Annex D.1

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A. The Recognition of Individual Criminal Responsibility in International Criminal Law

In its judgment against the major war criminals of WWII, the International Military Tribunal (IMT)[1] held quite apodictically that individual criminal responsibility has ‘long been recognized’, and stated further with a very famous *dictum* that:

> [E]nough has been said to show that individuals can be punished for violations of International Law. Crimes against International Law are committed by men not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of International Law be enforced.[2]

The IMT simply referred to the decision of the US Supreme Court in *Ex parte Quirin* [3] and thus drew, it could be argued, a ‘domestic analogy’.[4] Although this opinion was not thoroughly justified, it has been restated by Principle I of the famous Nuremberg Principles.[5] Subsequently it has been confirmed by the various war crimes trials since WWII,[6] the establishment of the (permanent) International Criminal Court (ICC),[7] and, in particular, by the growing jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY),[8] and that for Rwanda (ICTR).[9] Thus, it is not surprising that this classical statement of the IMT was quoted in a decision in the *Tadić* case. In this decision the Chamber laid down the foundations of individual (p. 103) criminal responsibility for violations of Common Article 3 of the 1949 Geneva Conventions and other customary rules, notwithstanding the existence of an international or internal conflict, concluding that:

> All of these factors confirm that customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles, and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles, and rules regarding means, and methods of combat in civil strife.[10]

Given these developments, it is fair to conclude that the concept of *individual criminal responsibility* for violations of humanitarian and human rights norms is universally *recognized*.[11] However, another question to be dealt with here is what the *constituting elements* of such a responsibility are. Most writings on ICL concentrate on the historical development, and organizational and procedural matters relating to an international criminal court, or the specific crimes, but neglect the development and analysis of the elements of individual criminal responsibility. Only recently have the technical issues received a more profound treatment in the academic literature.[12] The most promising approach to refine the elements of individual criminal responsibility is to go back to the primary sources of ICL, that is, international and national war crimes jurisprudence since Nuremberg, ICL conventions, and other written sources. The emphasis will lie on the case law here; the written sources will be treated in relation to this case law.

The analysis of the jurisprudence will cover, first of all, the Nuremberg and Tokyo trials, and the trials documented by the United Nations War Crimes Commission (UNWCC trials (see Section B. (1)). Secondly, selected judgments of national tribunals on Nazi crimes (*Eichmann, Barbie, Touvier*, and *Finta*),[13] and other state-tolerated or -sponsored criminality (*My Lai, Comandantes, Letelier/Moffitt, Fujimori*; East German border killings) will be examined (see Section B.(2)).

B. Historical Case Law on Individual Criminal Responsibility in ICL

(1) The Nuremberg, Tokyo, and UNWCC trials

(a) The applicable law

While the trials before the IMT and International Military Tribunal for the Far East (IMTFE)[14] were truly international, the twelve subsequent Nuremberg[15] and all the (p. 104) UNWCC trials[16] took place before national tribunals or those of the occupying powers. Despite this organizational[17] difference, the applicable law was, a grosso modo, the same, that is, the Nuremberg and Tokyo Statutes, and Control Council Law No. 10 (CCL 10). The provisions regarding individual criminal responsibility read as follows:

Article 6 IMT (Nuremberg) Statute:[18]

> The Tribunal … shall have the power to try and punish persons who, *acting in the interests* of the European Axis countries, whether as *individuals* or as *members of* or*ganizations*, committed any of the following crimes.
>
> The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be *individual responsibility*:
>
> > (a) Crimes against peace: namely, *planning*, preparation, initiation or waging of a war of aggression … or *participation* in a common plan or *conspiracy* for the accomplishment of any of the foregoing;

(b) War crimes: … ;

(c) Crimes against humanity: …

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

Article 10 IMT Statute:

In cases where a group or or*ganization* is declared *criminal* by the Tribunal,[19] the competent national authority of any Signatory shall have the right to *bring individuals to trial for membership* therein before national, military or occupation courts.

Article II CCL 10:[20]

1. Each of the following acts is recognized as a crime:

(a) Crimes against Peace. Initiation of invasions of other countries and wars of aggression … including but not limited to planning, preparation, initiation or waging a war of aggression … or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

(b) War Crimes. …

(c) Crimes against Humanity. …

(d) Membership in categories of a criminal group or organization declared criminal by the International Military Tribunal.

2. Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was

(a) a principal or

(b) was an accessory to the commission of any such crime or ordered or abetted the same or

(c) took a consenting part therein or

(d) was connected with plans or enterprises involving its commission or

(p. 105) (e) was a member of any organization or group connected with the commission of any such crime or

(f) with reference to paragraph 1 (a) if he held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or satellites or held high position in the financial, industrial or economic life of any such country.

Article 5 IMTFE (Tokyo) Charter:[21]

Jurisdiction Over Persons and Offenses.

The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offenses which include Crimes against Peace.

> The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:
>
> (a) Crimes against Peace: Namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression … , or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
>
> (b) Conventional War Crimes: … ;
>
> (c) Crimes against Humanity: …
>
> Leaders, organizers, instigators and accomplices *participating* in the formulation or execution of a common *plan* or *conspiracy* to commit *any* of the foregoing crimes are responsible for *all* acts performed by *any* person in execution of such *plan*.

It is striking that only CCL 10 puts emphasis on the different forms of participation and is more specific as to the possible status of the responsible persons, while the IMT and IMTFE Statutes merely require a causal contribution to a certain criminal result, thereby opting for a *unitarian concept of perpetration* (*Einheitstäterschaft*). As will be seen below, the jurisprudence adopted this fairly unsophisticated approach.[22]

The trials, as documented by the UNWCC, in large part accepted the Nuremberg and Tokyo law as the common ground, although the cases to be tried involved almost exclusively suspects coming from civil law jurisdictions. In any case, a comparative analysis of all the jurisprudence yields some results notwithstanding the fact both the IMT and IMTFE judgments are certainly the most authoritative historical sources of ICL.

(b) Objective elements of individual responsibility (actus reus)

(i) Causal connection?

In attributing to a defendant the (more or less) certain result of his conduct the Nuremberg jurisprudence pursued a quite straightforward cause-effect approach (in the sense of the theory of equivalence, or the *conditio sine qua non* formula). Limitations of this *de facto* unlimited and old-fashioned concept of attribution by taking recourse to normative theories of (objective) attribution[23] were not developed.[24] Thus, it is not surprising that (p. 106) the jurisprudence does not offer a theoretical foundation in this regard; all that can be found is Judge Powers' laconic reference to a 'causal connection'.[25] In sum, the Nuremberg approach can be called pragmatic rather than principled, putting the emphasis on evidentiary questions. The IMTFE and the UNWCC trials did not say much more on the question of causality either. They only referred to criteria of causality in the context of participation.

(ii) Participation/complicity

The *Nuremberg jurisprudence* did not distinguish between principal and accessory (secondary or derivative) participation[26] on the level of attribution of criminal responsibility, but rather considered any form of (factual) participation in a crime sufficient to hold a participant accountable. Thus, any cooperation in Hitler's war plans, and any knowledge of these plans gave rise to criminal responsibility for participation in the crime against peace:

> Hitler could not make aggressive war by himself. He had to have the co-operation of statesmen, military leaders, diplomats and business men. When they, with *knowledge* of his aims, gave him their *co-operation*, they made themselves *parties* to the plan he had initiated. They are not to be deemed innocent because Hitler made use of them, if they *knew* what they were doing.[27]

These rather specific requirements concerning the crime against peace were further elaborated upon in the subsequent trials, and extended to the other crimes contained in the Statute. Possibly the most concrete statement can be found in *US v von Leeb et al.*, in which it is stated that ‘to be held criminally responsible, there must be a breach of some moral obligation fixed by international law, a personal act voluntarily done with knowledge of its inherent criminality under international law’.[28]

In sum, *any form of participation*—from mere consent to active conduct—was considered *sufficient* to be held accountable not only for the crime against peace but also for war crimes and crimes against humanity. Consequently, a defendant who did not directly commit a crime could be held accountable as an accomplice for a certain bureaucratic or functional involvement in the crimes of the Nazi system. For the first time, criminal responsibility was developed for organizational functions within a bureaucratic apparatus:

> The charge … is that of conscious participation in a nation wide [*sic*] government-organized system of cruelty and injustice, in violation of the laws of war and of humanity, perpetrated in the name of law by the authority of the Ministry of Justice, and through the instrumentality of the courts. The dagger of the assassin was concealed beneath the robe of the jurist.[29]

Confirming the line adopted by the IMT, (direct) perpetration and (indirect) complicity were treated equally, such that ‘[t]he person who persuades another to commit murder, the person who furnishes the lethal weapon for the purpose of its commission, and the person who pulls the trigger are all *principals*, or *accessories* to the crime’.[30]

Similarly, in *US v Pohl et al*. participatory liability was based on the functional division of different tasks which, taken together, facilitate or promote the commission of the crime:

> (p. 107) An elaborate and complex operation, such as the deportation and extermination of the Jews and the appropriation of all their property, is obviously a task for more than one man … As may be expected, we find the various participants in the programme tossing the shuttlecock of responsibility from one to the other. The originator says: ‘It is true that I thought of the programme, but I did not carry it out.’ The next in line says: ‘I laid the plan out on paper and designated the *modus operandi* but it was not my plan and I did not actually carry it out.’ The third in line says: ‘It is true I shot people, but I was merely carrying out orders from above.’ The next in line says: ‘It is true that I received the loot from this programme and inventoried it and disposed of it, but I did not steal it nor kill the owners of it. I was only carrying out orders from a higher level.’ To invoke a parallelism, let us assume that four men are charged with robbing a bank. … *[T]he acts of any of the four, within the scope of the overall plan, become the acts of all the others*.[31]

The argumentation of the Nuremberg Tribunals concerning reciprocal attribution is reminiscent of the English doctrine of common design[32] which was in modern ICL revived by the ICTY’s joint criminal enterprise (JCE) doctrine to be analysed below.[33] The common design doctrine was applied in the British war crimes trials, as documented by the UNWCC. While, as a general rule, it was deemed sufficient that the defendant has been ‘concerned in the committing’ of the crime, in the case of various participants, a mutual attribution of the individual contributions to the (main) offence was based on the participants’ common purpose and plan. A mutual attribution could also be the consequence of a functional division of tasks between the accomplices. This implies liability for preparatory acts which initiate the commission as well as for acts undertaken after the accomplishment of the offence. In the trial of *Karl Adam Golkel et al.*, for example, the Judge Advocate made the case for liability for preparatory acts:

> [A] man would be concerned in the shooting if he was 50 miles away if he had *ordered* it and had taken the *executive steps* to set the shooting in motion. You must consider not only physical acts done at the scene of the shooting, but whether a particular accused … took *any part* in organizing it.[34]

However, the participation must have had a real impact on the commission, such that 'the person concerned must have been *part of the machine* doing some duty, carrying out some performance which went on directly to achieve the killing, … had some *real bearing* on the killing'.[35]

Unlike the Anglo-American jurisprudence, the French courts distinguished between direct perpetration and (indirect) participation as recognized by French law. Article 4 of the corresponding *Ordinance* reads:

> Where a subordinate is prosecuted as the actual perpetrator of a war crime, and his superiors cannot be indicted as being equally responsible, they shall be considered as accomplices in so far as they have organised or tolerated the criminal acts of their subordinates.[36]

(p. 108) However, in other countries all forms of participation were treated equally. Finally, even acts rather distant from the ultimate result (such as a denunciation leading to death in a concentration camp) were attributed to the 'primary authors', that is, the persons whose conduct was the original cause for the later criminal results.[37] The rest of continental jurisprudence instead followed the Anglo-American concept, treating—on the level of attribution of criminal responsibility—perpetrators and accomplices equally.

(iii) Expansion of attribution

(1) Command responsibility

In the trials against leading members of the *Wehrmacht* and the *SS*, the US military tribunals activated the doctrine of command responsibility as developed in the *Yamashita* case.[38] In this case Japanese General *Tomoyuki Yamashita* was charged by US Prosecutors of having '*unlawfully* disregarded and *failed* to discharge his duty as commander *to control* the operations of the members of his command, permitting them to commit brutal atrocities, and other high crimes against the people of the United States, and of its allies, and dependencies, particularly the Philippines'.[39] He was sentenced to death by a US Military Commission on 7 December 1945. The Commission drew no express conclusion of knowledge, but found only that there had been widespread atrocities and that Yamashita had 'failed to provide effective control … as was required by the circumstances'.[40] Yamashita appealed first to the Supreme Court of the Philippines, which declared itself incompetent 'to interfere with acts of the U.S. Army … '.[41] The US Supreme Court accepted the petition for writ of *habeas corpus* and recognized that the crimes in question constituted 'violations of the law of war'.[42] These violations were attributed to the defendant by the superior responsibility doctrine because

> the law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts … [and] … he may be charged with personal responsibility for his failure to take such measures when violations result. … Hence the law of war presupposes that its violation is to be avoided through the control of

> the operations of war by commanders who are to some extent responsible for their subordinates.[43]

The trial and the judgment received strong criticism in judicial and academic circles, especially because of the alleged violations of the principles of culpability, and of fair trial.[44] It may also be possible to negate *any* precedental value of the *Yamashita* (p. 109) decision;[45] it cannot be denied that its mixture of technical-legal flaws[46] and ideological-racial prejudice severely hampers its legal and, above all, moral value. As to the superior responsibility doctrine itself and the principle of culpability,[47] one cannot underestimate the importance of the following criticism expressed by Supreme Court Justice Murphy (dissenting):

> there was no serious attempt to charge or to prove that he [Yamashita] committed a recognized violation of the laws of war. He was not charged with personally participating in the acts of atrocity or with ordering or condoning their commission. Not even knowledge of these crimes was attributed to him. It was simply alleged that he unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit the acts of atrocity. The recorded annals of warfare and the established principles of international law afford not the slightest precedent for such a charge. This indictment in effect permitted the military commission to make the crime whatever it willed dependent upon its biased view as to the petitioner's duties and his disregard thereof, a practice reminiscent of that pursued in certain less respected nations in recent years.[48]

In *US v Pohl et al.* the tribunal referred explicitly to *Yamashita* and stated:

> The law of war imposes on a military officer in a position of command an *affirmative* duty to take such steps as are within his power and appropriate to the circumstances to control those *under his command* for the prevention of acts which are violations of the law of war.[49]

Thus, liability for *omission* in the case of defendants of certain military or civilian[50] status was reaffirmed. It was argued that a command position implies certain duties of control and supervision with regard to the respective area of competence. If offences are committed within this area of competence, the responsible officer will have to intervene. If he fails to do so—despite 'actual knowledge' of these offences (which may be inferred from his position as superior)[51]—he will be liable for criminal omission. However, the duty to control or supervise declines with diminishing commanding power. Thus, these rules apply to a commanding general and even to a commanding officer; they do not, however, apply when such officers transmit orders without knowledge of their content.[52] Neither do they apply to staff officers since such officers normally have no commanding power. Yet, staff officers too may incur criminal liability, as '[i]f the basic idea is criminal under international law, the staff officer who puts that idea into the form of a military order … , or takes personal action to see that it is properly distributed … commits a criminal act (p. 110) under international law'.[53] As to crimes against peace it was stated that '[i]t is not a person's rank, or status, but his power to shape, or influence the policy of his state, which is the relevant issue for determining his criminality'.[54] In general, the IMT and the military tribunals required—with regard to aggressive war—that the defendant be a 'leader', or 'planner' (IMT), or belong to the 'policy level'.

The IMTFE confirmed and extended this jurisprudence to *civilian personnel*.[55] First, it imposed duties of supervision and control on civil and military command personnel with regard to the proper treatment of prisoners of war. Consequently, abuses of prisoners were attributed to the defendants if they failed to prevent such occurrences. Command responsibility was further extended to the (civilian) government, arguing for a type of *collective* responsibility:

> A cabinet member may resign. If he has knowledge of ill-treatment of prisoners, is powerless to prevent future ill-treatment, but elects to remain in the cabinet thereby continuing to participate in its *collective responsibility* … [,] he willingly assumes responsibility for any ill-treatment in the future.[56]

Membership in the cabinet was deemed to fulfil the requirement of causal connection—at least in the case of wilful or negligent ignorance—between the failure to act, and the committed abuses. Also, duties of oversight, and investigation were increased.

This jurisprudence was confirmed by the British, Canadian, Australian, and Chinese war crimes trials as documented by the UNWCC.[57] Concretely speaking, the competent tribunals—*a grosso modo*—considered the position or status of the defendant as crucial when determining criminal accountability based on command responsibility. The UNWCC itself took the position, however, that 'the principles governing this type of liability … are not yet settled'[58] and formulated the following—today highly relevant—questions:

- How far can a commander be held liable for not taking steps before the committing of offences to prevent their possible perpetration?
- How far must he be shown to have known of the committing of offences in order to be made liable for not intervening to stop offences already being perpetrated?
- How far does he have a duty to discover whether offences are being committed? [59]

(2) Conspiracy

As far as conspiracy is concerned, the IMT interpreted Article 6 (last sentence) of its Statute restrictively[60]—probably a result of fierce criticism by German defence lawyers against this norm.[61] Thus, a conspiracy to wage an aggressive war was punishable only if it was based on a common and concrete plan that was not too distant from the actual act, and that was motivated by criminal intent. Article II(1)(a) of CCL 10 and the IMTFE[62] confirmed that (p. 111) conspiracy was punishable only in cases of crimes against peace, not in cases of crimes against humanity or war crimes. The IMTFE further required the real possibility of participation in the planning—also at a later stage; this possibility could be presumed if the defendant belonged to the 'policy level'. Yet, such a presumption to the detriment of the defendant may be considered a violation of the principle of culpability.

