trial Decision on the Implementation of Regulation 55, supra n. 21, para. 29.

<sup>137</sup> *Katanga* Trial Judgment, supra n. 17, para. 1629.



gives expression to their meeting of minds, i.e. their shared intent. On this account, the Trial Chamber majority in *Katanga* emphasized that

[c]rimes ensuing solely from opportunistic acts by members of the group and which fall outwith the common purpose cannot be attributed to the group's concerted action. Only those crimes which the group harboured the *intention* to commit (the common purpose being to commit the crime or encompassing its execution), and falling within the ordinary course of events, can therefore be attributed to the said group and incur the accused's liability under article 25(3)(d).<sup>138</sup>

56. ICC case law presents different views about what the object of the common purpose should be. In *Mbarushimana*, the Pre-Trial Chamber held that the common purpose does not need to be specifically directed at the commission of crimes, i.e. the commission of crimes does not need to be the group's overarching goal. Rather, it suffices that the common purpose includes 'an element of criminality',<sup>139</sup> which means that the commission of crimes was a virtually certain result of the common purpose. The common purpose must entail a sufficient risk that if events follow their ordinary course, crimes will be committed.<sup>140</sup>

57. By contrast, the Pre-Trial Chamber in *Katanga* seems to have taken a different – more restrictive – approach. Following ICTY case law on JCE, the Pre-Trial Chamber required that the common purpose was to commit a crime, or at least involved the commission of crimes.<sup>141</sup> At first sight, these terms suggest a closer connection between the common purpose and the criminal conduct than the 'element of criminality' criterion. In particular, the standard of the *Katanga* Pre-Trial Chamber seems to preclude that the accused is held responsible for crimes committed in excess of an otherwise legitimate common purpose.<sup>142</sup>

58. In recent case law, the ICC has integrated the two seemingly distinct standards by interpreting the 'element of criminality' criterion strictly. In some cases, the Court held that the 'element of criminality' requires that the common plan involves the commission of a crime for which the suspect is charged,<sup>143</sup> whilst in others it considered that the commission of crimes must be a virtually certain result of the implementation of the common plan.<sup>144</sup> At the same time, the Court has defined the requirement that the common plan *involves* the commission of crimes in a broad way. In particular, the Court has considered that the common plan *involves* crimes when its implementation results in

<sup>138</sup> Ibid., para. 1630.

<sup>139</sup> *Mbarushimana* Decision on the Confirmation of Charges, supra n. 17, para. 271. This view is critically assessed by Judge Van den Wyngaert in her minority opinion to the *Katanga* Trial Judgment. *Katanga* Minority Opinion of Judge Christine Van den Wyngaert, supra n. 20, para. 286.

<sup>140</sup> *Lubanga* Trial Judgment, supra n. 16, para. 984.

<sup>141</sup> *Katanga* Trial Judgment, supra n. 17, para. 1627.

<sup>142</sup> On this issue, Ambos, supra n. 99, at 140; Gil Gil and Maculan, supra n. 90, at 360–361.

<sup>143</sup> *Ruto et al.* Decision on the Confirmation of Charges, supra n. 18, para. 301; *Ntaganda* Decision on the Confirmation of Charges, supra n. 44, paras. 105, 160; *Kenyatta et al.*, Pre-Trial Chamber Decision on the Confirmation of Charges, ICC-01/09-02/11, 26 January 2012, para. 399.

<sup>144</sup> This interpretation is linked to the ICC's findings on the scope of Article 30 of the ICC Statute, which stipulates that the accused can only be held responsible for a criminal consequence if he/she knows this consequence will occur as a result of his/her actions. *Lubanga* Trial Judgment, supra n. 16, para. 984; *Lubanga* Appeal Judgment, supra n. 16, para. 451; *Bemba* Decision on the Confirmation Charges, supra n. 29, para. 362.