(3) Membership in a criminal organization

The membership liability was also interpreted restrictively[63] even though the wording of the provisions, especially Article 10 of the IMT Statute ('bring individuals to trial for membership'), clearly provides for liability because of mere membership. Notwithstanding, the jurisprudence limited responsibility to members who actively took part in the acts of the criminal organization and knew of their criminal character. Thus, membership alone was not considered sufficient:

> A criminal organization is analogous to a criminal conspiracy in that the essence of both is co-operation for criminal purposes. There must be a group bound together and organized for a common purpose … Since the declaration with respect to the organizations and groups will, as has been pointed out, fix the criminality of its members, that definition should exclude persons who had no *knowledge* of the criminal purposes or acts of the organization and those who were drafted by the State for membership, unless they were *personally implicated* in the commission of

> acts declared criminal by Article 6 of the Charter as members of the organization. Membership *alone* is not enough to come within the scope of these declarations.[64]

The subsequent trials adopted the position of the IMT. In *US v Ohlendorf et al.* it was stated that:

> [I]n order to avoid unnecessary repetition in the individual judgements, the Tribunal here declares that where it finds a defendant guilty under count three [membership in criminal organizations] it will be because it has found beyond a reasonable doubt from the entire record that he became or remained a member of the criminal organization involved subsequent to 1 September 1939 under the conditions declared criminal in the judgement of the International Military Tribunal.[65]

The British jurisprudence, as documented by the UNWCC, tried to *distinguish* between conspiracy, common design, and membership in a criminal organization. Accordingly, the difference between a charge of conspiracy and one of common design was that the former required the making of an agreement to commit offences, while the latter required not only the agreement but also the performance of acts pursuant to it. Membership in a criminal organization was more closely related to the common design doctrine since membership alone was not punishable; instead, knowledge of, and voluntary membership with active participation in the criminal acts of the organization were required.[66]

(p. 112) (c) Subjective elements of individual responsibility (mens rea)

In general, the required subjective element is knowledge of the crime or criminal plan.[67] Yet, in the *Justice Trial* a type of *negligent or blameworthy ignorance* was considered sufficient.[68] In addition, with regard to war crimes and crimes against humanity, knowledge was in fact presumed in light of the evident criminality of the acts:

> While we hold that knowledge that Hitler's wars … were aggressive is an essential element of guilt … [,] a very different situation arises with respect to … war crimes and crimes against humanity. He who knowingly joined or implemented, aided, or abetted … cannot be heard to say that he did not know the acts in question were criminal. Measures which result in murder, ill-treatment, enslavement … are acts which shock the conscience of every decent man. These are criminal per se.[69]

Similarly, the decision in *IG Farben* referred to the personal ability and position of the defendants:

> It is contended that the defendants *must have known* … . [V]iewed in retrospect[,] … armament production might be said to *impute knowledge* … . If we were trying military experts … [,] such a conclusion might be justified. None of the defendants, however, were military experts. They were not military men at all. The field of their life work had been entirely within industry … The *evidence* does not show that any of them knew the extent to which general rearmament had been planned.[70]

These considerations give rise to many questions. First of all, it is unclear what the object of reference of the required knowledge actually is. While the *Justice Trial* refers to the legal characterization of crimes against humanity and war crimes as criminal per se, the *IG Farben* Tribunal refers to the factual knowledge with regard to the re-armament. Secondly, the broad use of presumptions, apart from conflicting with the culpability principle (as to any presumption to the detriment of the accused), makes it practically impossible to invoke a mistake of law as a valid defence. For if a defendant *must* know what is wrong or right, it is presumed that he necessarily recognizes the wrongfulness of his acts, and thus acts in full awareness of the unlawfulness of his conduct. If he nevertheless claims to have erred with regard to the wrongfulness of his conduct, this error will easily be treated as avoidable and therefore irrelevant. Against this background it is preferable, for reasons of fairness, to make only a very limited use of presumptions of knowledge. Finally, a distinction between general and specific intent, based on US criminal law,[71] was developed in the *Krupp* case, without, however, clearly delimitating these forms of *mens rea* from each other.[72]

(p. 113) The IMTFE, as mentioned above, diluted the subjective requirement even further. Accordingly, defendants who displayed negligent ignorance were seen to have acted with *mens rea* because '[t]hey [were] at fault in having failed to acquire such knowledge'.[73]

The British, Canadian, Australian, and Chinese jurisprudence documented by the UNWCC confirmed the strict standard of the IMTFE, requiring only possible knowledge of punishable offences, thereby accepting a standard of negligent ignorance as well.

(2) Selected judgments on Nazi crimes, and other state-sponsored criminality

The various judgments on Nazi crimes[74] dealt mainly with the crime against humanity within the meaning of Article 6 of the IMT Statute. Other (objective and subjective) elements of individual responsibility played a more important role only in selected judgments on other state-sponsored criminality.[75]

(a) Objective elements of responsibility (actus reus)

(i) Participation, in particular perpetration by virtue of an organization

The clear commitment of CCL 10 to a unitarian concept of perpetration left the continental tribunals little room to distinguish between perpetration and complicity. Accordingly, the German Supreme Court for the British Zone (*Oberste Gerichtshof für die Britische Zone*, OGHBrZ) had to recognize that CCL 10 accorded equal value to each contribution to a criminal act, and that such contributions had to be punished independently of each other. Differences in qualitative or quantitative weight were considered in the sentencing stage only.

(p. 114) Similarly, in the *Eichmann* case any form of participation in the 'final solution' was considered sufficient to justify criminal accountability. *Eichmann* was sentenced as 'principal offender' on the basis of various acts of support, or cooperation. Interestingly, the Jerusalem District Court did not take issue with the classical doctrine of participation but held that the macrocrimes in question had to be treated differently. In fact, it argued for a type of *organizational responsibility*, a form of domination of the criminal events and immediate perpetrators by the 'man at the desk', a further development of the concept used in the *Justice Trial*:

> But more importantly, with such a vast and complicated crime as the one we are now considering [the final solution], in which many people participated, at different levels of control and by different modes of activity – the planners, the organizers and the executants, according to their rank – there is little point in using the ordinary concepts of counselling and procuring the commission of an offence. For these crimes were mass crimes, not only having regard to the numbers of victims but also in regard to the numbers of those who participated … and the extent to which any one of the many criminals were close to or remote from the person who actually killed the victims says nothing as to the measure of his responsibility. On the contrary, the degree of *responsibility* generally *increases* as we draw further away from the man who uses the fatal instrument with his own hands and reach the *higher levels of command*, the 'counsellors', in the language of our law. As regards the victims who did not die but were subjected to living conditions calculated to bring about their death, it is especially difficult to define in technical terms *who*

> *abetted whom*: he who hunted down the victims and deported them to a concentration camp, or he who made them work there.[76]

In some *Latin American jurisdictions*, Claus Roxin's theory of indirect perpetration by virtue of domination of the direct perpetrators through and within an organization ('*mittelbare Täterschaft kraft Organisationsherrschaft*')[77] has gained ground in the case law which deals with serious human rights violations committed during military dictatorships (Argentina, Chile) or armed conflicts (Colombia, Peru).[78] In the Argentinean trial against the former commanders of the military junta, a (national) tribunal had, for the first time, to deal with the accountability of the political leadership of a country for crimes committed against the political opposition on the basis of a national plan of destruction.[79] The Appeals Court and the Supreme Court argued for a form of *perpetration by means* [80] invoking Roxin's theory. Accordingly, the organizational structure of a military apparatus can confer upon its leaders or commanders the power to dominate the acts of their subordinates, who—as direct perpetrators—carry out the crimes conceived and ordered by the commanders. Although the subordinates are criminally responsible, the commanders are in total control since the former are easily replaceable: they are fungible mediators of the act (*fungible Tatmittler*). The domination of the system implies the domination of each individual who forms part of the system. The Appeals Court stated:

> (p. 115) The accused *dominated* the acts since they *controlled the organization* which carried them out. The acts judged in this case are not the result of an erroneous and isolated individual decision by those who executed them but they constituted the mode of battle which the Commanders-in-Chief of the Armed Forces communicated to their men. That means that the acts were carried out by the complex variety of factors (men, orders, places, vehicles, food, etc.) which are involved in any military operation.
>
> …
>
> In this context, the actual executor of the acts *loses* importance. The domination of those who control the *system* over the commission of the acts which they have ordered is total, since even if there were a subordinate who refused to comply, he would be automatically replaced by another who would certainly do it, from which it follows that the plan … cannot be frustrated by the will of the executor as he only plays the role of a simple cogwheel in a gigantic machinery.
>
> We are not dealing here with the traditional domination of the will in the sense of indirect perpetration. The *instrument* which the 'man in the background' uses is the *system itself*, handling it with wide discretion, a system which is composed of *fungible men* functioning to achieve the proposed objective. The domination, then, is not domination over a determined will, but an 'undetermined will', for whomever the executor may be, the act will be carried out regardless.
>
> The direct perpetrator loses transcendence as he plays a secondary role in the execution of the act. He who dominates the system dominates the anonymous will of *all the men* who constitute it.[81]

Similarly, in an investigation into the disappearance of the German citizen Elisabeth Käsemann during the Argentinean military dictatorship, it has been argued that the members of the then *Junta,* the generals Jorge Videla and Emilio Massera, were responsible as indirect perpetrators on the basis of this doctrine.[82] Recently, in the case *Riveros et al.*, the Tribunal analysed in detail the possibility of applying the *Organisationsherrschafts* theory, and rejected it. It found that the already convicted perpetrators (the *Junta*) alone could be held responsible as indirect perpetrators because of their control by and within an organization, whereas all other perpetrators under their hierarchical level did not have the possibility of total control over other perpetrators. In this sense, it was argued that only the top-level perpetrators which headed the whole organization (that is, the state) could (p. 116) have acted and used other (direct) perpetrators without being disturbed by upper authorities; thus, only they could be held responsible as indirect perpetrators.[83]

In the *Chilean* trial for the murders of the foreign minister of the Allende regime, Orlando Letelier, and his American partner, Ronaldo Moffitt, the defendants (the former director of the military secret service, Contreras, and the official Espinoza) were also sentenced as indirect co-perpetrators (‘*coautores mediatos*’). While the Court referred to Roxin’s theory of control by and within an organization (‘*Organisationsherrschaft*’), the decision could not be based directly on this doctrine since Article 15 of the Chilean Criminal Code (‘Código Penal’) only provides for indirect perpetration based on the domination of the direct perpetrators by duress exercised by the *Hintermann* (‘Nötigungsherrschaft’).[84] In any case, the gist of the Court’s argument was that the Chilean secret service, DINA, controlled the physical perpetrators who themselves appeared to be simple instruments of this organization.[85]

In recent years, the doctrine of *Organisationsherrschaft* has also gained ground in *Colombia*, especially in the practice of the Human Rights Unit of the Federal Prosecutor (‘*Fiscalía General de la Nación*’), which applied it in its pursuit of the rebel group FARC.[86] For a long time, however, the Criminal Law Chamber (‘*Sala Penal*’) of the Supreme Court rejected this doctrine, preferring a responsibility based on co-perpetration.[87] It then referred to the doctrine in the case *Arana Sus* [88] and finally applied it for the first time in the case of *García Romero.* [89] In this case, the Court expressively changed its case law and distinguished between three possible forms of perpetration: the ‘indirect perpetrator’, referring to the leaders of the organized power apparatus, the ‘co-perpetrator’, referring to the coordinators, and the simple ‘perpetrator’, referring to the direct executors and subordinates.[90] The Court found *García Romero,* a former senator, responsible as an indirect perpetrator for murder.[91] Thus, ultimately, the Colombian Supreme Court—invoking, inter alia, the *Fujimori* judgment of its Peruvian sister-court (to be dealt with in turn)—accepted the concept of indirect perpetration even if the direct perpetrators act with full responsibility.[92]

(p. 117) In *Peru*, the doctrine of *Organisationsherrschaft* has for the first time been applied in the case against *Abimael Guzmán*, alias ‘*Presidente Gonzalo*’, the former leader of the rebel group Shining Path (*Sendero Luminoso* (*SL*)). The ‘*Sala Penal Nacional*’, a first-instance terrorism court, attributed the crimes committed by the members of this group to its leaders, especially to *Guzmán*, arguing that *SL* was an ‘organized power apparatus’ (‘*aparato organizado de poder*’) whose members acted almost automatically pursuant to the orders issued by *Guzmán*.[93] The Supreme Court confirmed this decision without further argument, simply referring to Roxin’s theory.[94] In the more recent case of former Peruvian President *Alberto Fujimori* the Supreme Court followed this case law, but considerably refined the requirements of the *Organisationsherrschaft* doctrine.[95] *Fujimori* was convicted for indirect perpetration through control over an organization for the crimes of murder and serious assault; these crimes were committed in the context of his campaign against terrorism in Peru and were thus qualified by the Court as crimes against humanity because they had been committed within a pattern of gross and systematic violations of human rights.[96] *Fujimori* did not commit the crimes personally, but his position as originally democratic, but later dictatorial, President of Peru ensured that the crimes ordered by him were actually committed by subordinates. Thus, *Fujimori* ‘could find support in a large reserve of “willing executioners”. Even if some of them would refuse, or resist, they could be easily replaced by other volunteers’.[97] As a general requirement for the application of Roxin’s *Organisationsherrschaft* doctrine, the Court mentioned first the existence of an organizational apparatus with the respective power characterized by two specific objective requirements (power of decision[98] and dissociation of the organization from the lawful order),[99] complemented by two requirements with regard to the direct perpetrators (their replaceablity or fungibility[100] and unreserved willingness to carry out the respective crimes).[101] The Court considered that all these requirements were fulfilled and thus found that *Fujimori* 'controlled' the commission of the crimes by virtue of the organization.[102]

In the German trials against civil and military leaders of the former German Democratic Republic (GDR), the Supreme Court referred to the 'substantive legal bases of the IMT judgement' to declare null and void the justification of shootings at the East German border by the respective GDR legislation.[103] The Court invoked Roxin's doctrine to apply (p. 118) (indirect) perpetration to the ruling elite in the GDR, responsible for the border regime and thus the ensuing killings (*in casu* the members of the National Defence Council (NDC) and the generals of the National People's Army):

> As members of the NDC the accused belonged to a body, whose decisions formed the *mandatory* requirements for the fundamental orders, on which the border regime … was based. They knew that the orders based on the decisions of the NDC were carried out. They had been notified of the victims of the border mines and the order to shoot ('*Schießbefehl*'). The executors of the acts which directly led to the killings acted as part of a *military hierarchy* in which their role was *specifically* set down. Neither did the accused have a completely subordinated role in relation to Honecker.[104]

Further, a commander of a border patrol—that is, a member of the mid-command level—was sentenced as an indirect perpetrator because of his domination by command ('*Befehlsherrschaft*') for ordering a subordinate to kill a refugee.[105]

In sum, the concept of domination, or control by virtue of an organization, has received increasing recognition and thus increasing importance. Given its convincing reasoning with respect to the criminal responsibility of leaders within strict hierarchical structures, it is little surprise that the doctrine has also played an increasing role at the ICC. We will therefore analyse it in more detail in connection with Article 25(3) of the ICC Statute.[106]

(ii) Others

Other forms of objective responsibility were not of special relevance. Only in the *Eichmann* conspiracy trial has it been interpreted so restrictively as to require concrete acts going beyond the mere agreement to commit an offence. In the *My Lai* trial, *command responsibility* was considered with regard to *Captain Medina* as a kind of fallback liability, since it could not be proven that he ordered Lieutenant Calley to commit the killings. Colonel Howard, the military judge, in his charge to the jury stated:

> a commander is also responsible if he has actual knowledge that troops or other persons subject to his control are in the process of committing or are about to commit a war crime and he wrongfully fails to take the necessary steps to insure compliance with the law of war. You will observe that these legal requirements placed upon a commander require actual knowledge plus a (p. 119) wrongful failure to act. Thus mere presence at the scene without knowledge will not suffice. That is, the commander-subordinate relationship alone will not allow an inference of knowledge. While it is not necessary that a commander actually see an atrocity being committed, it is essential that he know that his subordinates are in the process of committing atrocities or about to commit atrocities.[107]

(b) Subjective elements of responsibility (mens rea)

According to the OGHBrZ, a crime against humanity requires only a *dolus eventualis* (*bedingter Vorsatz*) on the subjective level, that is, a subjective requirement unknown to common law which can be situated somewhere between purpose/knowledge and recklessness/negligence.[108] Notwithstanding the use of this concept in ICL, it is of enormous practical importance that the OGHBrZ did not require the defendant to have a specific intent to commit a crime against humanity. An ordinary *dolus*, that is, the general awareness that the victim of his act might have been exposed to the arbitrary and unjust Nazi system, was deemed sufficient. In terms of the consciousness of the unlawfulness (‘*Unrechtsbewußtsein*’) of the conduct, the OGHBrZ relied on an objective standard: it must have been possible for a reasonable person to recognize the legal wrong, and, on that basis, to have behaved in a normatively correct way. The defendant’s individual (subjective) capacity was not taken into account (at this level of imputation).

In *Eichmann*, only an ordinary *mens rea* was required. *Eichmann* had known of the final solution; thus, the biological destruction of the Jews formed part of his *dolus*.

In *Barbie* and *Touvier*, the French courts required knowledge of the criminal plans and a specific intent.[109] Thus, in *Touvier* the court doubted that the defendant acted with the necessary *mens rea* since he was neither an agent of the Nazi state nor did he have the specific intent to implement a policy of ideological hegemony. The court finally presumed Touvier’s specific intent—not very convincingly—since he was instigated by a Gestapo official.[110]

In *Finta*, the Canadian courts held that the defendant must have known or been wilfully blind to the circumstances or facts which made his act a crime against humanity.[111] It was deemed sufficient that the defendant—from the perspective of an ordinary observer—was aware of the *factual quality* of his acts as crimes against humanity. He must have inferred from this factual quality the specific blameworthiness of his behaviour.

In the *My Lai* trial, the deliberation focused on the subjective criteria to distinguish homicide from murder. Calley was finally sentenced for murder because he voluntarily executed Vietnamese civilians according to his ‘preconceived malice’, and was therefore absolutely conscious of his acts:

> [The] Appellant knew he was armed and what his weapon would do. He had the same knowledge about his subordinates, and their arms. He knew that if one aimed his weapon at a villager and fired, the villager would die. Knowing this, he ordered his subordinates to ‘waste’ the (p. 120) villagers at the trail and ditch, to use his own terminology; and fired upon the villagers himself. These bare facts evidence intent to kill, consciously formed and carried out.[112]

C. The Modern Law on Individual Criminal Responsibility

(1) Preliminary remarks

Article 7(1) ICTYS[113] and the identical Article 6(1) ICTRS[114] read:

> A person who planned, instigated, ordered, committed or otherwise aided, and abetted in the planning, preparation or execution of a crime … of the present Statute, shall be individually responsible for the crime.

In the case against the Serb *Dusko Tadić*, interpreting Article 7(1) ICTYS and referring to the jurisprudence since Nuremberg, Trial Chamber (TC) II held that the concept of individual criminal responsibility, as well as the modes of participation pursuant to Article 7 ICTYS, have a basis in customary international law.[115] Nevertheless, the drafter of the ICC

Statute abstained from adopting the unitarian approach of Article 7 and opted for a more differentiated model with Article 25(3), which states in the relevant part:

> **3.** In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
>
> > (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
> >
> > (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
> >
> > (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
> >
> > (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
> >
> > > (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
> > >
> > > (ii) Be made in the knowledge of the intention of the group to commit the crime;
> >
> > (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
> >
> > (f) …
>
> 3*bis*. In respect of the crime of aggression, the provisions of this article shall apply only to persons in a position effectively to exercise control over or to direct the political or military action of a State.