criminal conduct in the ordinary course of events.<sup>145</sup> As the *Katanga* Trial Chamber explained,

the purpose must be to commit the crime or must encompass its execution. It need not be specifically directed at the commission of a crime within the jurisdiction of the Court. Nor must the group pursue a purely criminal purpose or must its ultimate purpose be criminal. Hence, a group with a political and strategic goal which also entails criminality or the execution of a crime may constitute a group acting with a common purpose within the meaning of article 25(3)(d).<sup>146</sup>

59. In this light, it seems appropriate to nuance the material distinction between the 'critical element of criminality' standard and the requirement that the common plan involves the commission of crimes. Both approaches appear to require that the common purpose at least resulted in the commission of crimes in the ordinary course of events. It is important that the ICC applies this requirement strictly. As Ambos has rightly noted, the common purpose should at least 'contain a more or less concrete crime to be committed, otherwise there is nothing (agreed) [that] could be mutually attributed'.<sup>147</sup> Thus, the ICC needs to ascertain that the common purpose remains closely connected to the commission of crimes. If this is not done carefully, the accused can be held responsible for contributing to a legitimate plan that involves the mere risk that crimes will follow from its implementation. Such an expansive interpretation of the common purpose infringes upon the principle of individual criminal responsibility and personal guilt, in particular when bearing in mind that the other *actus reus* and *mens rea* elements of Article 25(3)(d) already allow for a broad application.

#### (d) Outside contributors

60. A final point of discussion relates to the question of whether Article 25(3)(d) of the ICC Statute can be applied to persons who were themselves a member of the group acting with a common purpose, or whether common purpose liability is limited to 'outside contributors', i.e. persons who contribute to the common purpose from an external position.

61. In legal doctrine, scholars have presented different views on this matter. These views are linked to different opinions about how common purpose liability relates to other liability theories. On the one hand, scholars like Cassese contend that common purpose liability constitutes a residual type of criminal liability that does not apply to persons who belong to the inner circle of perpetrators. On this account, they maintain that Article 25(3)(d) of the ICC Statute specifically applies to persons outside the criminal group, i.e. persons who contribute to the commission of group crimes without being a group member.<sup>148</sup> In particular, Cassese stressed that

<sup>145</sup> *Katanga* Trial Judgment, supra n. 17, para. 1627.

<sup>146</sup> Ibid.

<sup>147</sup> Ambos, supra n. 99, at 140.

<sup>148</sup> K. Heller, 'Lubanga Decision Roundtable: More on Co-Perpetration', *Opinio Juris*, 16 March 2012, available at <http://opiniojuris.org/2012/03/16/lubanga-decision-roundtable-more-on-co-perpetration>, last consulted 24 March 2017; M. Aksenova, 'Complicity in International Criminal Law: A Case for Clarifications', at 14, available at [www.academia.edu/4792033/Complicity\\_in\\_International\\_Criminal\\_Law\\_A\\_Case\\_for\\_Clarification](http://www.academia.edu/4792033/Complicity_in_International_Criminal_Law_A_Case_for_Clarification), last consulted 24 March 2017.

the gist of Article 25(3)(d) is the regulation ... of a ... mode of responsibility [consisting] in the fact that a person *outside* the criminal group committing (or attempting to commit) a crime *contributes* to the perpetration of such crime without being a member of the criminal group.<sup>149</sup>

62. Furthermore, Heller clarifies that if common purpose liability were to apply to group members, it would become equivalent to JCE liability. If that was indeed the intention of the drafters of the ICC Statute, they would have phrased Article 25(3)(d) as a principal form of perpetration – just like JCE – and not as a type of accessorial participation, which is currently the case.<sup>150</sup>

63. By contrast, Ohlin characterizes common purpose liability in a different way. In his view, Article 25(3)(d) of the ICC Statute ‘represents a statutory surrogate for joint criminal enterprise’, which resembles domestic forms of complicity.<sup>151</sup> Whilst complicity liability may indeed relate to accessories who aid – but do not join – a criminal plan, it does not preclude membership *per se*:

Accomplice liability is certainly not predicate on a determination that the defendant is not a member of the criminal group. Indeed, on some theories of accomplice liability, defendants are prosecuted precisely because they are considered participants in a criminal endeavour with a unity of purpose or a commonality of objective.<sup>152</sup>

Moreover, Ohlin points to the text of Article 25(3)(d) of the ICC Statute, which does not include any element of an outside or external contribution, and to the overall structure of Article 25(3). He argues that common purpose liability would allegedly become ‘dangerously redundant’ if it was only applied to outside participants, because this type of conduct is already covered by aiding, abetting and otherwise assisting under Article 25(3)(c) of the ICC Statute.<sup>153</sup>

64. The question of whether common purpose liability is limited to persons outside the criminal group has also been debated before the ICC. The Defence in *Mbarushimana* and *Katanga* argued that common purpose liability can only be applied to non-members, since the text of Article 25(3)(d) of the ICC Statute clearly distinguishes between the accused’s conduct, on the one hand, and the group’s actions, on the other.<sup>154</sup> However, this argument has been rejected by the Court. According to the *Mbarushimana* Pre-Trial Chamber, restricting Article 25(3)(d) of the ICC Statute to non-members ‘would create results which run contrary to any literal, systematic or teleological interpretation of the principles established in the Statute for individual criminal responsibility’.<sup>155</sup> The Pre-Trial Chamber justified this finding with reference to the *actus reus* and *mens rea* requirements of joint perpetration and aiding and abetting – in particular the *essential* contribution and the *purpose* of facilitating crimes, respectively. According to the Pre-Trial Chamber, it would be incorrect if persons who do not meet these strict requirements

<sup>149</sup> Cassese, *supra* n. 49, at 213.

<sup>150</sup> Heller, *supra* n. 149.

<sup>151</sup> Ohlin, ‘Joint Criminal Confusion’, *supra* n. 20, at 408.

<sup>152</sup> *Ibid.*, at 411.

<sup>153</sup> *Ibid.*, at 415–416.

<sup>154</sup> *Katanga* Defence Observations on Article 25(3)(d), *supra* n. 120, para. 115; *Mbarushimana* Defence Written Submissions, *supra* n. 63, para. 20.

<sup>155</sup> *Mbarushimana* Decision on the Confirmation of Charges, *supra* n. 17, para. 274.

could only be held accountable for their actions under Article 25(3)(d) of the ICC Statute if they operated from outside a group.<sup>156</sup> In *Katanga*, the Trial Chamber affirmed this finding, thereby considering that ‘[t]o confine application of article 25(3)(d) to outsiders to the group who contribute to the commission of crimes would unduly circumscribe its reach, in contravention of a plain reading of the provision’.<sup>157</sup> It thus seems that the issue is now settled in favour of a broad approach, which renders Article 25(3)(d) of the ICC Statute applicable to persons acting both from within and from outside the group.

65. Indeed, this seems like the right way forward. The text of Article 25(3)(d) of the ICC Statute in no way stipulates that common purpose liability only applies to outside contributors. By contrast, it explicitly applies to persons who aimed to contribute to the group’s common purpose (alternative (i)), which will often entail that they shared the group’s objective and thus acted as a group member. Indeed, it may be more obvious to assess the responsibility of group members under (indirect) co-perpetration since Article 25(3)(a) of the ICC Statute constitutes a type of principal – rather than accessorial – responsibility. However, when the *actus reus* or *mens rea* requirements of (indirect) co-perpetration are not met, nothing precludes the ICC from turning to common purpose liability instead. In this respect, it should be recalled that the drafters of the ICC Statute sought to regulate a number of partially overlapping and non-exclusive modes of perpetration and participation.<sup>158</sup> This entails that the mere finding that the accused’s conduct better fits with (indirect) co-perpetration does not automatically imply that common purpose liability is inapplicable. The accused’s conduct may concurrently fall within the scope of different modes of liability.<sup>159</sup>

### 10.3.3 Overall Assessment

66. Article 25(3)(d) of the ICC Statute has generated extensive debate about the nature and scope of common purpose liability. First, in relation to the status of common purpose liability as a residual mode of liability, the ICC’s policy of alternative charging and its practice of applying Article 25(3)(d) to leadership figures suggest that common purpose liability is not *by definition* based on a weak link between the accused and the crimes for which he/she stands trial. On this account, common purpose liability does not automatically generate a low level of blameworthiness.