Of course, given the difference in wording between Article 7(1) ICTYS/Article 6(1) ICTRS and Article 25(3) ICC Statute, the practice of the ad hoc tribunals, including the post-ICTY and ICTR ones (here discussed under 'mixed tribunals'), could and can only serve to a very limited degree as a model for the ICC. I have already argued elsewhere that a '*tabula rasa* (p. 121) principle', in particular with regard to modes of liability, should apply.[116] It is for this reason that the following analysis of the law of individual criminal responsibility *stricto sensu* (Article 25(3)(a)–(d) and (e)) is divided into three sections.

(2) Article 7(1) ICTYS and Article 6(1) ICTRS

(a) 'Direct' commission: physical and co-perpetration

As to the meaning of the term '*committed*', the *Tadić* AC first held that committing means 'first and foremost the physical perpetration … by the offender himself'.[117] Similarly, in *Čelebići* it was stated that 'commission' constitutes primary or direct responsibility.[118] The *Stakić* Chamber defined 'committing' as participating 'physically or otherwise directly or indirectly'.[119] A broader understanding of commission was only introduced by the *Seromba* AC. It clarified, that '"committing" is not limited to direct and physical perpetration', rather, the decisive question is whether the actions carried out were as much 'an integral part' of the crime as the direct and physical actions.[120] This view has been adopted by subsequent case law.[121]

In any case, since the *Tadić* Appeals ruling commission is to be understood foremost as '*physical perpetration*', that is, the commission of the crime by the perpetrator him- or herself 'with his/her own hands'.[122] Yet, 'direct commission' also covers the direct perpetration by various persons, that is, a mode of participation most aptly captured by the term '*joint or co-perpetration*'. The ICTY decided a significant number of cases dealing with this form of participation focusing on the *common criminal design or purpose* of the different perpetrators. Most importantly, the *Tadić* AC, inter alia, referring to Article 25(3) (p. 122) ICC Statute, held that this principle is contained in Article 7(1) ICTYS and constitutes a form of participation that is particularly necessary in order to cope with international crimes since 'most of … these crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups or individuals acting in pursuance of a common criminal design'.[123]

The Chamber considered whether this doctrine has a basis in customary international law[124] and found that it is rooted in the national law of many states, referring explicitly to civil law (France, Germany, Italy, and the Netherlands), and common law jurisdictions (Australia, Canada, England and Wales, the USA, and Zambia).[125] The objective requirements of the responsibility for this mode of participation can be stated in one sentence as follows:[126] there must be a plurality of persons who act on the basis of an—explicit or implicit—common plan or purpose and the accused must take part in this plan, at least by supporting or aiding its realization.[127] The *Furundžija* AC held that the common plan may also be developed during the execution of the crime, and does not need to exist in advance.[128] In any case, co-perpetration in the sense of the common purpose doctrine exists '[w]here the act of one accused contributes to the purpose of the other, and both acted simultaneously, in the same place and within full view of each other, over a prolonged period of time … '.[129] The *Čelebići* AC required 'the existence of a common concerted plan' and the 'shared intent' of the participants to further the planned crimes.[130] The *Stakić* AC, on the other hand, took the view that co-perpetration 'does not have support in customary international law or in the settled jurisprudence of this tribunal'.[131] This is surprising given the *Tadić* jurisprudence and the subsequent case law, as set out above; it (p. 123) also ignores the fact that co-perpetration as such or as a form of joint perpetration/commission is recognized in almost all jurisdictions,[132] and thus amounts to a general principle of law.[133]

(b) 'Indirect' commission I: joint criminal enterprise

The *Tadić* AC distinguished *three categories of collective criminality* on the basis of the case law, which today are known as JCE I, II, and III:[134] *first*, the *basic* form, where the participants act on the basis of a 'common design' or 'common enterprise' and with a 'common intention';[135] the necessary grade of the intervention remains unclear, and controversial.[136] *Secondly*, the *systemic* form, that is, the so-called 'concentration camp cases' where crimes are committed by members of military or administrative units, such as those running concentration or detention camps, on the basis of a common plan ('common purpose').[137] *Thirdly*, the so-called *extended* JCE where one of the co-perpetrators actually (p. 124) engages in acts, going beyond the common plan, but his or her acts still constitute a foreseeable consequence of the realization of the plan.[138] This form would, for example, apply, if co-perpetrators in a JCE share the intent to abuse prisoners of war, but in fact those prisoners end up being killed by one or several members of the JCE.[139]

It is unclear, whether the case law considers JCE as a form of co-perpetration or as a new independent (*sui generis*) mode of responsibility.[140] We will return to this question below[141] —here it suffices to refer to the *Tadić* AC which found an *implicit basis* in the term '*committed*', since 'the commission of crimes … might also occur through participation in the realisation of a common design or purpose', and Article 7(1) ICTYS which 'does not exclude those modes of participating … '.[142] In addition, in the Chamber's view the objective requirements for responsibility under this doctrine are equal for all three forms and correspond to the ones developed for common purpose responsibility as mentioned above: plurality of persons, common purpose, and participation in the common purpose.[143] The *Brđanin* AC tried to give the objective elements of JCE a more precise meaning, developing the following criteria:[144] as to the plurality of persons it is not necessary to identify each member by his or her name;[145] as to the common purpose, the (p. 125) prosecutor must determine precisely the objective and temporal, geographical, and so on scope and that the purpose is effectively common for all members of the JCE;[146] last but not least, the prosecutor must prove a significant contribution[147] of the accused to the execution of the purpose. Furthermore, the Chamber made clear that neither an additional agreement between the superiors and the direct perpetrators is necessary[148] nor do the latter have to belong to the JCE I, that is, it is possible that the superiors (e.g., the leadership of a totalitarian regime) form among themselves a JCE, and use for the execution of their objectives direct perpetrators who do not belong to this JCE (although they may eventually belong to a parallel JCE). In order to impute the crimes of the 'external' direct perpetrators to the members of the primary JCE in such a case, it is necessary to prove, at the very least, the existence of a nexus between the direct perpetrators and their acts with at least one member of the JCE, and that this member acted by virtue of a common agreement between all the members of the JCE.[149] In this way, the Chamber created a form of *indirect co-perpetration* (or *co-perpetration by way of others*) *for the members of the JCE* with regard to the direct perpetrators who, however, are not only mere instruments of the superiors.[150] As to the 'significant contribution', the *Milutinović et al*. TC further stated that it can be made by omission and that this possibility extends to all three forms of JCE.[151] It was further explicitly recognized in *Krajišnik* that the contribution of the accused in the JCE does not necessarily need to be criminal per se; rather, it may be within the lawful competence of the accused.[152]

Concerning the *mens rea*, the requirements differ according to the form of the JCE: the basic (first) form requires the shared intent of the (co-)perpetrators to commit the crime and to participate in a common plan in order to do so,[153] including a specific (special) (p. 126) intent.[154] The systemic (second) form demands personal knowledge of the system of ill-treatment.[155] The extended (third) form requires, on the one hand, the intention to participate in the criminal purpose and to further it, and, on the other, awareness of the contribution to the commission of a crime by a group.[156] Responsibility for a crime which was not part of the common purpose arises if the commission of this crime was foreseeable and the accused (willingly) took that risk.[157] In *Karadzic* it was further held that the foreseeability of the perpetration of a crime must be established through a 'possibility standard', that is, liability exists as long as the possibility of the crime is 'sufficiently substantial'; knowledge about the probability of the perpetration is not required.[158] According to the *Brđanin* AC the extended JCE may even give rise to the responsibility of a JCE participant for genocide without having the specific intent to destroy a protected group.[159] We will return to this position in connection with the principle of culpability.[160]

While the subsequent case law in essence followed the *Tadić* ruling,[161] it cannot be characterized as consistent.[162] There are considerable differences in the use of terminology, and regarding the substantial requirements of the doctrine. In *Kordić and Čerkez,* the TC referred specifically to the third category of *Tadić*, and basically followed this decision.[163] The *Krstić* TC applied the JCE doctrine to the 'ethnic cleansing' of Srebrenica[164] and held that the accused, a general of the Bosnian-Serb Army (VRS), played a central role in the execution of this plan[165] and in the 'genocidal joint criminal enterprise' to kill the Bosnian Muslim men.[166] The considerable suffering of the victims was a foreseeable consequence of the plan and can as such be attributed to the accused.[167] In any case, participation 'of an extremely significant nature and at the leadership level' gives rise to responsibility as a co-perpetrator and not as a mere accomplice.[168] In *Kvočka et al.*, (p. 127) the JCE doctrine was applied to crimes committed in the prison camp Omarska (Prijedor, Bosnia Herzegovina), that is, for the first time, to a concentration camp case in the sense of the second category of JCE, as developed in *Tadić*.[169] The AC affirmed that an accused may be responsible for crimes committed beyond the common purpose of the systemic JCE (i.e., the second category of cases), if they were a natural and foreseeable consequence thereof.[170] Furthermore, it stressed (contrary to the holding of the TC), that 'in general, there is no specific legal requirement that the accused make a substantial contribution to the joint criminal enterprise'.[171] The *Krnojelac* TC followed *Tadić*,[172] and defined the (alternative) forms of participation in a JCE as follows: direct commission of the agreed crime; presence during the commission and assisting/encouraging another person to commit the crime; acting in furtherance of a particular criminal system by reason of a specific position or authority, with knowledge of the system, and intent to further it.[173] The same forms of participation in a JCE were adopted by the *Vasiljević* TC on the basis of the first and second category of collective commission as developed by *Tadić*.[174] In the *Ojdanić* decision, the AC held unequivocally that a JCE is a *form of 'commission'* pursuant to Article 7(1) of the ICTYS insofar as a participant shares the purpose of the enterprise as opposed to merely knowing about it (in this case he would only be an accomplice).[175] Although participation in a JCE is a form of 'commission', this participation must not necessarily be an active one. Omission may also lead to responsibility for participation in a JCE 'where there is a legal duty to act'.[176] The *Stakić* TC adopted the three forms of participation in a JCE as developed by *Krnojelac*. [177] It further considered that the term 'commission' in Article 7(1) ICTYS includes other forms of co-perpetration than a JCE[178] and employs a concept of co-perpetration based on the doctrine of control over the act.[179] The *Ntakirutimana* AC extended these principles to Article 6(1) ICTRS and only required a 'form of assistance in, or contribution to, the execution of the common purpose' as concrete participation of the accused.[180] This assistance must be 'a significant one'.[181]

(c) 'Indirect' commission II: aiding and abetting

While the perpetration of a crime by one, or various persons constitutes a '*direct* commission' within the meaning of Article 7(1) ICTYS and 6(1) ICTRS, other forms of secondary participation, that is, forms of encouragement (instigating, inducing, ordering)[182] and any form of assistance ('aiding and abetting'), are considered to (p. 128) constitute an 'indirect commission'. In the landmark case of *Tadić*, the TC had to determine whether the accused was sufficiently connected to the crimes.[183] The Chamber held that, on the basis of the Nuremberg case law, it must be proven, on an objective level, that 'there was participation in that the conduct of the accused contributed to the commission of the illegal act' and, on a subjective level, that the accused acted intentionally and consciously.[184] The act in question must *contribute directly and substantially* to the commission of the crime.[185] 'Substantial' means that the contribution has had an effect on the commission, in other words, there must exist—in one way or another—a causal relationship between the act and the result;[186] this 'requires a fact-based inquiry'.[187] However, this causal relationship is not equal to a 'cause-effect relationship between the conduct of the aider or abettor and the commission of the crime'; such relationship 'need not be established'.[188] Further, a substantial contribution does not necessarily require physical presence at the scene of the crime. Rather, the TC advanced a broad concept of participation along the lines of the English 'concerned in the killing' theory:[189] 'not only does one not have to be present but the connection between the act contributing to the commission and the act of commission itself can be geographically and temporally distanced'.[190] In fact, the Chamber did not take the 'direct and substantial' criterion very seriously, since it included within the concept of aiding and abetting 'all acts of assistance by words, or acts that lend encouragement or support'.[191] This position was confirmed, inter alia, by the TC in *Čelebići* [192] and in *Naletilić and Martinović.* [193]

In *Furundžija* the ICTY took a more sophisticated view.[194] The TC distinguished between the nature of the assistance and its effect on the act of the principal (main) perpetrator. Regarding the former, it stated that the assistance need not be 'tangible' but that 'moral support and encouragement' is sufficient. Mere presence at the scene of the crime suffices if it has 'a significant legitimizing or encouraging effect on the principals'. The term 'direct'—used by the ILC in qualifying the proximity of the assistance—is 'misleading' since it implies that the assistance needs to be 'tangible'.[195] Regarding the effect of the assistance, the Chamber did not consider necessary a causal relationship in the sense of the *condition sine qua non* formula, but holds that the acts of assistance must 'make a significant difference to the commission of the criminal act by the principal'.[196] Thus, it is, for example, sufficient that a person continues to interrogate the victim while they are being (p. 129) raped by another person.[197] The 'significance' requirement, however, implies that it would not be sufficient if the accomplice only has 'a role in a system without influence'.[198] In sum, aiding and abetting requires 'practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime'.[199] The *Furundžija* and *Čelebići* AC endorsed this view.[200]

The subsequent case law of the ICTY has confirmed the broad concept of aiding and abetting developed in *Tadić, Čelebići*, and *Furundžija.* [201] The *Aleksovski* TC required a *substantial effect* on the main act,[202] and allowed the act of support to be given at any time.[203] In *Aleksovski, Blaškić, Krnojelac, Vasiljević*, and *Naletilić and Martinović* the TCs renounced to the causal relationship between the aiding and the final criminal result, following the jurisprudence developed in *Furundžija*.[204] Presence at the scene of the crime would (only) be sufficient if the accused had an *uncontested authority* that encouraged the direct perpetrator to commit the crime.[205] At a minimum, the presence of a superior constitutes a *probative indication* in this respect.[206] The contribution can take place before, during, or after the act of the principal perpetrator.[207] In the last case it is required that the agreement between the principal and the accomplice existed 'at the time of the planning, preparation, or execution of the crime'.[208] Aiding and abetting may also consist in an omission.[209] We will return to this point in Chapter V.[210]

(p. 130) Turning to the ICTR case law, the TC in *Akayesu* defined aiding as 'giving assistance to someone' and abetting as involving 'facilitating the commission of an act by being sympathetic thereto'.[211] These separate definitions of aiding and abetting entail that either form of participation—in the alternative—gives rise to responsibility.[212] In any case, subsequent case law does not distinguish between aiding and abetting but, taking the same approach as the ICTY, requires any form of physical or moral support which contributes substantially to the commission of a crime for both,[213] in other words, the 'support must have [had] a substantial effect upon the perpetration of the crime'.[214] Thus, the contribution does not need to be 'always' 'tangible'[215] nor indispensable (in the sense of a *conditio sine qua non*).[216] The act of support may be given before, during, or after the act.[217] Although it is not necessary that the aider or abettor has been present during the commission,[218] presence may indicate moral support, especially if the accused possesses a degree of authority since this entails 'a clear signal of official tolerance'.[219]

Summing up this case law, aiding and abetting, in objective terms, encompasses *any assistance*, physical, or psychological, that had a *substantial effect* on the commission of the crime. Thus, the only limiting element is the 'substantial effect' requirement. Obviously, this requirement is far from being precise and the case law has not contributed to its clarification, instead leaving it to *case by case* decisions.

(p. 131) The requirement of *intent* complements and restricts the broad objective criteria on the subjective level. The accused must have been aware of the act of participation and conscious that such participation has had a direct and substantial effect on the commission of the crime. Intent is founded upon knowledge.[220] Thus, for example, presence at the scene of the crime alone is not sufficient if it is an ignorant or unwilling presence; it must at least be shown that the accused knew that his presence had a direct and substantial effect on the commission. In addition, aiding and abetting requires that the defendant intended to contribute to the commission of the offence. However, the subjective requirement is itself considerably weakened in two ways. First, knowledge and intent may be inferred from all relevant circumstances,[221] that is, it may be proven by circumstantial evidence.[222] Secondly, intent founded on such inherent knowledge is deemed sufficient. The TC does not need to establish the existence of a pre-arranged plan which fixes the accused's specific conduct; his connection to a criminal scheme or system is sufficient. In sum, the TC held in *Tadić* that:

> [T]he accused will be found criminally culpable for any conduct where it is determined that he *knowingly* participated in the commission of an offence that violates international humanitarian law and his participation *directly* and *substantially* affected the commission of that offence through supporting the actual commission *before, during or after* the incident. He will also be responsible for *all* that naturally *results* from the commission of the act in question.[223]

This position has been confirmed by *Čelebići* [224] and—more explicitly—by *Furundžija*.[225] In the latter decision it was held that 'it [is] not necessary for the accomplice to share the *mens rea* of the perpetrator, in the sense of positive intention to commit the crime', nor even necessary to 'know the precise crime that was intended, and … committed'; rather it is sufficient that the aider and abettor 'is aware that one of a number of crimes will probably be committed',[226] and possess the 'knowledge that the acts performed assist the commission'.[227] Especially in cases requiring specific intent, such as genocide, it is sufficient—but also necessary—that the aider and abettor knew of this intent; it is not necessary that he shared the intent of the perpetrator.[228] The ICTR case law adopts the same view.[229]

(p. 132) (d) Incitement to commit genocide

For the crime of genocide, Article 4(3)(c) of the ICTYS and Article 2(3)(c) of the ICTRS provide for individual responsibility in cases of 'direct and public incitement to commit genocide'. This specific form of participation was particularly important in the case law of the ICTR. A TC first confirmed the importance of incitement in relation to genocide in *Kambanda* [230] and *Akayesu*;[231] subsequent judgments have basically followed *Akayesu.* [232] In this case incitement was explained as follows:

> Incitement is defined in Common law systems as encouraging or persuading another to commit an offence. One line of authority in common law would also view threats or other forms of pressure as a form of incitement. As stated above, Civil law systems punish direct and public incitement assuming the form of provocation, which is defined as an act intended to directly provoke another to commit a crime or a misdemeanor through speeches, shouting or threats, or any other means of audiovisual communication. Such a provocation, as defined under Civil law, is made

up of the same elements as direct and public incitement to commit genocide covered by Article 2 of the Statute, that is to say it is both direct and public.[233]

The *Akayesu* AC, however, distinguished between incitement as a *general* form of participation within the meaning of Article 6(1) ICTRS and the *specific* form of incitement to genocide within the meaning of Article 2(3)(c) ICTRS.[234] Only the latter must be committed publicly and directly while the former does not necessarily require these additional elements.[235] The provision constitutes, on the one hand, an autonomous offence of endangerment and, on the other, an inchoate crime with regard to genocide as the main offence,[236] that is, the genocide does not even need to be attempted.[237] The *Akayesu* TC correctly stated that incitement to commit genocide 'must be punished as such, even where such incitement failed to produce the result expected by the perpetrator'.[238]

To incite '*publicly*' means that the call for criminal action is communicated to a number of persons in a public place or to members of the general public at large, in particular by using technical means of mass communication such as radio or TV.[239] The ICTR considers (p. 133) the place where the incitement occurred and the scope of the assistance as particularly important.[240]

To incite '*directly*' means that another person is concretely urged, or specifically provoked to take immediate criminal action; a vague suggestion is not sufficient.[241] There must be a specific causal link between the act of incitement and the main offence.[242] However, 'implicit language may be "direct" because incitement does not have to involve an explicit appeal to commit genocide'.[243] The fulfilment of the 'direct' requirement may also depend on the 'cultural and linguistic' context.[244] What, for example, a Rwandan national understands as a 'direct' call to commit a crime might not be understood as such by a French citizen, and *vice versa*. The qualifier 'direct' brings the concept of incitement even closer to ordinary forms of complicity, such as instigation, solicitation, or inducement. Thereby, the concept loses its original purpose,[245] which is the prevention of an uncontrollable and irreversible danger of the commission of certain mass crimes.[246] If an individual urges another individual known to him to take criminal action, he or she has the same control over the actual perpetrator as does an instigator or any other accomplice provoking a crime.