67. Second, with respect to the question of how to exclude *de minimis* contributions from the scope of common purpose liability, the majority of case law requires that the accused makes a significant contribution to the crimes charged. The requirement of a normative-causal contribution can be used to determine whether the significant contribution threshold is met. Following the theory of objective imputation – which focuses

<sup>156</sup> *Ibid.*, paras. 273–274.

<sup>157</sup> *Katanga* Trial Judgment, *supra* n. 17, para. 1631.

<sup>158</sup> van Sliedregt, *supra* n. 1, at 86.

<sup>159</sup> In this respect, it is noteworthy that the ICTY has acknowledged that liability theories are not always mutually exclusive: ‘in practice there are factual situations rendering the charging and convicting of the same person under both Article 7(1) [covering principal and accessorial liability] and 7(3) [covering superior responsibility] perfectly appropriate’. See e.g. ICTY, *Delalic et al.*, Trial Chamber Judgment, IT-96-21-T, 16 November 1998, para. 1222.



on the reasonableness of attribution – the ICC can resort to clearly defined factual and normative factors to establish a sufficiently close link between acts of the accused and the crimes committed.

68. Third, regarding the nature of the common plan, the apparent distinction between the requirement that the common plan *involves* the commission of crimes and the requirement of an ‘element of criminality’ can be nuanced. Both standards essentially entail that the common purpose at least resulted in the commission of crimes in the ordinary course of events. It is important to apply this requirement strictly in order to avoid the accused being held responsible for contributing to a legitimate plan, which merely involves the *risk* that crimes follow from its implementation.

69. Fourth, and despite scholarly arguments to the contrary, the ICC has rightly resolved the debate about the issue of ‘outside contributors’ in favour of a broad interpretation. This interpretation allows Article 25(3)(d) of the ICC Statute to be applied to group members and external participants alike. The fact that common purpose liability may thus somewhat merge with (indirect) joint perpetration is not problematic, considering that Article 25(3) regulates a number of partially overlapping liability theories from which judges can choose freely.

#### 10.4 Status under International Criminal Law

70. Whilst all international criminal courts have – in one way or another – used liability theories that capture the collective nature of international crimes, the ICC takes a unique approach to this issue by relying on common purpose liability – a concept derived from the Terrorist Bombings Convention. The specific type of common purpose liability regulated in Article 25(3)(d) of the ICC Statute is not to be found in the Statutes of other international criminal courts, which instead rely upon conspiracy and JCE liability.<sup>160</sup> Considering its novel character and limited scope, it seems premature to find that common purpose liability is part of customary international law. Before being qualified as a customary notion, common purpose liability needs further confirmation in practice. Until that time, the concept should be considered as a mode of liability that is applied specifically by the ICC.

#### 10.5 Evidentiary Factors

71. Common purpose liability is based on the existence of a common purpose between a group of persons. The common purpose can be inferred from circumstantial evidence, which demonstrates a group’s collective decision-making and concerted action.<sup>161</sup> In this respect, account may be taken of *inter alia*:

<sup>160</sup> Werle, *supra* n. 19, at 498; Werle, *supra* n. 5, at 970.

<sup>161</sup> *Mbarushimana* Decision on the Confirmation of Charges, *supra* n. 17, para. 271; *Katanga* Trial Judgment, *supra* n. 17, para. 1626; *Ruto et al.* Decision on the Confirmation of Charges, *supra* n. 18, para. 301; *Lubanga* Trial Judgment, *supra* n. 16, para. 988; *Lubanga* Decision on the Confirmation of Charges, *supra* n. 18, para. 345.