With regard to the relationship between incitement and instigation, the *Kalimanzira* TC identifies four possible responsibility combinations:

- incitement resulting in the commission of a genocidal act is punishable under the combination of Articles 2(3)(a) and 6(1) of the ICTR Statute as genocide by way of instigation;
- incitement resulting in the commission of a genocidal act and which may be described as 'direct' and 'public' is punishable under either Article 2(3)(c) of the ICTR Statute as direct and public incitement to commit genocide, or under the combination of Articles 2(3)(a) and 6(1) of the Statute as genocide by way of instigation;
- incitement not resulting in the commission of a genocidal act but which may be described as 'direct' and 'public' is only punishable under Article 2(3)(c) of the ICTR Statute; and
- incitement not resulting in the commission of a genocidal act, and which may not be described as 'direct' and 'public', is not punishable under the Statute. [247]

The person who incites must have the *specific intent or intention* (*dolus specialis*) to destroy,[248] in whole or in part, a protected group him- or herself, that is, he or she must (p. 134) possess the same state of mind as the main perpetrator.[249] In the words of the *Nahimana* AC, the inciter must 'directly prompt or provoke another to commit genocide. It implies a desire on the part of the perpetrator to create by his actions a particular state of mind necessary to commit such a crime in the minds of the person(s) he is so engaging'.[250] According to the *Akayesu* TC, this requirement also applies to other forms of participation in genocide but not to complicity under Article 2(3)(e) ICTRS.[251] This differentiation is not convincing,[252] and indeed, it was not followed by the *Musema* TC, which held that complicity in genocide—independent of its legal basis and form—requires only *knowledge* of the genocidal intent;[253] for aiding and abetting, even possible knowledge, that is, culpable ignorance ('had reason to know'), shall be sufficient.[254] This is correct because it limits the accomplices' *mens rea* to positive knowledge; yet it goes too far in allowing for the 'had reason to know' standard for the aider and abettor, since this standard introduces a negligence threshold and thereby violates the principle of culpability. Thus, in general, positive knowledge possessed by the accomplice with regard to the genocidal intent of the (main) perpetrator(s) must be considered necessary and, at the same time, sufficient. A higher threshold, that is, specific genocidal intent, should only be required for those forms of commission which are similar to direct perpetration, that is, the other forms of perpetration (co-perpetration, perpetration by means) and the specific forms of complicity (incitement, and conspiracy), since those create a specific and autonomous risk for the protected groups.[255]

(e) Delimitation of co-perpetration and aiding and abetting

The case law has developed some, albeit inconsistent, rules with regard to the delimitation between co-perpetration and aiding and abetting. The question was for the first time addressed with regard to participation in *torture*, by the *Furundžija* TC. It held that it amounts to co-perpetration if the accused takes part in an 'integral part of the torture, and partake[s] of the purpose'; if he or she 'only' assists 'in some way' in the torture, and knows of the perpetration, the accused is liable as an aider and abettor.[256]

(p. 135) The subsequent case law treated the question in a more general way.[257] According to the *Tadić* AC, the main difference between co-perpetration and aiding and abetting lies in the existence of a *common plan*: co-perpetration requires the existence of such a plan, aiding and abetting does not. If such a plan exists, any contribution to its realization constitutes co-perpetration.[258] In *Krstić*, TC I held that co-perpetration requires participation 'of an extremely significant nature and at the leadership level'.[259] In *Kvočka et al.*, the same Chamber made the delimitation using subjective criteria: while the co-perpetrator shares the intent of the JCE, the aider and abettor merely has knowledge of the principal offender's intent.[260] However, in *Krnojelac*, TC II explicitly rejected this view and instead followed the more simplistic *Tadić* approach. It considered any participant in a criminal enterprise who is not a principal offender as an accomplice, but referred to him or her, oddly enough, as a co-perpetrator (*sic*).[261] In substance, however, this Chamber pursued the same subjective approach as TC I in *Kvočka et al*.[262] In the *Vasiljević* Appeals Judgment, the Chamber drew the following distinction between co-perpetration by way of a JCE and aiding and abetting:

> (i) The *aider and abettor* carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. By contrast, it is sufficient for a participant in a *joint criminal enterprise* to perform acts that in some way are directed to the furtherance of the common design.
>
> (ii) In the case of *aiding and abetting*, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal. By contrast, in the case of participation in a *joint criminal*

> *enterprise*, ie, as a co-perpetrator, the requisite *mens rea* is intent to pursue a common purpose. [263]

This latter approach was confirmed by the AC in the *Kvočka et al*. Appeal Judgment.[264]

(3) Mixed tribunals

(a) The applicable law

The Statutes of the new (mixed) tribunals are modelled after the Statutes of the ICTY/ICTR, and ICC.[265] Article 6(1–4) of the Statute of the Special Court for *Sierra Leone* (p. 136) (SCSL)[266] is identical to Article 7 ICTYS and Article 6 ICTRS. Article 29 of the Law on the Establishment of Extraordinary Chambers in the Courts of *Cambodia* (ECCC)[267] establishes individual responsibility for '[a]ny suspect who planned, instigated, ordered, aided, and abetted, or committed the crimes … '. Section 14.3 of Regulation No. 2000/15 of the United Nations Transitional Administration in East Timor (UNTAET)[268] and Article 15 of the Statute of the Iraqi Special Tribunal[269] adopt almost verbatim Article 25(3) of the ICC Statute.[270] Article 3 of the Statute of the Special Tribunal for Lebanon (STLS) codifies individual criminal responsibility in a similar way.[271]

(b) The case law

Given the relatively short time since the new tribunals began operating, their case law is still sparse and not always easily accessible.[272] Apart from that, with the end of the UN transitional administrations in Kosovo and East Timor,[273] the nature of these judicial systems has also changed to a (predominantly) national system of law. For this reason, the following overview will be limited to the most important decisions of five of the tribunals or panels described in Chapter I, Section F. of this treatise.

(i) The Special Panels of East Timor

There are some judgments of the Special Panels which heavily rely on the case law of the ICTY and ICTR. The Special Panels follow the ad hoc tribunals in ascertaining that a person can be held individually responsible for a crime even if he did not personally commit that crime.[274] In looking at the various *modes of participation* listed in s. 14.3(b) of UNTAET Regulation No. 2000/15, one Panel interpreted the three terms used therein ('orders, solicits or induces') as being a description of the different forms of instigation by which a defendant may urge another to commit a crime.[275] Thus it is not necessary to prove that the accused (p. 137) himself 'committed the crime or participated in its commission',[276] it is sufficient to establish that the accused ordered the act in question (' … was not the main perpetrator of the murder, he ordered the murder, thereby his individual responsibility is met in s. 14.3(b)').[277] However, the Panel was of the opinion that even if 'the crime does not occur, a defendant who ordered, solicited, or induced the commission, or the underlying offence nonetheless bears criminal responsibility under s. 14.3(b) for the other's attempt'.[278]

The Special Panels also ascertained the responsibility of the accused as a 'co-*perpetrator*, making it possible for the perpetrator to materially perform the crime'.[279] In *Prosecutor v Sisto Barros and Cesar Mendonca*,[280] the Special Panel recognized and applied the JCE doctrine. It held that according to s. 14.3(d)(i) UNTAET Regulation No. 2000/15:

> a person can be individually responsible for a crime even if he did not personally commit the offence, provided that he in any way contributes to the commission … of such a crime by a group of persons acting with a common purpose. … The liability described in this section is often referred to as *joint enterprise*, or common enterprise liability.[281]

The Special Panels also looked at the minimum requirements for JCE:[282]

> At any level, *joint criminal enterprise* must require a *minimum* of coordination amongst those who participate in the action, in order to assure that the aim of the action is properly pursued. This *minimum* may be represented as a horizontal expression of will, explicit, or implied, which binds those taking part in the specific action and is, in the end, the very reason for gluing their responsibility together. By adhering to a plan, or a common (i.e. shared) purpose, the accused would further the criminal activity by lending moral support to someone else's execution. Persisting in the geometrical representation, it is this horizontal will that would bind the co-perpetrator in joint criminal enterprise and not the will expressed by the order from the militia leader to the subordinate. The order is a 'vertical' expression of will in the sense that it implies the presence of hierarchy.[283]

(p. 138) Furthermore, one Panel held that an 'accused has to be held accountable when he directly commits a crime, or has some *status* in the ranks of the paramilitary hierarchy, and in that capacity participates to the chain of command which permitted the execution of actions of great size, giving orders, or simply supporting his subordinates with his encouraging, or threatening presence'.[284] Another Panel found that 'just holding a gun during a siege manoeuvre against unarmed civilians … played an undoubting role to the commission'.[285]

(ii) The Special Court for Sierra Leone

The SCSL has produced its first two judgments on the Armed Forces Revolutionary Council (AFRC) and the Civil Defence Forces (CDF) cases.[286] The accused were charged under different modes of responsibility:

> (i) Individual criminal responsibility pursuant to Article 6(1) of the SCSL Statute in that each of the Accused planned, instigated, ordered the planning, preparation, or execution of the said crimes, or each Accused otherwise aided and abetted in the planning, preparation, or execution of the said crimes, or the said crimes were within a joint criminal enterprise, or were a reasonably foreseeable consequence of the joint criminal enterprise, in which each Accused participated.[287]

Invoking established jurisprudence of the ICTY,[288] the Special Court observed that 'the principle that an individual may be held criminally responsible under one of these modes of responsibility is enshrined in customary international law'.[289] The Court, in looking at the various forms of participation, held that the *actus reus* of committing primarily covers the physical perpetration of a crime by the offender himself.[290] However, it rejected the argument put forward by the defence that, in the absence of the physical perpetration of a crime by an accused, any submission that the accused should be held culpable for 'committing' ought to be dismissed or at least weakened.[291] In looking at '*planning*' as a form of participation, the Court took a different position than the one taken by the ICTY in the *Brđanin* TC, which held that the responsibility for planning a crime only arises when an accused is 'substantially involved at the preparatory stage of the crime in the concrete form it took, which implies that he possessed sufficient knowledge thereof in advance'.[292] The Court disagreed with such a narrow construction of the responsibility for planning, but admitted that 'there must be a sufficient link between the planning of a crime both at the preparatory, and the execution phases'. For the Court, it was 'sufficient to demonstrate that the planning was a factor substantially contributing to such criminal conduct'.[293] The Court followed this interpretation in the *Taylor* judgment[294] and did not require any (p. 139) causal effect of the accused's plan.[295] Regarding the objectives of the enterprise, the Court's AC stated in *Brima, Kamara and Kanu* that the JCE does not necessarily derive from the final objectives per se, but may also derive from the means adopted to achieve these objectives.[296]

The TC further held that the *actus reus* of *aiding and abetting* required the accused to give practical assistance, encouragement, or moral support, which had a substantial effect on the perpetration of a crime.[297] Aiding and abetting could be constituted by a contribution—either directly or through an intermediary[298]—to the planning, preparation, or execution of a finally completed crime, irrespective of whether the participant was present or removed either in time or place from the actual commission of the crime.[299] However, mere *presence* at the scene of the crime and a failure to prevent its occurrence does not per se constitute aiding and abetting;[300] still, such presence by a person in a position of authority might be considered as an important indication for encouragement or support.[301] The AC required the contribution to have a 'substantial effect'.[302]

The TC further considered that a persistent failure to prevent or punish crimes by subordinates does not entail a *superior's responsibility* under Article 6(3) of the SCSL Statute, but could be a basis for his liability for aiding and abetting. Superior responsibility rather requires 'that the superior had "effective control" over his subordinates—i.e. the material ability to prevent or punish the commission of the offence'.[303]

As to the JCE doctrine, TC I and II of the Special Court took different positions. TC II rejected the doctrine as a mode of responsibility.[304] It held that the indictment had been improperly pleaded with respect to liability for JCE, since the common purpose alleged in paragraph 33, that is, 'to take any actions necessary to gain, and exercise political power, and control over the territory of Sierra Leone, in particular the diamond mining areas' did not amount to a criminal purpose recognized by the SCSL Statute. The common purpose to take over power and to control the state of Sierra Leone is not an international crime and was subject only to the internal law of the state concerned.[305] In contrast, TC I fully recognized this mode of participation and extensively elaborated upon it.[306] It held that the phrases 'common purpose doctrine' and 'joint criminal enterprise' have been used interchangeably in the international jurisprudence and mean one and the same thing.[307] It further shared the view that 'insofar as a participant shares the purpose of a JCE (as he or (p. 140) she must do) as opposed to merely knowing about it, he or she cannot be regarded as a mere aider and abettor to the crime which is contemplated'.[308] TC I concurred with the position taken by the ICTY AC in the *Tadić* case in finding that JCE existed under customary international law at the time of the perpetration of the acts charged in the indictment. It went on further to list and explain the three categories of JCE.[309] The Chamber held the opinion that the principal perpetrator does not need to be a member of the JCE and could merely have been used as a tool by one of the members. The Chamber concurred with the opinion of the ICTY AC in *Brđanin et al*. by holding that 'where the principal perpetrator is not shown to belong to the JCE, the trier of fact must further establish that the crime can be imputed to at least one member of the JCE and that this member—when using the principal perpetrator—acted in accordance with the common plan'.[310] The *Taylor* TC had to analyse if the accused was part of the RUF JCE. It concluded that while the RUF and the accused were 'military allies and trading partners',[311] their 'relationship was mutually beneficial',[312] and expressed 'converging and synergetic interests';[313] this all was insufficient to establish that the accused was part of the JCE.[314] In *Sesay, Kallon and Gbao*, the AC expressly recognized JCE as a mode of liability, distinguishing it from conspiracy. Thus, 'the AC does not consider Kallon's references to United States conspiracy law helpful because conspiracy and JCE are legally distinct concepts. Most obviously, conspiracy is an inchoate offence whereas JCE is a mode of liability'.[315]

(iii) The Extraordinary Chambers in the Courts of Cambodia

The ECCC came up with its first judgment in July 2010 in the case against the alleged chairman of the headquarters of a special branch of the Kampuchean Republic secret police, *Kaing Guek Eav, alias* Duch.[316] The judgment gives a detailed analysis of the relevant law on individual criminal responsibility. Given that the relevant provision of the Law on the Establishment of ECCC (Article 29) is modelled after Article 7 ICTYS and Article 6 ICTRS, the ECCC TC essentially adopted the jurisprudence of the ad hoc tribunals.[317] There is only one point that is of interest here: the ECCC discussed at length whether JCE I to III are encompassed by Article 29.[318] It even asked some experts to submit written briefs as *amici curiae*.[319] Two issues had to be analysed: (a) the development of the JCE theory, with particular reference to the time period from 1975 to 1979; and (b) whether JCE can be applied before the ECCC, taking into account the fact that the crimes were (p. 141) committed in said period.[320] Two of the briefs concluded that JCE existed as part of customary international law in its three distinct forms during the relevant time and thus could be applied before the ECCC.[321] This author took a different view distinguishing between JCE I and II and JCE III: while the former have a basis in the post-WWII case law, the latter does not, that is, it was neither accessible nor foreseeable at the time of the commission of the crimes.[322] The Chamber came to the same conclusion with regard to JCE I and II and considered that it is included in the notion of 'committed',[323] thereby confirming the PTC's 'Decision on the Appeals Against the Co-Investigative Judges Order';[324] with regard to JCE III the Chamber remained silent.[325] The issue was then clarified by a TC decision in the case against *Ieng Sary, Ieng Thirith and Khieu Samphan*.[326] Here the TC confirmed the earlier decision of the PTC, considering JCE III to not form part of international customary law as a form of liability during the relevant time period.[327]

(iv) The Iraqi Special Tribunal

In its first judgment against Saddam Hussein, the Iraqi Special Tribunal used a broad concept of individual and superior criminal responsibility to hold the defendant responsible for all the crimes against humanity (killings, deportations, deprivations of liberty, torture, disappearances, other inhuman acts) committed in relation with the Dujail massacre. In concreto, the Tribunal held that Saddam ordered some of these acts, aided and abetted the direct perpetrators, and was responsible for these acts as a superior.[328] This jurisprudence was continued with the decision of the Second Chamber of the Tribunal regarding the so called 'Anfal campaign'.[329] In this case three high-ranking soldiers (commanders of the army) were sentenced to death[330] and two others sentenced to life (p. 142) imprisonment;[331] one was aquitted for lack of evidence.[332] All were held responsible for genocide, crimes against humanity, and war crimes as perpetrators, or for ordering, aiding or abetting them, and as superiors for not having prevented them.[333] In a third trial, which started on 21 August 2006, fifteen persons, including *Al-Majid*, were accused of having participated in the repression of a rebellion of the Shiite population in Southern Iraq in February–March 1991. *Al-Majid* was held responsible for genocide, crimes against humanity and war crimes, and sentenced to death.[334] All in all, the considerations on individual criminal responsibility do not deserve a closer analysis.

(v) The Special Tribunal for Lebanon

The Lebanon Tribunal has so far delivered one important pre-trial decision which, inter alia, deals with the applicable rules on individual criminal responsibility.[335] With regard to this, the AC had to answer the following question of the Pre-Trial Judge:

> In order to apply modes of criminal responsibility before the Tribunal, should reference be made to Lebanese law, to international law or to both Lebanese and international law? In this last case, how, and on the basis of which principles, should

any conflict between these laws be resolved, with specific reference to commission and co-perpetration?

Thus, the AC was not concerned with the modes of participation as such, but it had primarily to decide on the applicable law, that is, whether the law of participation of Lebanon (pursuant to the *renvoi* of Article 2 of the Statute) or of ICL (pursuant to Article 3) or both would have to be applied. It answered this question in a somewhat Solomon-like way by, in essence, ordering the application of both legal regimes with the choice of the law most favourable to the accused in case of conflict (otherwise, if no conflict, the Lebanese law applies).[336] It then went on to carry out a quite profound comparative analysis of the modes of perpetration, co-perpetration, and complicity in Lebanese and international criminal law,[337] finally concluding that conflicts between these two legal regimes exist in 'more complicated instances of co-perpetration' and complicity.[338] Thus, while the following considerations of the Chamber are indeed of a high quality in terms of legal knowledge and (p. 143) argumentation (rarely seen in international criminal tribunals), they have only been made obiter and thus are, as of now, of academic rather than practical value.

With regard to the forms of perpetration, the Chamber first defines a '*perpetrator*' as 'whoever physically carries out the prohibited conduct, with the requisite mental element'.[339] In contrast, *co-perpetration* requires 'a plurality of persons, all persons performing the same act … namely persons who take part in the actual commission of the crime, with the same mens rea'.[340] As to *perpetration by means*, the Chamber holds that it 'is neither a form of liability under customary international law, nor is it recognised by Article 3(1) of the Statute'.[341]

Interestingly, the Chamber considers JCE as a form of co-perpetration.[342] As to the forms and requirements of JCE it relies—unsurprisingly[343]—on the ICTY case law, but it imposes certain limitations on JCE III liability by demanding that 'the un-concerted crime' must 'be generally in line with the agreed upon criminal offence',[344] that is, that there must be a certain link to the original plan or common purpose. The Chamber rightly emphasizes in this context that JCE 'is contingent on (and incidental to) a common criminal plan, that is, an agreement or plan by a multitude of persons to engage in illegal conduct as described above. The "additional crime" is the outgrowth of previously agreed or planned criminal conduct for which each participant in the common plan is already responsible.'[345] As to the state of mind of the JCE member, it further requires that the 'secondary offender had a chance of predicting the commission of the un-concerted crime by the primary offender',[346] that he had 'specifically foreseen the possibility … or, at least, to be in a position, under the "person of reasonable prudence" test, to predict' the (more serious) additional crime(s).[347] Last but not least, the Chamber was also critical of the ICTY practice to convict persons under JCE III for specific intent crimes without themselves possessing the specific intent.[348] The Chamber rightly calls this a 'serious legal anomaly'[349] and consequently rejects the use of JCE III—as perpetrator-like liability—with regard to specific intent crimes and aims at best to allow for a conviction on the basis of accomplice liability.[350]

As to *complicity* (aiding and abetting) the AC refers, in objective terms, to 'practical assistance, encouragement, or moral support to the principal perpetrator' with a 'substantial effect' on the main crime.[351] As to its form, the 'assistance may be provided in the form of positive action or omission', it 'may be physical (or tangible) or moral and psychological'; as to the temporal aspect with regard to the main crime 'it may be provided before, during or after' its commission.[352] As to the subjective side, the assistant needs a double intent, that is, '(i) awareness that the principal perpetrator will use the assistance for the purpose of engaging in criminal conduct, and (ii) intent to help or encourage the principal perpetrator to commit a crime'.[353] Yet, he need not be 'fully (p. 144) cognizant of the specificities' of the main crime nor share 'a common plan or purpose with the principal perpetrator or his criminal intent'.[354] He just needs to be aware 'of the substantial likelihood that the perpetrator will commit a crime', that is, less than direct intent or full knowledge (*dolus directus*), namely just 'advertent[355] recklessness (*dolus eventualis*)', is required.

(4) Article 25 ICC Statute as the central provision on individual criminal responsibility in modern ICL

(a) Preliminary remarks: the law of participation and Article 25(3)

Article 25 has already been quoted above as far as the modes of participation *stricto sensu* are concerned. In general terms, the provision, in particular paragraphs 1 and 2, confirms the universal acceptance of the principle of individual criminal responsibility as recognized by the IMT[356] and reaffirmed by the ICTY in the *Tadić* jurisdictional decision with regard to individual criminal responsibility for violations of common Article 3 of the Geneva Conventions.[357]

As far as *jurisdiction over natural persons* is concerned, *paragraph 1* states the obvious. Already the IMT found that international crimes are 'committed by men not by abstract entities'.[358] However, the decision to abstain from including 'legal' or '*juridical*' *persons* within the jurisdiction of the court was controversial. The French delegation argued strongly in favour of an inclusion since it considered it to be important in terms of restitution and compensation orders for victims.[359] The final proposal presented to the Working Group was limited to private corporations, excluding states and other public and non-profit organizations.[360] Furthermore, it was linked to the individual criminal responsibility of a leading member of a corporation who was in a position of control and who committed the crime acting on behalf of, and with the explicit consent of, the corporation in the course of its activities. Despite this rather limited liability, the proposal was rejected for several reasons, which are quite convincing on the whole. The extension of the Court's jurisdiction to legal persons would detract from its focus on individuals. Furthermore, the investigation and prosecution of legal persons entails serious and ultimately overwhelming problems of evidence. In addition, there are as yet no universally recognized common standards for corporate liability; in fact, the concept is not even recognized in all major criminal law systems.[361] Consequently, the absence of (p. 145) corporate criminal liability in many states would render the principle of complementarity (Article 17)[362] ineffective and overload the ICC with international corporate crime cases. Notwithstanding all these reasons, there are increasingly voices in favour of a recognition of the responsibility of legal persons under ICL in general and under the ICC Statute in particular.[363]

A person may 'commit' a 'crime within the jurisdiction of the Court' (genocide, crimes against humanity, war crimes, and the crime of aggression, Articles 5(1)(a)–(c), 6–8*bis*) using one of the modes of participation set out in *paragraph 3* of Article 25. *Subparagraphs (a)–(c)* of paragraph 3 establish the *basic modes of participation* in a crime.[364] Subparagraph (a) refers to three forms of *perpetration* as forms of *principal responsibility*: perpetration on one's own, as a co-perpetrator, or through another person (traditionally also called 'perpetration by means', *mittelbare Täterschaft*).[365] Subparagraphs (b) and (c) provide for forms of *complicity* as forms of *secondary participation*, employing different terms which can be best captured—in line with the terminology introduced by the UK Law Commission in 1993[366]—by the umbrella terms '*encouragement*' and '*assistance*'. The former covers the 'soliciting' and 'inducing' of subparagraph (b)—leaving out 'ordering', which rather belongs to subparagraph (a)[367]—while 'assistance' covers subparagraph (c), including 'aiding and abetting'. The use of this traditional common law concept is misleading since it mixes up mere assistance (aiding) and exhortation or encouragement (abetting);[368] for this very reason the UK Law Commisson proposed the term 'assisting',[369] also used in subparagraph (c) as 'otherwise assists'. *Subparagraphs (d), (e)* and *(f)* provide for *expansions of attribution*: contributing to the commission or attempted commission of a crime by a group, incitement to genocide, and attempt.[370] Paragraph 3*bis* restricts the application of Article 25 to persons in a particular position of leadership over a state's political or military activities for cases of the crime of aggression.

While the above reading seems to flow quite straightforwardly from the wording of paragraph (3), some more principled *clarifications* seem appropriate. First of all, the ICC Statute's distinction—in contrast to the ILC Draft Codes of Crimes Against the Peace and Security of Mankind[371] and the Statutes of the ad hoc tribunals (Article 7(1) ICTYS and 6(1) ICTRS)[372]—between perpetration (subparagraph (a)), and other forms of participation (subparagraphs (b), (c), and (d)), confirms the general tendency in comparative (p. 146) criminal law to reject a pure unitarian or unified concept of perpetration (*Einheitstätermodell*)[373] in favour of some form of differentiation.[374] This is convincing for both principled and practical reasons. As to the former, the differentiated imposition of a title of imputation upon the defendant, based on the weight of his contribution and the degree of wrongfulness, serves justice and fairness better than treating all parties to a crime equally. In addition, to do this already at the pre-trial phase is a useful heuristic exercise.[375] From a practical perspective, it must be stressed that this exercise will be required in each system, ultimately at the sentencing stage, where the 'degree of participation' must be taken into account.[376]

Against this background, it is little surprise that Article 25 differentiates, at least terminologically, between different forms of participation, thereby following a unitarian concept of perpetration in a functional[377] sense (*funktionelle Einheitstäterschaft*)[378] as known, for example, in Austrian and Swedish law.[379] In line with this model, Article 25(3) does *not expressly* provide for a gradation in the degree of criminal liability *but implicitly* and *terminologically* distinguishes between the degrees of responsibility attached to each (p. 147) mode of participation.[380] This idea was confirmed by PTC I in *Lubanga* when distinguishing between '(i) the commission *stricto sensu* of a crime … within the meaning of Article 25(3)(a) of the Statute, and (ii) the responsibility of superiors … , and any other forms of accessory, as opposed to principal, liability provided for in Article 25(3)(b) to (d) of the Statute'.[381] It was also acknowledged by the majority[382] of the *Lubanga* Trial Chamber. The Chamber argued that the *hierarchical structure of the modes of participation* of Article 25(3) implies that the forms of perpetration in subparagraph (a) prevail over the other forms of (secondary) participation (subparagraphs (b)–(d)) in terms of the level of responsibility of the perpetrators and the blame to be imposed upon them.[383] The implicit value-based differentiation between the different forms of participation in paragraph 3 finds support in its wording, in particular in the contribution requirement of subparagraph (a) as compared to (c)[384] and (d),[385] in the limitation of attempt liability according to subparagraph (f) to those persons who 'commit' (i.e., the perpetrators within the meaning of subparagraph (a))[386] and in the (factual) dependence of secondary participation from perpetration (primary participation) as expressed in the reference to an attempted crime in subparagraphs (b) and (c).[387] Against this background it is a welcome clarification that the majority of the *Lubanga* TC stresses that 'the notion of principal liability' expresses 'the blameworthiness of those persons who are the most responsible for the most serious crimes of international concern'.[388]

With regard to the basic forms of *secondary participation* it is important to reiterate[389] that complicity or secondary participation is not a crime in itself or even a completely autonomous form of participation, but a form of accessorial or derivative liability (p. 148) ('*emprunt de la criminalité*', '*accesoriedad de la participación*', '*Akzessorietät*') and as such at least factually dependant on a main act or crime.[390] This also follows from the already mentioned reference to an attempted crime in subparagraphs (b) and (c).[391] As a consequence, the attempted encouragement or assistance is not punishable.[392] Of course, this structural observation does not solve the question of the *normative justification or rationale* of accomplice liability. In this respect, a mixed theory combining the autonomous wrong inherent in each complicity conduct and the partaking in the wrong of the main act most convincingly explains why the accomplice deserves to be punished.[393]

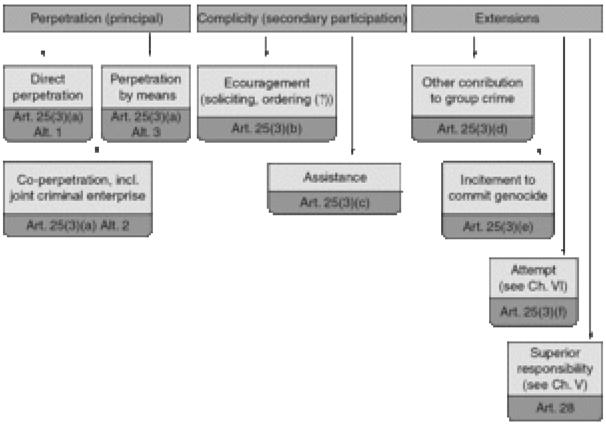
In sum, Article 25(3) ICC Statute contains, on the one hand, basic rules of individual criminal responsibility (distinguishing between the principal responsibility of perpetrators and the secondary responsibility of those who induce/encourage or assist) and, on the other, rules expanding attribution (which may or may not still be characterized as specific forms of participation). Against this background one can say that an *individual* is, all remaining requirements fulfilled and taking into account the individual-collective dimension of imputation in ICL,[394] criminally *responsible if he perpetrates, takes part in or attempts a crime within the jurisdiction of the Court* (Articles 5–8*bis*). The forms of participation can be summarized in Figure 7.

(b) Detailed analysis of paragraph 3

(i) Forms of perpetration (subparagraph (a))

(1) Direct perpetration

The characterization of direct perpetration as committing a crime 'as an individual' is unfortunate since it does not make clear that the direct perpetrator acts on his or her own, without relying on or using another person.[395] The formulation only repeats the principle of individual responsibility. While the original French version ('*à titre individuel*') was more precise, the new one ('*individuellement*') is identical to the English and Russian ('*индивидуально*') versions; the Chinese version ('单独') can be understood as both 'individual' and 'alone';[396] only the Spanish ('*por sí solo*') and (p. 149)



▸ View full-sized figure

Figure 7. Forms of participation in the ICC Statute

Source: own elaboration

Arabic' 'سواء بصفته الفردية'[397] versions more clearly refer to the concept of direct perpetration.[398] It must not be overlooked, however, that the term 'committed' as such is broad enough to include the other forms of perpetration contained in subparagraph (a), especially if they were not explicitly mentioned. As has been seen above, this view is supported by the ad hoc tribunals' broad interpretation of commission within the meaning of Article 7(1) and Article 6(1) of the ICTYS and ICTRS.[399]

(2) Co-perpetration

Co-perpetration is no longer included in the complicity concept but recognized as an autonomous form of perpetration.[400] It is characterized by a functional division of the criminal tasks between the different (at least two) co-perpetrators, which are normally interrelated by a common plan or agreement. Every co-perpetrator fulfils a certain task which contributes to the commission of the crime and without which the commission would not be possible. The common plan or agreement forms the basis of a reciprocal or mutual attribution—a key element of co-perpetration—of the different contributions, holding every co-perpetrator responsible for the whole crime.[401]

(p. 150) The ICC—unlike the ICTY[402]—explicitly adopted the mode of co-perpetration in its narrow sense in the *Lubanga* case[403] and especially approved the German doctrine of 'functional domination of' or 'control over the act' ('*funktionelle Tatherrschaft*'),[404] disapproving of both the 'objective'[405] and 'subjective'[406] theory of perpetration:[407]

> The concept of co-perpetration based on joint control over the crime is rooted in the principle of the division of essential tasks for the purpose of committing a crime between two or more persons acting in a concerted manner. Hence, although none of the participants has overall control over the offence because they all depend on one another for its commission, they all share control because each of them could frustrate the commission of the crime by not carrying out his or her task.[408]

On an *objective level* the PTC established two requirements, namely the existence of an agreement or common plan between two or more persons[409] and a coordinated essential contribution by each co-perpetrator resulting in the realization of the objective elements of the crime.[410] As to the subjective side, the PTC generally stated the obvious, that is, that the suspect must fulfil the subjective elements of the crime in question.[411] More concretely, the suspects must all be mutually aware and mutually accept that implementing their common (p. 151) plan may result in the realization of the objective elements of the crime;[412] they must be aware of the factual circumstances enabling them to jointly control the crime.[413] This case law was also followed in the second confirmation of charges decision in the case of *Katanga and Chui* [414] and was further developed in the third confirmation of charges decision in the case against *Jean-Pierre Bemba Gombo*, the former president of the rebel *Mouvement de Libération du Congo* (MLC) and commander-in-chief of its military wing, the *Armée de Libération du Congo* (ALC).[415] In this last decision, the PTC explained co-perpetration following the 'control over the crime' theory,[416] and determined the following objective requirements:

> [C]riminal responsibility under the concept of co-perpetration requires the proof of two *objective elements*: (i) the suspect must be part of a *common plan* or an agreement with one or more persons; and (ii) the suspects and the other co-perpetrator must carry out *essential contributions* in a coordinated manner which result in the fulfillment of the material elements of the crime.[417]

In the ICC's first judgment against *Thomas Lubanga*, the Trial Chamber confirmed the PTC's confirmation decision and its majority (Judges Odio Benito and Blattmann), Judge Fulford dissenting,[418] also followed the existing case law in its interpretation of co-perpetration on the basis of the control of/over the act theory (*Tatherrschaftslehre*).[419] However, some questions remain open, especially concerning the *nature and contents of the plan*. How concrete does the plan have to be and must it be criminal? Does the 'plan' really figure as an (exclusively) objective element?[420] What is the 'essential' nature of a contribution?[421] Does an *ex ante* assessment as to the essentiality of the contribution suffice when an *ex post* observation unveils that the contribution had only been substantial but not essential?[422] Is (p. 152) there a relevant difference between the qualifiers 'substantial' and 'essential'? Is the presence of a co-perpetrator at the scene of the crime required? Surprisingly, the *Bemba* PTC did not elaborate on these questions. It only focused on *mens rea*, arguing that not all subjective criteria had been met and therefore considering it unnecessary to discuss the objective requirements.[423] This methodological approach is questionable since the subjective requirements come after the objective ones and should not be invoked to 'bypass' the objective requirements. This may be appropriate if the subjective requirements are beyond any doubt missing, but this was clearly not the case in *Bemba*.

Be that as it may, some of these questions came up again in the *Lubanga* trial. As to the *nature of the common plan*, the Chamber took the view that the plan does not need be ‘intrinsically criminal’[424] but only include, ‘as a minimum’, ‘a critical element of criminality’, that is, the implementation of the plan must embody ‘a sufficient risk that, if events follow the ordinary course, a crime will be committed’.[425] I am not convinced that a mere ‘critical element of criminality’ suffices for a plan of co-perpetrators. After all, we are not dealing here with any plan (e.g., to pay a visit to Paris next weekend) but with a plan which forms the basis of a joint commission of a crime and, as a consequence, of the mutual attribution of the respective contributions of the co-perpetrators.[426] Such a plan cannot be predominantly non-criminal but must at least—that would be my ‘minimum’—contain a more or less concrete crime to be committed,[427] otherwise there is nothing (agreed) which could be mutually attributed.[428] This certainly needs clarification in the future case law of the Court.