- The occurrence of meetings during which group members agree upon the crucial aspects of a plan (e.g. distribution of weapons and transport of perpetrators);<sup>162</sup>
- The relations and interaction between group members;<sup>163</sup>
- Public statements in which group members express their intentions;<sup>164</sup>
- The organized preparation and commission of violence;<sup>165</sup> and
- The intentions of key group members, which reflect the intentions of the group as a whole.<sup>166</sup>

72. It is required that the accused makes a *significant* contribution to the common plan. The significance of the contribution must be answered on a case-by-case basis, taking into account all relevant facts of the case under consideration.<sup>167</sup> The assessment should focus on the *effect* of the accused’s conduct, rather than on the *direct nexus* between the accused and the crimes committed.<sup>168</sup> Thus, it is possible that the accused contributed to the common purpose ‘through other members of the group’.<sup>169</sup> In particular, the finding of a significant contribution may depend on facts such as:<sup>170</sup>

- The accused’s sustained participation after acquiring knowledge of the group’s criminal purpose;
- The accused’s (lack of) efforts to prevent the criminal activity or to impede the efficient functioning of the group’s crimes;
- Whether the accused created or merely executed the criminal plan;
- The position of the accused in the group or relative to the group (i.e. his/her functions within the organization); and
- The accused’s role vis-à-vis the seriousness and scope of the crimes committed.

73. In addition, ICC case law has clarified that *ex post facto* contributions – i.e. contributions after the commission of crimes – can be ‘significant’ when they were agreed upon by the group before the crimes were perpetrated.<sup>171</sup>

74. The *mens rea* elements of Article 25(3)(d) of the ICC Statute may be established on the basis of the accused’s acts and utterances. In practice, account has been taken of the accused’s public statements, his/her contribution to the commission of crimes and his/her role vis-à-vis the common purpose.<sup>172</sup> Thus, there is considerable overlap between the evidentiary factors for establishing a common purpose and those for determining that the accused possessed the requisite *mens rea*.

<sup>162</sup> *Ruto et al.* Decision on the Confirmation of Charges, *supra* n. 18, paras. 302–303.

<sup>163</sup> *Blé Goudé* Decision on the Confirmation of Charges, *supra* n. 16, para. 175; *Gbagbo* Decision on the Confirmation of Charges, *supra* n. 137, para. 254.

<sup>164</sup> *Gbagbo* Decision on the Confirmation of Charges, *supra* n. 137, para. 254.

<sup>165</sup> *Ibid.*

<sup>166</sup> *Ruto et al.* Decision on the Confirmation of Charges, *supra* n. 18, para. 352.

<sup>167</sup> *Katanga* Trial Judgment, *supra* n. 17, para. 1634; *Mbarushimana* Decision on the Confirmation of Charges, *supra* n. 17, para. 284.

<sup>168</sup> *Katanga* Trial Judgment, *supra* n. 17, para. 1635.

<sup>169</sup> *Ibid.*

<sup>170</sup> *Mbarushimana* Decision on the Confirmation of Charges, *supra* n. 17, para. 284.

<sup>171</sup> *Ibid.*, para. 287.

<sup>172</sup> *Blé Goudé* Decision on the Confirmation of Charges, *supra* n. 16, para. 180.

### 10.6 Concluding Principles

75. The following concluding principles can be drawn from the above analysis: Common purpose liability is a mode of liability that applies to all international crimes within the jurisdiction of the ICC. It establishes criminal responsibility for making a significant contribution to crimes committed (or at least attempted to be committed) by a group of persons acting pursuant to a common purpose, i.e. an agreement. Common purpose liability applies to both members/insiders and non-members/outsideers of the group. It is required that the accused acts intentionally – i.e. means to engage in his/her conduct – and with knowledge that he/she contributes to the group's activities. In addition, the accused should either act with the purpose of promoting the objectives of the group, or with positive knowledge of the group's commission of crimes. It is not required that the accused shares the group's common purpose, or that he/she intends to commit the crimes charged. The accused's contribution and knowledge should specifically relate to the commission of crimes and not solely to the common purpose of the group. The elements of common purpose liability can be established on the basis of circumstantial evidence that shows the concerted and informed actions of the group and the accused.

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