As to the *nature of the contribution*, the *Lubanga* TC confirms the general view that it must be *essential*,[429] offering however a more principled justification than the case law so far. In essence, the majority argues, as already mentioned above,[430] with the *hierarchical structure of* paragraph 3 of Article 25, especially the value-based difference—with regard to the degree of wrongfulness and blame—between perpetration (subparagraph (a)) and secondary participation (subparagraphs (b)–(d)). From this it follows that the contribution of a perpetrator must be greater than the contribution of a secondary participant. This is (p. 153) certainly less evident with regard to subparagraph (b)—especially with regard to ‘ordering’, which belongs structurally and systematically to subparagraph (a)[431]—but it is certainly true with regard to the classical forms of accessorial participation of subparagraphs (c) and (d). Thus, one must find a qualifier which unambiguously expresses the greater weight of the contribution of a perpetrator; more concretely speaking, the contribution must be more than ‘substantial’ since this qualifier has already been used by the ad hoc tribunals for the contribution of the aider and abettor (assistant, accessory).[432] In my view, there is no better qualifier than ‘essential’, which, of course, will have to be further refined by the case law.[433]

The question of whether co-perpetration requires *presence* at the scene of the crime is answered in the negative by both the majority of the *Lubanga* TC and Judge Fulford.[434] However, this correct answer does not follow from the plain wording of the Statute, as claimed by Fulford,[435] but again requires some theoretical explanation since the wording of subparagraph (a) (‘jointly with another’) is silent on the issue. The ‘control over the act’ theory provides a convincing or at least plausible explanation.[436] It focuses on a normative concept of control which offers different explanations of how control can be exercised, even in the absence of a potential co-perpetrator, for example, by directing the execution of the crime from a distance with technical means or by maintaining control as master of the criminal plan which is meticulously executed. In other words, the physical absence of a co-perpetrator can be compensated by his superior psychological or intellectual contribution, which normally already dominates the preparatory stage of the commission.[437] If, in turn, the absent co-perpetrator controls the execution despite his absence, the mutual attribution of the respective contributions, as the key element of co-perpetration already mentioned above,[438] entails that the contributions of the other (present) co-perpetrators can be imputed to him.

With regard to the *subjective requirements*, the *Bemba* PTC demanded that:

> The suspects (a) fulfill the *subjective elements* of the crimes charged, namely *intent* and *knowledge* as required under article 30 of the Statute; (b) be *aware* and *accept* that implementing (p. 154) the common plan will result in the *fulfillment* of the *material elements* of the crimes; and (c) be *aware of the factual circumstances* enabling him to *control* the crimes jointly with the other co-perpetrator.[439]

The subjective requirements (a) and (b) have also been recognized by the *Lubanga* and *Katanga* confirmation decisions, while requirement (c) was not applied in *Katanga* with regard to co-perpetration, since the PTC only discussed this requirement in relation to co-perpetration *through another person*.[440] This is correct, since this (third) requirement demands too much from the co-perpetrator whose form of control is structurally different from that of the indirect perpetrator: while the latter exercises *control over the physical perpetrators* and must be aware of this powerful position, the co-perpetrator only exercises *control over the crime jointly* with other co-perpetrator(s).[441] *In casu*, the Chamber found that *Bemba* did not even fulfil the first subjective requirement, that is, he was not aware that the crimes would be committed.[442] Therefore, it discussed and confirmed the charge of command responsibility, to be discussed in more detail in Chapter V.

It is to be welcomed that the *Lubanga* TC did not only abandon the controversial 'third awareness' requirement of *Bemba*, but also generally applied Article 30 to co-perpetration,[443] although it should have said more clearly to which objects of reference (conduct, consequence, or circumstance) and thus to which paragraphs and alternatives of Article 30 it refers.[444] *In casu*, the Chamber proposes the following standard (with regard to the recruitment of children according to Article 8(2)(e)(vii)):

> (i) the accused and at least one other perpetrator meant to conscript, enlist or use children under the age of 15 to participate actively in hostilities or they were aware that in implementing their common plan this consequence 'will occur in the ordinary course of events'; and
>
> (ii) the accused was aware that he provided an essential contribution to the implementation of the common plan. [445]

(3) Perpetration through another person, in particular organizational control ('Organisationsherrschaft')

Perpetration through another person, now explicitly recognized by Article 25(3)(a) 3rd alternative,[446] presupposes, in its *classical* form, that the person who commits the crime ('intermediary', '*intermédiaire*', '*Tatmittler*') can be used as an instrument or tool by the indirect perpetrator ('*auteur médiat*') as mastermind[447] or 'man in the background' ('*Hintermann*').[448] The intermediary is normally an innocent agent, not (p. 155) responsible for the criminal act. This is typically the case if the direct perpetrator (intermediary) acts under 'duress' (*Nötigungsherrschaft*) (Article 31(1)(d)), incurs a mistake, or is not culpable because he is a minor or suffers from a (mental) defect.[449] In the duress situation, responsibility for the person(s) responsible for causing the duress might arise. The background man, by inflicting coercion on the direct perpetrator to such an extent that the latter is exempted from criminal responsibility, assumes, from a normative perspective, control over the act and is therefore responsible as an indirect perpetrator.[450] Such an indirect perpetrator is also considered a principal in common law.[451] Also, if the background man commits the act through the intermediary using *vis absoluta* ('full force'), he should equally be considered as principal or direct perpetrator.[452]

In any case, as we have seen above,[453] imputation in ICL, in a context of 'macrocriminality', operates differently in that the direct perpetrator or executor normally performs the act with full responsibility—in particular, he possesses the necessary *mens rea* and is fully aware of its illegality. Thus, the question arises whether perpetration by means always presupposes that the direct perpetrator has a 'defect', or whether the theory also works with a fully responsible or culpable direct perpetrator, that is, in the *special* case of an '(indirect) perpetrator behind the (direct) perpetrator' ('*Täter hinter dem Täter*'). This has been affirmed for cases in which the '*Hintermann*' dominates the direct perpetrators by way of a *hierarchical organizational structure*, that is, where he or she has control over the organization ('*Organisationsherrschaft*').[454] Although there are no *explicit* precedents in international case law, it may be argued, as done above,[455] that the judgment in the *Justice (p. 156) Trial* was *implicitly* based on this doctrine. In any case, the doctrine has received widespread support in national jurisdictions as already demonstrated above.[456]

At the international level, the *Lubanga* PTC of the ICC recognized that those who have 'control over the commission of the offence' are perpetrators ('*auteur*'), since they 'control the will of those who carry out the objective elements of the offence (commission of the crime through another person, or indirect perpetration)'.[457] In the *Lubanga* arrest warrant decision, the requirements for indirect perpetration liability have been specified as 'applicable' if there is: (1) a 'hierarchical relationship'/'hierarchically organized group'; (2) the 'final say' of the indirect perpetrator as to policies and practices of the group; and (3) if he or she is 'aware of his/her unique role'.[458] Furthermore, the PTC affirmed that the most typical manifestation of the 'control over the crime theory' is 'the commission of a crime through another person', as explicitly provided for in Article 25(3)(a).[459] The *Bemba* PTC implicitly applied the same doctrine by holding that *Bemba* had control over the crimes committed by his troops 'as a result of his authority over his military organization'.[460]

Perhaps the most elaborate treatment of the *Organisationsherrschaftslehre* is offered by the *Katanga and Chui* confirmation of charges decision.[461] On the one hand, the Chamber recognizes plain *indirect perpetration,* that is, acting through an innocent agent,[462] extending it to acting through fully responsible agents (*perpetrator behind the perpetrator*),[463] in particular by means of *control over and by an organization*.[464] This organization must amount to an organized and hierarchical apparatus of power[465] in which crimes are automatically executed due to strict compliance.[466] The PTC justifies the use of this mode of indirect perpetration, apart from relying predominantly on the works of German and Spanish scholars, by the practice in 'numerous national jurisdictions'.[467] As to the ad hoc tribunals' rejection of this mode of responsibility,[468] the PTC does not feel bound, given the different legal sources.[469] As to the requirements of liability under the organizational control theory (*Organisationsherrschaftslehre*), the PTC, apart from omitting two of them ('detachment of the organization from the law' and the 'disposition of the direct perpetrator (p. 157) to commit the act'),[470] rightly focuses on the controversial issue of how direct perpetrators acting fully responsibly can be controlled at all.[471] Instead of invoking the classical criterion of the fungibility (replaceability, interchangeability) of the direct perpetrators, the PTC relies on 'automatic compliance' secured 'through intensive, strict and violent training regimes'[472] or through mechanisms of payment and punishment for the (non-)execution of crimes.[473] Arguably, the PTC's approach better captures the typical lack of institutional autonomy ('*Autonomiedefizit*') of a direct perpetrator acting in a macrocriminal context given the institutionalist pressure exercised by the criminal system or organization upon him.[474]

On the other hand, the Chamber advocates a *combination* of indirect perpetration and co-perpetration,[475] that is, a *joint indirect perpetration* ('joint commission through another person'),[476] entailing criminal responsibility for the masterminds on the basis of the former and mutual attribution of their contributions on the basis of the latter. In principle, this is not a new mode of responsibility but only the 'factual coincidence of two recognized forms of perpetration' (namely indirect and co-perpetration).[477] One should, however, distinguish between two scenarios:[478] on the one hand the situation where (only) one organization or collective entity, composed of several co-perpetrators, controls the direct perpetrators and commits the crimes through them (*mittelbare Täterschaft in Mittäterschaft*, 'indirect perpetration within co-perpetration', the 'junta model'); on the other hand, the situation of several organizations, each composed of several co-perpetrators, who control different direct perpetrators by way of their organizations (*mittelbare Mittäterschaft*, 'indirect co-perpetration'). In the latter situation, which is similar to that in *Katanga and Chui*, acts committed by the direct perpetrators of one organization are attributed to all indirect perpetrators pursuant to the respective criminal agreement, that is, the indirect perpetrators are also responsible for crimes committed by direct perpetrators who are not under their direct hierarchical control but belong to the other co-perpetrator(s)' criminal organization.[479] It has been argued, however, that such a broad imputation of acts committed by another organization presupposes, however, that the respective organizations carry the crimes out jointly; otherwise, the indirect perpetrator whose organization did not participate in the commission would not have contributed to the crimes.[480] This is not necessarily true, however. Imagine a general, overall plan of two (p. 158) leaders ('L_1' and 'L_2') of two different paramilitary organizations ('A' and 'B') to attack ten villages within the next eight weeks to spread fear among the civilian population. Five of the ten attacks are carried out by both groups, three only by group A, and two only by group B. If one follows the restrictive view just mentioned, only the five joint attacks can be attributed to both L_1 and L_2, while the other three and two attacks can only be attributed to L_1 and L_2 respectively. But are L_1 and L_2 not also jointly responsible for these attacks, since they have jointly planned these attacks counting on both paramilitary groups respectively? In my view, the decisive argument for or against an indirect co-perpetration in these cases is not the joint execution of the plan but the joint planning in the first place.

The Prosecutor, for the first time, charged indirect perpetration in the application for the issuance of an arrest warrant against *Omar Hassan Ahmad Al Bashir*.[481] The PTC, following the application in this respect, issued the warrant because of *Al Bashir's* probable participation as 'indirect perpetrator, or as an indirect co-perpetrator'[482] in the commission of crimes against humanity and war crimes.[483] The Chamber found that there were reasonable grounds to believe that *Al Bashir* 'played an essential role in coordinating the design and implementation of the common plan'.[484] With regard to his responsibility as indirect co-perpetrator, the Chamber argued:

> [I]n the alternative, there are reasonable grounds to believe that Omar Al Bashir (i) played a role that went beyond coordinating the implementation of the common plan; (ii) was in full control of all branches of the 'apparatus' of the State of Sudan, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Forces, the NISS and the HAC, and (iii) used such control to secure the implementation of the common plan.[485]

Thus, the PTC implicitly sustained the application of the organizational control theory (*Organisationsherrschaft*), considering as main requirements the control of the apparatus, thereby securing the commission of the crimes.[486] The difference between *Al Bashir* and *Katanga and Chui* apparently lies in the factual circumstances: in the former case the control is exercised through only one (state) organization (governed arguably by several co-perpetrators), while in the latter case through different (non-state) organizations.[487] Admittedly, it is somewhat unclear whether the *Al Bashir* PTC indeed wanted to focus on one organization given its reference to '*branches* of the apparatus of the State of (p. 159) Sudan'.[488] In any case, the concept of control through one organization has also been employed by the Kenya confirmation decisions[489] and in prominent arrest warrants.[490]

Clearly, the fundamental problem of any theory of indirect perpetration with regard to fully responsible direct perpetrators, including the *Organisationsherrschaftslehre*, remains to convincingly explain the indirect perpetrator's control given that the direct perpetrator's conduct is imputed to him as though it were his own. Generally speaking, perpetration by means requires a *sufficiently tight control by the Hintermann over the direct perpetrator*, similar to the relationship between superior and subordinate in the case of command responsibility (Article 28).[491] Although it cannot be denied that the *Hintermann* exercises only limited control over a fully responsible direct perpetrator—the latter may, at any time, decide to abandon the criminal plan—this lack of control is compensated by the control of the criminal organization, which produces an unlimited number of potential willing executors. In other (more 'dogmatic') words: direct perpetrators acting with full criminal responsibility may be considered mere 'interchangeable mediators of the act' ('fungible *Tatmittler*') since the system provides for a practically unlimited number of replacements and thereby for a high degree of flexibility as far as the personnel necessary to commit the crimes is concerned.[492] For this 'system' or organizational reason one can also argue, as already done above,[493] that the individual perpetrator has less institutional autonomy than the one acting outside a system or organization. While the individual perpetrator possesses the direct *power* over the act (*Tatmacht*),[494] the leaders of the organization *dominate* his acts by way of their control over the organization.[495] Thus, ultimately, the control rests less on the concrete replaceability of the individual executor but rather on the control over the organizational apparatus, the criminal system, of which he is a part.[496] We will return to this issue at the end of this chapter.

Another, more normativist explanation of *Organisationsherrschaft* follows, with regard to state organizations, from the state's special duty of protection vis-à-vis its citizens, which entails a further duty to limit and control its violating power (*Verletzungsmacht*) with regard to citizens' rights. If the state orders a violation of these rights or fails to prevent such violations, it does not live up to this special duty and thus its highest representatives incur criminal responsibility for being part of the state organization.[497]

Still, it is clear that only very few persons command the control necessary to immediately replace one (failing) executor with another, namely only those who belong to the leadership of the criminal organization, or who, at least, control a part of the organization. Only they can dominate the unfolding of the criminal plan undisturbed by other members of the (p. 160) organization.[498] Although these persons are generally far away from the actual execution of the criminal acts, and are therefore normally considered indirect perpetrators or even accessories before the fact,[499] they are in fact, from a normative perspective, the main perpetrators, while the executors (the direct perpetrators) are merely accessories or accomplices in the implementation of the criminal enterprise.[500] In contrast, mid-level perpetrators normally lack unlimited control, their actions might always be 'disturbed' by superiors; therefore, they qualify rather as co-perpetrators than as indirect perpetrators, assuming that they have an, at least, silent agreement with the direct, low-level perpetrators.[501] We will return to this issue of the right title of imputation at the end of this chapter.

As to the last part of subparagraph (a)—' … *regardless of whether that other person is criminally responsible*'—the French ('*celle-ci*') and Spanish ('*éste*') versions indicate, that it refers only to indirect perpetration. This is confirmed by a teleological interpretation. As explained above (Section C. (4)(b)(i)(2)), in the case of co-perpetration all persons involved fulfil a certain function and are, therefore, criminally responsible. Thus, in the case of co-perpetration it is not irrelevant whether one co-perpetrator is responsible. In contrast, in the case of perpetration by means, it is the rule that the person employed to commit the crime ('the instrument') is not criminally responsible; indeed, he or she is an innocent agent. Yet, if this were an indispensable requirement of any form of indirect perpetration, the organizational control theory, discussed above, would not be possible, for under this theory the direct perpetrator is fully responsible. As a consequence, the 'regardless' clause makes this theory possible by declaring that the responsibility of 'that other person' is irrelevant, that is, he can be fully responsible or not.[502]

(4) Special consideration: joint criminal enterprise (JCE)

Joint criminal enterprise, has—as seen above[503]—been applied extensively by the ICTY and ICTR. The concept serves to impute certain criminal acts or results to persons for their participation in a *collective* ('joint') criminal enterprise, that is, it extends individual responsibility by reference to a collective or systemic element.[504] For this 'systemic reason' (p. 161) the concept, at least in its basic form, fulfils an important function in the context of ICL.[505] The 'criminal enterprise' is defined by a common—explicit or tacit—agreement or understanding to commit certain criminal acts for an *ultimate* criminal *objective* or *goal*, for example, in the case of a genocidal enterprise, the ultimate destruction of the targeted group. Such a global or broad enterprise normally may consist of various smaller ('subsidiary') sub-enterprises,[506] for example, the running of concentration or prison camps for the members of the targeted group, the local or regional organized persecution of members of the group, and so on.[507] The participants in the enterprise are bound together by their *common will* to achieve the ultimate goal by all necessary means, that is, the crimes that must be committed on the road to achieve the ultimate criminal goal. The underlying rationale of a JCE, its core feature, is the combined, associated, or *common criminal purpose* [508] of the participants in the enterprise. The *common* purpose is the *collective* element of the JCE doctrine which links the members among themselves[509] and turns it into a theory of collective responsibility based on an institutional-participatory[510] or systemic[511] model of imputation or attribution. At the same time, the link among the JCE members and between them and the (external) direct perpetrators[512] of the envisaged crimes forms the basis of attribution and therefore needs to be interpreted strictly. The members should belong to the same hierarchical level (*horizontal link*) and their common purpose relate to the same criminal enterprise (*ratione materiae link*).[513]

While the case law analysed above finds an implicit legal basis for JCE in Article 7(1) ICTYS,[514] it fails to clarify whether the doctrine belongs to the traditional *law of participation* or constitutes a new and autonomous form of criminal imputation. Traditional doctrine, albeit not easily applicable to ICL because of its collective or systemic context, provides for forms of collective participation (as shown by the examples of conspiracy and membership liability) and thus helps to understand and systematize the forms of imputation and participation in ICL. As to co-perpetration, the JCE's roots in the (English) common purpose theory[515] and indeed its focus on the collective or systemic commission marks a structural difference to this mode of participation which focuses on the joint commission by single perpetrators.[516] It is for this reason that JCE I is not identical to co-perpetration, but can only be equated with it in a functional sense.[517] In any case, it is difficult to reconcile the extended *JCE III* with the common purpose approach given the (p. 162) imputation of one or more additional crimes, which did not form part of the original common purpose in the first place, on the basis of a foreseeability standard.[518] In any case, the ensuing responsibility of a JCE member does not amount to a form of principal perpetration since this would require that he himself fulfils all objective and subjective elements of the offence; if one or more of these elements is missing and can only be imputed to the person by way of *vicarious liability* (*responsabilité du fait d'autrui*), that is, by taking recourse to the act of a third person, transposing this act to a 'non-actor', as done by JCE III,[519] this non-actor can only be considered an assistant (aider or abettor) to the (additional) crime in question.[520] This view is supported by traditional English doctrine which has long held that participants in a common criminal purpose are principals in the second degree, in respect of every crime committed by any of them in the execution of that purpose.[521]

If one agrees with the unanimous *Tadić* AC's view that the participant of a JCE 'performs [objective] acts that in some way are directed to the furthering of the [subjective] common plan or purpose',[522] *JCE I* is a form of participation functionally similar to civil law *co-perpetration* [523] and common law *common purpose/design*,[524] that is, it is a *sui generis concept* of ICL based on both *common* and *civil law*.[525] As to the *lex lata*, this means that JCE I is the only category of JCE that can be considered, without difficulty, as 'commission' within the meaning of Article 7(1) ICTYS[526] and Article 25(3)(a) ICC Statute. As to its characterization as 'co-perpetration' within the meaning of Article 25(3)(a) 2nd alternative, the answer depends, apart from the just-mentioned structural difference between the two concepts,[527] on the concept of co-perpetration as compared with JCE I. If one understands the latter as predominantly subjective, focusing on the common intent as reflected in the common design, enterprise, or plan, an objective understanding of co-perpetration, as adopted by the ICC case law on the basis of the control over the act theory, cannot be reconciled with JCE I. Against this background, it is correct that the *Lubanga* PTC affirms that 'the concept of co-perpetration pursuant to Article 25(3)(a) of the Statute differs from that of co-perpetration based on the existence of a joint criminal enterprise'.[528] If, in contrast, JCE I is interpreted in a more objective or at least mixed objective-subjective (p. 163) sense, it may well fit the understanding of co-perpetration pursuant to Article 25(3)(a).[529] We will return to JCE III at the end of this section (see Section C.(4)(b)(viii)) giving regard to its conflict with fundamental principles of criminal law.

(ii) Complicity I: encouragement (subparagraph (b))

Subparagraph (b) establishes a number of different forms of participation. The first of them is actually not a secondary one: a person who *orders* a crime is not a mere accomplice but rather an indirect perpetrator, abusing his position of authority to force a subordinate to commit a crime.[530] Indeed, the identical Article 2(1)(b) of the 1996 Draft Code was intended to provide for criminal responsibility of mid-level officials who order their subordinates to commit crimes.[531] The ICTR, in the *Akayesu* judgment, correctly held that 'ordering implies a superior-subordinate relationship' whereby 'the person in a position of authority uses it to convince (or coerce) another person to commit an offence'.[532] Such an—at least *de facto* [533]—'superior-subordinate relationship' is also the basic requirement of command or superior responsibility, as first confirmed in the *Čelebići* case[534] and adopted by the subsequent case law of the ad hoc tribunals.[535] Consequently, the first alternative in subparagraph (b) ('orders') complements the command responsibility provision (Article 28): in the latter case the superior is liable for an omission, in the case of an order the superior is liable for a positive act. In conclusion, the first alternative in subparagraph (b) structurally belongs to the forms of perpetration provided for in subparagraph (a), constituting a form of commission 'through another person'.[536] Therefore, the person ordering must himself share the respective subjective requirements such as the intent to destroy in Article 6.[537]

Soliciting a crime means, inter alia, 'urging, advising, commanding, or otherwise inciting another to commit a crime'.[538] Similarly, *inducing* entails the 'enticement or urging of another person to commit a crime'.[539] Thus, both terms basically refer to a situation where a person is influenced by another to commit a crime. In fact, the French version of the Statute speaks of '*sollicite ou encourage*', thereby using encouragement to express the English term 'induce'. There is, therefore, no clear delimitation between (p. 164) soliciting and inducing. In substance, in both cases a person is caused to commit a crime.[540] Such 'causal' influence is normally of a psychological nature (persuasion) but may also take the form of physical pressure (coercion) within the meaning of *vis compulsiva*. [541] It may also occur in a chain, that is, a person induces another to induce a third person to commit a crime.[542] In contrast to cases of ‘ordering’, a superior-subordinate relationship is not necessary.[543]

(iii) Complicity II: assistance (subparagraph (c))

As already explained above,[544] subparagraph (c) provides for liability for any form of *assistance* to a crime within the jurisdiction of the Court. Generally speaking, this form of participation implies a lower degree of responsibility than the form found in subparagraph (b). In *Furundžija*, the ICTY stated that subparagraph (c) covered ‘assistance either in physical form or in the form of moral support. … “abet” includes mere exhortation or encouragement’.[545] The difficult task, however, is to determine the minimum requirements of this mode of complicity.[546] Article 2(3)(d) of the 1996 Draft Code requires that the aiding and abetting be ‘direct and substantial’; that is, the contribution should facilitate the commission of a crime in ‘some significant way’.[547] As has been shown above,[548] the ICTY referred to these criteria in the *Tadić* case and held that the act in question must constitute a *direct and substantial contribution* to the commission of the crime. The *Furundžija* TC even held that Article 25(3)(c) of the ICC Statute is objectively ‘less restrictive’ than the ILC Draft Code 1996, since it does not limit aiding and abetting—as Article 2(3)(d) Draft Code does—to assistance which ‘facilitate[s] in some significant way’, or ‘directly and substantially’ assists the perpetrator.[549] The predominant opinion holds that the ICTY’s ‘substantiality’ standard should nevertheless be transferred to the ICC,[550] and this view has recently been confirmed by the *Mbarushimana* PTC.[551] However, it still needs some further clarification as to what constitutes a ‘substantial’ contribution to fully comply with the requirements of legal certainty and foreseeability (*nullum crimen sine lege*).[552] If one takes this principle seriously, a general theory of imputation in ICL must be developed, inter alia, to determine, on an abstract level, when an effect is ‘substantial’ and, thus, when assisting a (p. 165) crime should entail criminal responsibility.[553] From a theoretical perspective, this is ultimately a normative question, which can best be answered by taking into account the modern theories of imputation.[554] Accordingly, to incur criminal responsibility the assistant must, by way of his contribution, create or *increase the risk* that the crime be committed, and thereby fundamental legal interests violated (‘*Risikoerhöhung*’).[555] The risk must be realized through the commission of the (main) crime (‘*Risikorealisierung*’) or, in other words, the *risk creation* or increase must be *causal* for the commission of this crime (‘*kausale Risikosteigerung*’). Finally, the risk created or increased must be disapproved of by the legal order, that is, it must be a *prohibited risk* (‘*Risikomißbilligung*’).[556]

This risk-based approach is also helpful with a view to criminal liability for so-called ‘*neutral’ contributions*, for example by delivering (e.g., food, petrol, or other ordinary marketable commodities) to a criminal enterprise. While this is not the place for a more profound treatment of this issue,[557] it is clear that there must be some minimum threshold in order not to criminalize socially desirable and legitimate conduct, but only a significant deviation from standard social or commercial behaviour.[558] In line with the risk-based approach, the contribution should at least *increase the risk* with regard to the commission of the main crime;[559] also, liability should depend on the specific *purpose* which was pursued by the respective contribution.[560] From this, it also follows that the apparently open and broad wording of subparagraph (c) referring to an ‘*otherwise*’ assistance cannot be interpreted as renouncing any objective threshold for accomplice liability. Rather, on the basis of the case law and the substantial effect requirement, as an independent constituting element of accomplice liability, it can safely be assumed that a substantial effect on the main crime and the respective increased risk and realization are always required.

The assistant to the crime must act ‘[f]or the *purpose of facilitating*’ the commission of the crime. By this wording a subjective threshold is introduced which goes beyond the ordinary *mens rea* requirement within the meaning of Article 30 of the ICC Statute.[561] The expression ‘for the purpose of facilitating’ is borrowed from the Model Penal Code. While the requirement was controversial within the American Law Institute, it is clear that *purpose* generally implies a specific subjective requirement which goes, in its volitional (p. 166) dimension, beyond mere knowledge.[562] The formula, therefore, sets aside the—above-quoted[563]—jurisprudence of the ICTY and ICTR, since this jurisprudence holds that assistants must only know that their acts will assist the principal in the commission of an offence.[564] It is important to note that this higher subjective threshold only applies to the relation between the contribution and the execution of the crime ('facilitation'). With regard to additional *mens rea* requirements, for example, the 'intent to destroy' in Article 6, it suffices for the assistant to be aware of the perpetrator's special intent, but he need not himself possess this intent.[565] In any case, this additional subjective requirement confirms the general impression that subparagraph (c) provides for a *relatively low objective but high subjective threshold* (in any case higher than the ordinary *mens rea* requirement according to Article 30).[566]

(iv) Responsibility extension I: other contribution to group crime (subparagraph (d))

The whole subparagraph is an almost exact copy of a 1998 anti-terrorism convention[567] and presents a *compromise* with earlier 'conspiracy' provisions,[568] which since Nuremberg have been controversial.[569] The 1991 ILC Draft Code held punishable an individual who 'conspires in' the commission of a crime, thereby converting conspiracy into a form of 'participation in a common plan for the commission of a crime against the peace and security of mankind'.[570] The 1996 Draft Code has extended liability to a person who 'directly participates in planning or conspiring to commit such a crime which in fact occurs'.[571] Thus, it restricts liability compared with the traditional conspiracy provisions in that it requires a direct participation and an effective commission of the crime. Subparagraph (d) takes this more restrictive approach even further, eliminating the term conspiracy altogether and requiring at least a *contribution to a collective attempt* of a crime.[572]

The English wording 'in any other way' seems to indicate, at first sight, that subparagraph (d) requires the lowest *objective threshold* of the different modes of responsibility in Article 25.[573] With regard to co-perpetration, the case law so far invokes subparagraph (d) as a residual mode of participation in cases where an alleged co-perpetrator is not found to (p. 167) be able to frustrate the commission of the crime.[574] The prosecution also seems to favour subparagraph (d) over (a) given its lower objective (and thus, evidentiary) requirement with respect to the defendant's contributing act.[575] This unexpected popularity of subparagraph (d)[576] calls for a careful legal analysis as to which acts really qualify as contributions to a group crime within the meaning of this provision. Such a careful analysis reveals that the *'substantial' standard* of subparagraph (c) should also be applied to the contribution within the meaning of subparagraph (d). First, there is no clear difference in wording between these two subparagraphs which justifies a different quality of the contribution required. While one may detect a slight semantic difference between a contribution which 'otherwise assists' (subparagraph (c)) and a contribution 'in any other way' (subparagraph (d)),[577] this does not justify a substantive difference between the form and degree of the contribution required.[578] Secondly, in terms of substance, subparagraph (d) demands a contribution and, in light of the principle of culpability and the gravity threshold embodied in Articles 17(1)(d) and 53(1)(b), (c), (2)(b), (c),[579] this contribution must be qualified somehow; otherwise, subparagraph (d) would turn into a limitless, hardly measurable mode of responsibility.[580]

In a similar vein, the *Mbarushimana* PTC, while stressing the 'residual' nature of subparagraph (d) within the framework of Article 25,[581] has introduced a *'significance'* threshold,[582] (p. 168) invoking the JCE standard of the ad hoc tribunals.[583] As the first PTC ever dealing more thoroughly with subparagraph (d), the Chamber convincingly argued that the contribution 'cannot be just any contribution', introducing the significance standard as a minimum threshold 'below which responsibility … does not arise'.[584] As to the concrete assessment of a contribution as 'significant', the PTC proposed a case-by-case analysis of the person's conduct in the given context taking into account several factors.[585] *In casu*, the Chamber held that the defendant's actions, essentially as the secretary general of the Forces Démocratiques de la Libération du Rwanda (FDLR) issuing press releases and directing media campaigns from France, did not amount to significant contributions to the alleged FDLR crimes in the DRC.[586] Thus, in essence, PTC I clearly tries, driven by a liberal, culpability-based approach, to avoid an overly broad interpretation of the contribution requirement; it only implicitly suggests that the significance standard is lower than the one of substantiality.[587] In contrast, however, PTC II explicitly compares the two standards and held that 'subparagraph (d) is satisfied by a less than "substantial" contribution'.[588]

The special feature of subparagraph (d) undoubtedly lies in the reference to 'a *crime by a group of persons* acting with a common purpose'. This evident disparity with regard to subparagraph (c) has been addressed by the ICTY in *Furundžija*, stating that these provisions confirm that international (criminal) law recognizes a distinction between aiding and abetting a crime and participation in a common criminal plan as 'two separate categories of liability for criminal participation'.[589] Be that as it may, it is controversial as to whether the group element only encompasses members of the respective group (*intranei*, insiders) or also extends to non-members (*extranei*, outsiders). While the former view[590] is not contradicted by the wording of the provision, which only refers to any 'person' contributing to a group crime, it would limit the provision's scope too much, rendering it almost meaningless. Thus, PTC I's broader interpretation, extending subparagraph (d) also to outsiders,[591] is to be welcomed.

The real distinction between subparagraphs (c) and (d) lies on the *subjective* level. While the former, apart from the general mental element, demands the 'purpose of facilitating', subparagraph (d) requires, on the one hand, a 'common purpose' of the group and, on the other, an 'intentional' contribution of the participant, complemented by alternative additional requirements ((i) and (ii)). As to the *intentional contribution*, the 'intentionality' (p. 169) must not be reduced to the conduct,[592] but rather 'include an additional element, linking the contribution with the crimes alleged',[593] that is, the contributor's intent must extend to these crimes. It is not absolutely clear what is meant by an 'intentional' contribution. Does it refer to the traditional use of 'intent'[594]—as *dolus* ('*Vorsatz*')[595]—including knowledge (*Wissen*) and intention or purpose (*Wollen*), or is it limited to the latter, that is, first degree *dolus directus*?[596] To cut a long story short: the term is used here in the general sense of Article 30[597] (to be analysed more closely in Chapter VII); thus the reference is redundant given that Article 30 applies anyway.

Subparagraphs (i) and (ii) contain additional specific subjective requirements which put the general notion of 'intentional' in more concrete terms. A contribution to an (attempted) group crime has either to be made 'with the *aim of furthering* the criminal activity or criminal purpose of the group' provided that this 'activity or purpose involves the commission of a crime within the jurisdiction of the Court' (i.e., subparagraph (i)) or the participant must *know the intention* of the group to commit the crime (i.e., subparagraph (ii)). As to the first alternative, its last part ('activity or purpose … ') does not require further examination since it only states the obvious; namely, that contributions to group crimes may only give rise to individual responsibility if these crimes belong to the subject matter jurisdiction of the Court (Articles 5–8*bis*). According to the first part of the phrase, the participant must pursue the 'aim' to further the criminal 'activity' or 'purpose' of the group. Thus, he or she must act with a specific *dolus*, that is, with the specific intention to promote the practical acts and ideological objectives of the group.[598] According to the second alternative, the participant must know the intention of the group to commit the crime, that is, he or she must know that the group plans and wants to commit the crime. The question is whether positive knowledge with regard to the specific crime is required or whether it is sufficient that the participant is aware that a crime will probably be committed. The latter requirement was considered sufficient with regard to aiding and abetting by a Trial Chamber of the ICTY,[599] but this precedent is only applicable to subparagraph (c), and not to subparagraph (d)(ii). The subparagraph under examination clearly requires 'knowledge of the intention … to commit the crime', that is, the participant must be aware of the specific crime intended by the group.[600]

In sum, we can conclude that Article 25(3)(d) stipulates a *double objective element*, namely the individual contribution and a group crime; further, it provides for a *triple subjective element*, that is, the common purpose of the group, the general intent regarding the contribution, and the specific alternative subjective requirements regarding the group (purpose of furthering the criminal activity *or* knowledge of the group's intention).

(p. 170) **(v)** Responsibility extension II: incitement to commit genocide (subparagraph (e))

The provision criminalizes direct and public incitement but only with regard to genocide. Identical to Article III(c) of the 1948 Genocide Convention[601] and Articles 4(3)(c) ICTYS and 2(3)(c) ICTRS,[602] the provision provokes the same criticism. Some delegations felt that incitement as a specific form of complicity in genocide should not be included in the 'General Part' of the *Statute* but only in the specific provision on the crime of genocide (Article 6) to make clear that incitement is not recognized for other crimes.[603] This argument is questionable since incitement is covered by other forms of complicity, in particular—in the case of the ICC Statute—by soliciting and inducing as defined above.[604] Normally, the difference between an ordinary form of complicity, for example, instigation, and incitement lies in the fact that the former is more specifically directed towards a certain person or group of persons in a rather private setting, while the latter is directed to the public in general.[605] The ILC rightly referred to the use of the mass media to promote the commission of genocide in Rwanda to justify the inclusion of direct and public incitement in subparagraph (f) of Article 2(3) of the 1996 Draft Code.[606] The ICTR, as already seen above,[607] developed the requirements of 'direct' and 'public' incitement.

One important difference still remains between subparagraph (e) and the forms of complicity found in subparagraphs (b), (c), and (d): incitement within the meaning of subparagraph (e) does not, as in the corresponding provision of the ICTR Statute,[608] require the commission or even attempted commission of the actual crime, that is, genocide; it is not necessary that genocide 'in fact occurs or is attempted' (as, e.g., is required in a general manner by subparagraph (b)).[609] Thus, subparagraph (e) creates an *inchoate crime* and breaks with the dependence of the act of complicity on the actual crime, abandoning the accessorial or derivative *nexus* which governs—at least in the sense of *factual* dependence of the complicity on the main act[610]—subparagraphs (b)–(d). While inchoate liability is, from a principled and liberal perspective, normally difficult to accept, here it is reasonable since the act of incitement is as such sufficiently damaging and blameworthy to be criminalized.[611]

On the *subjective level*, as has already been said above, the inciter himself must possess the specific genocidal intention (*dolus specialis*) to destroy.[612]

(p. 171) **(vi)** Participation and the crime of aggression (paragraph 3*bis*)

This provision confers the leadership clause of the crime of aggression[613] into the framework of Article 25, stating that the modes of participation may, with respect to the crime of aggression, only be applied to 'persons in a position effectively to exercise control over or to direct the political or military action of a State' (insider, *intranei*).[614] This restriction goes back to the Nuremberg Trials where liability for waging an aggressive war was restricted to those who were apt to 'shape and influence' a state's action. While this standard appears to be less restrictive than the 'control or direct' criterion,[615] both standards confirm that liability shall be limited to leaders. Further, taking the wording literally ('effectively'), paragraph 3*bis* focuses on *de facto* control instead of a mere formal status, entailing also a possible responsibility of business or other leaders.[616] On the other hand, persons who do not dispose of enough (factual) influence to 'control or direct' the state's action, such as soldiers, or low- and mid-ranking bureaucrats, are—as outsiders (*extranei*)—exempted from liability. In principle, the leadership clause provides for a prudent restriction of the *ratione personae* jurisdiction of the Court; whether it, ultimately, creates unacceptable gaps of impunity depends on the interpretation of the 'control or direct' criterion. It is, in any case, more problematic that the leadership clause is state-centric, focusing only on state leaders, and thereby losing sight of non-state actors (terrorists or paramilitary groups) responsible for acts of aggression.[617] Thus, it remains to be seen whether it can be applied to these forms of organizations at all.

Those persons (*intranei*) who fall within the scope of the leadership clause may, in principle, be responsible under all modes of participation set out in Article 25(3). The leadership quality of an *intraneus* implies, however, that co-perpetration will most probably be the best fit to adequately classify his participation: a leader's contribution will normally be qualified as essential for the execution of the common plan (i.e., overcoming the 'ability to frustrate' threshold) excluding other modes of participation, in particular Article 25(3)(d).[618]

(vii) Complicity after commission

Article 25 does not say anything about the responsibility for acts of complicity *after* the commission of the crime. The ILC only wanted to include such acts within the concept of complicity if they were based on a commonly agreed plan; in the absence of such a plan, the person would only be liable pursuant to a distinct offence ('harbouring a criminal').[619] During the Preparatory Committee deliberations an explicit provision was deemed (p. 172) necessary,[620] but this should not be interpreted to the effect that, without such a provision, liability for that, without such a provision, liability for *ex post facto* contributions is *a limine* excluded.[621] Clearly, accomplice contributions is *a limine* excluded.[622] Clearly, accomplice liability presupposes—given its derivative nature[623]—the existence of an '*attributory*' *nexus* between the main offence and the act of assistance. Thus, assistance that occurs after the completion of the main offence may only entail criminal responsibility if there is a *link to the accomplice's conduct previous to the completion*. In most cases such a link will consist in a prior common agreement which extends beyond the completion of the main offence.

This reasoning also follows from the *principle of culpability* recognized in ICL:[624] a participant in a crime can only be responsible for his own contribution to the crime, regardless of the responsibility of other participants. This implies that the responsibility of each participant has to be determined individually on the basis of his own factual contribution to the crime in question. A form of vicarious liability for the accomplice on behalf of the principal is excluded.[625] As a consequence, the accomplice's responsibility and culpability is predicated and determined exclusively by his contribution.[626] As to subparagraph (d), this means, as correctly held by the *Mbarushimana* PTC, that it 'can include contributing to a crime's commission *after* it has occurred, so long as this contribution had been *agreed upon* by the relevant group acting with a common purpose and the suspect prior to the perpetration of the crime'.[627]

(viii) Special consideration: JCE III and fundamental principles of criminal law

The principles of legality and culpability constitute bedrock principles of criminal law fully applicable in ICL.[628] The JCE doctrine in its third form (JCE III) conflicts with these principles.

As to the *principle of legality*, it is difficult to see how *JCE III* can be covered by Article 25(3) of the ICC Statute and thus how its application under the ICC Statute can be brought in line with the *lex stricta* component (prohibition of analogy) of Article 22. In fact, JCE III can neither be subsumed under subparagraph (a), nor under (c) or (d). As to *subparagraph (a)*, it has already be shown above that JCE III exceeds the contours of this mode of participation, in particular with regard to its low mental standard of foreseeability.[629] As to *subparagraph (c)*, it differs in respect of the mental side from JCE III: it requires, on the one hand, knowledge[630] or intent within the meaning of Article 30 ICC Statute and, on the other, an act 'for the purpose of facilitating the commission of such a crime'. As to *subparagraph (d)*, the situation is more complex. While the *Tadić* AC considered that subparagraph (d) contains a 'substantially similar notion' and 'upholds' the JCE (p. 173) doctrine,[631] and indeed the provision refers to a 'common purpose',[632] a careful analysis reveals that it is by no means identical to JCE III.[633] First, subparagraph (ii) of Article 25(3)(d) requires 'knowledge' with regard to the criminal intent of the group, that is, more than mere foreseeability as required by JCE III. Secondly, while the volitional element of subparagraph (i) ('aim of furthering the criminal activity … ') is not per se incompatible with the foreseeability standard of JCE III,[634] the contribution to the collective crime must, in any case, be 'intentional' (Article 25(3)(d) first clause), that is, it again requires more than mere foreseeability.[635] On a more general note, conceiving JCE as a form of collective responsibility modelled after the law of *conspiracy* [636] and similar to the *membership or organizational liability* as applied in Nuremberg,[637] its inclusion in subparagraph (d) would go against the will of drafters of the Rome Statute given that they, as already explained above,[638] drafted this subparagraph as a compromise formula rejecting any form of collective responsibility. Last but not least, JCE entails principal responsibility, while subparagraph (d) is a form of secondary participation.[639] Thus, in conclusion, to apply (p. 174) JCE III before the ICC, the States parties would have to include a corresponding provision in the Statute.[640]

As to the *principle of culpability*, the conflict with JCE III is even more evident.[641] This explains why Antonio Cassese, originally the driving force behind the doctrine in the ICTY, more recently took a more reserved stance and promoted a more restrictive reading as President of the STL.[642] In any case, if, according to this doctrine, *all* members of a criminal enterprise incur criminal responsibility even for criminal acts performed by only *some* members and which have not been agreed upon by all members before the actual commission but are, nonetheless, attributed to all of them on the basis of mere foreseeability, the previous *agreement or plan* of the participants as the only legitimate basis of reciprocal attribution has been *given up*. On what basis can a member of the original JCE who behaved in full compliance with the original plan then be blamed for the excess crimes? An alleged causal *nexus* between the original plan and the additional crime(s) exceeding this plan[643] does certainly not suffice to overcome this evident culpability deficit. Indeed, such kind of objective imputation sadly reminds the informed observer of the old, medieval '*versari in re illicita*' liability,[644] that is, a form of strict liability[645] which imposes responsibility and blame on all members of the original JCE for all possible consequences arising out of the original agreement. The *foreseeability* requirement likewise does not help for it is neither precise nor reliable and thus does not really limit liability in any meaningful way.[646] Quite ironically, one may say that the foreseeability standard, as applied by the ad hoc tribunals, makes the criminal responsibility for the accused unforeseeable. For this very reason—the uncertainty of the foreseeability standard—one cannot blame the member of the JCE for not having withdrawn from the criminal enterprise: how and why should he do so if he does not even foresee the criminal result with certainty?[647]

To be sure, while all these culpability flaws of JCE III may just be the reason for the attractiveness of the doctrine from a prosecutorial perspective, setting aside evidentiary (p. 175) problems—especially the need to prove a direct participation or contribution[648]—they turn out to be highly disadvantageous and unfair from the perspective of the defence.[649] Some of the judges of the ad hoc tribunals also seem to have problems with the *foreseeability standard*. They either downgrade co-perpetration in a JCE to aiding and abetting (a JCE or a single crime)[650] or try to increase or modify the subjective threshold by requiring knowledge together with foreseeability. According to the Appeals Chamber 'this question must be assessed in relation to the knowledge of a particular accused'. The prosecution must prove 'that the accused had sufficient knowledge such that the additional crimes were a natural and foreseeable consequence to him'.[651] While with knowledge more is required than with the *Tadić dolus eventualis* or recklessness standard,[652] the linkage between knowledge and foreseeability is by no means clear. If one gives both standards a subjective meaning, that is, referring to the *mens rea* of the concrete participant who shall be held responsible for the acts beyond the scope of the enterprise, the combination of them is like trying to square the circle. Either an accused knows that a certain result will occur, or this result is foreseeable to him; the existence of both is logically impossible. In fact, knowledge is a standard for intent crimes (see Article 30), while foreseeability belongs to the theory of recklessness or negligence. The only way out of this impasse is to construe foreseeability as an objective requirement (in the sense of a reasonable man standard), leaving the knowledge standard as the (only) subjective requirement of liability.[653] Obviously, this makes life for the defence more difficult since it is easy for the prosecution and/or judge to allege that the 'reasonable man' would have foreseen the criminal result, and it is difficult, if not impossible, for the defence to rebut this affirmation. As a consequence, JCE III responsibility should be predicated on, firstly, the objective foreseeability of the crimes that went beyond the purpose of the enterprise (since normally such crimes occur in the ordinary course of events pursued by such an enterprise) and, secondly, the knowledge of the concrete participant with regard to this (objective) foreseeability.[654] To put it more simply: the participant must know that the crimes in question normally occur in the given enterprise. Yet, while this interpretation may make sense with regard to the otherwise illogical combination of knowledge and foreseeability and, in addition, may bring JCE III into line with the principle of culpability, it does not help in cases where the accused credibly pleads a lack of knowledge with regard to the foreseeability, that is, argues that he—cognitively—was not aware of the (normatively construed) foreseeability of the excessive crimes. In this case he would incur an error or mistake and the question (p. 176) would arise as to what type of mistake—of fact or law—would be applicable and what consequences this mistake would entail. Obviously, recourse to the complex theory of mistake of law would not be necessary if one were to take into account the actual perception *ex ante* of the concrete accused instead of subjecting him to the reasonable man standard.

There is, however and regrettably, an opposite tendency in the case law, that is, the expansion of the foreseeability standard to *specific intent crimes*. According to the *Brđanin* AC, a participant in a JCE III to commit genocide need not himself possess the specific genocidal intent, but rather the commission of this crime must merely be 'reasonably foreseeable' to him.[655] Thus, the Chamber differentiates between JCE I and III with regard to a specific intent of a crime pursued by the enterprise: while such specific intent must be 'shared' by all participants in a JCE I, in the case of a JCE III, mere foreseeability by a participant who does not directly commit the specific intent crime is deemed sufficient. In fact, the Chamber downgrades the specific genocidal intent in cases of a JCE III to mere foreseeability, thereby bypassing the specific intent requirement and overcoming the well-known evidentiary problems. The *Milošević* Chamber followed this approach.[656] Yet, there is still some hope as this approach is by no means settled in the case law. Unlike the Appeals Chamber, the *Stakić* and *Brđanin* Rule 98 Trial Chambers held that the specific (genocidal) intent must be met.[657] In addition, in the posterior *Krstić* Appeal, JCE responsibility of the accused for the genocidal killings in Srebrenica was dismissed because of the lack of genocidal intent,[658] thus JCE III was not invoked to overcome the *mens rea* problem. Last but not least, the overwhelming academic literature is also in favour of upholding the specific intent requirement.[659]

(c) Conclusions and perspectives

The individual analysis of the modes of participation set out in Article 25(3)(a)–(d) has demonstrated that the ICC Statute provides for a *nuanced system of participation*, predicated on the fundamental distinction between principal and secondary (accessorial) responsibility. Clearly, the distinction between modes of participation already at the level of attribution, that is, procedurally speaking, when singling out certain suspects and charging them, makes it necessary to refine these modes of participation to such a degree that a, at least abstract or theoretical, precise *delimitation* between them is possible. As we have already seen in our analysis, in this area lies one of the main tasks of the future case law as far as the law of individual criminal responsibility and participation is concerned. Perhaps the most obvious problem of delimitation concerns the relationship between (p. 177) subparagraphs (c) and (d) of Article 25(3).[660] From an objective perspective, these provisions are quite similar, the only difference being that (c) is concerned with individual responsibility and (d) with group responsibility. A person who contributes to a group crime or its attempt will always be liable as an assistant to an individual crime in the sense of subparagraph (c). In other words, the group requirement of subparagraph (d) excludes liability for participation in individual crimes according to subparagraphs (a)–(c) but not *vice versa*. Thus, the really significant difference between subparagraphs (c) and (d) lies, if at all, on the subjective level. As pointed out above,[661] a participant in a group crime must either aim at furthering the criminal activity or purpose of the group (subparagraph (d)(i)) or must know of its criminal intention (subparagraph (d)(ii)). A person acting without the specific intent of facilitating the commission within the meaning of subparagraph (c) may still be liable under subparagraph (d)(ii).[662] In fact, the ICC Statute provides, on the one hand, for a subjective limitation of assistance by the requirement of facilitating (unlike the case law of the ad hoc tribunals which only requires knowledge that the assistance contributes to the commission of crimes);[663] on the other hand, however, it takes this limitation away by the low knowledge threshold in subparagraph (d)(ii).[664]

On a more principled level, the question arises of how the differentiated system of Article 25(3) may have to be adapted to the *particularities of imputation in ICL* already discussed in Chapter III.[665] In particular, the discussion of the organizational control theory (*Organisationsherrschaftslehre*) shows that the *system of individual attribution of responsibility*, as used for ordinary criminality, must be modified in ICL, aiming at the development of a mixed system of individual-collective responsibility in which the overall act or criminal situation (*Gesamttat*) and the criminal enterprise or organization which controls this situation take centre stage and serve as the points of reference for imputation. In the German-speaking discussion, this has been called the ‘*Zurechnungsprinzip Gesamttat*’.[666] Accordingly, the individual criminal contributions of the participants must be assessed in light of their effect on the criminal plan or purpose pursued by the (p. 178) criminal apparatus or organization. The control criterion, especially in its variant of a functional, mutual domination of the commission as required in the context of co-perpetration,[667] may lose importance because of the collective or systemic dimension of the criminal events.[668] Contributions without any effect may be excluded and the contributors exempted from responsibility. One can speak of a system of ‘organizational domination in stages’ (‘*stufenweise Organisationsherrschaft*’) where, however, domination requires at least some form of control over part of the organization.[669]

Thus, taking up the principled distinction between principals (perpetrators) and secondary participants (accomplices) outlined above,[670] one can, following *a grosso modo* the model developed by Hans Vest,[671] identify *three levels of hierarchies with the corresponding forms of participation and domination/control*: the first, and highest level is composed of those persons belonging to the leadership level (‘*Führungstäter*’) who take the decisions with regard to the criminal events as a whole; only those leaders, due to their total and undisturbed control over the organization, are able to control the course of events by means of the organizational structures, that is, they possess ‘domination over the decision’ (‘*Entscheidungsherrschaft*’)—the strategic, systemic overall control over the organized injustice of the (state) system;[672] thus, they normally qualify as indirect perpetrators by means of organization control.[673] At the second level, we find those persons of the mid-hierarchy who implement the decisions of the top level by way of planning and organizing the microcriminal enterprises, thereby exercising some form of control over a part of the organization (‘*Organisationstäter*’); they may possess domination with regard to the implementation and guidance of the criminal events (‘*Gestaltungs- and Steuerungsherrschaft*’) but normally do not dispose of total control over the criminal apparatus as a whole; therefore, they qualify rather as co-perpetrators than indirect perpetrators.[674] As in ordinary criminal law (take the famous example of the gang-leader), it is not necessary that the mid-level actors ‘get their hands dirty’.[675] The third and last level consists of the executors (‘*Ausführungstäter*’) who are, as persons committing the crime with their own hands, direct perpetrators, and as such possess the power over the act (*Tatmacht*)[676] but at the same time qualify only, with a view to the overall context, as accomplices in the larger criminal enterprise.[677] From the perspective of traditional individual responsibility, the executors may also jointly commit the crimes as co-perpetrators. In any case, it is important to note that the three-tiered hierarchy is ordered along the lines of quality (different forms of domination) and dimension (with a view to the collective/overall act, the partial complex of acts and the individual acts).[678] Thus, one can approach the model (p. 179) from two perspectives:[679] on the one hand, starting with the individual acts and going ‘bottom up’ to the (partial) complex of acts and the overall act; on the other hand, from the overall act going ‘top down’ to the individual acts. In a nutshell, the participant’s influence on the macrocriminal event depends, from a normative perspective, on his rank and influence within the collective system responsible for the criminal events as a whole. As to the organizational control theory, it amounts to a paradigmatic, albeit not singular, form of responsibility in ICL.[680] The two other important ways to impute mass crimes to the masterminds are JCE I, as analysed above,[681] and the doctrine of command responsibility, to be analysed in Chapter V. Admittedly, at this stage of the development of ICL, the magic formula of imputation has not yet been found[682] but it is fair to say that the move to a more differentiated participation system brought about by the ICC Statute has also shifted the attention to forms of participation more akin to the (differentiated) civil law than to the (unitarian) common law systems.

Footnotes:

1 The Nuremberg War Crimes Trials are documented online: <http://avalon.law.yale.edu/subject_menus/imt.asp> accessed 4 June 2012.

2 IMT, *Trial*, xxii (1947), p. 447 (*The Trial*). See also the statement of English Chief prosecutor *Sir Hartley Shawcross* in IMT, *Trial*, iii (1946), pp. 123–4; for a recent critical analysis of the concept of individual criminal responsibility in international law, see Boas, ‘Individual Criminal Responsibility’, in Stahn and van den Herik, *Future Perspectives* (2010), pp. 501–19.

3 *Ex parte Quirin v Cox*, 317 U.S. 1 (1942). The Supreme Court recounted various historical examples and stated at 27–8: ‘From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy *individuals*’ (emphasis added).

4 See *Prosecutor v Blaškić*, No. IT-95-14-AR108, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II, para. 40 (29 October 1997).

[5] Principles of International Law recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, as adopted by the ILC: ILC, 'Report of the International Law Commission Covering its 2nd Session' (5 June – 29 July 1950) UN Doc. A/1316, in *YbILC*, ii, 2 (1950), 374–8. Principle I states: 'Any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment.'

[6] See the excellent historical analysis of McCormack, 'Evolution', in McCormack and Simpson, *Law of War Crimes* (1997), pp. 31–63; Marschik, 'Politics', in ibid, pp. 65–101; Wenig, 'Lessons', in ibid, pp. 103–22; Triggs, 'War Crimes Trials', in ibid, pp. 123–49; Williams, 'Principles Lacking Application', in ibid, pp. 151–70.

[7] Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference: 'Final Act of the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court' (17 July 1998) UN Doc. A/CONF.183/9 <http://untreaty.un.org/cod/icc/index.html> accessed 4 June 2012 (Rome Statute), reprinted in *ILM*, 37 (1998), 999. See <http://www.icc-cpi.int> accessed 4 June 2012; and Ambos, *Internationales Strafrecht* (2011), § 6 mn. 21 ff. with further references.

[8] See <http://www.icty.org> accessed 4 June 2012.

[9] See <http://www.ictr.org> accessed 4 June 2012.

[10] See *Prosecutor v Tadić*, No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, paras. 128–37, 134 (2 October 1995).

[11] For the historical development of the idea of punishing war criminals and serious crimes through international tribunals, see Eiroa *, Políticas* (2009), pp. 33 ff.

[12] For a first approach, see Bassiouni, *Crimes Against Humanity* (1999), pp. 369 ff. See also Tornaritis, 'The Individual', in Bassiouni, *Treatise on ICL*, i (1973), pp. 103–21; Sunga, *Individual Responsibility* (2002); van Sliedregt, *Criminal Responsibility* (2003); id, *Criminal Responsibility* (2012); Ambos, *Internationales Strafrecht* (2011), § 6 mn. 21 ff., especially Part 3; id, *La parte general* (2006); Werle, *Principles* (2009), mn. 362 ff.. See also id, *JICJ*, 5 (2007), 953 ff.

[13] The cases *Prosecutor v Menten*, Summary of Proceedings, in *ILR*, 75 (1987), 331 (the Netherlands); *Polyukhovich v Commonwealth of Australia and Another*, Judgment of the High Court of Australia, in *ILR*, 91 (1993), 1 (14 August 1991); Kappler and Priebke, Tribunale Militare di Roma (1 August 1996 and 22 July 1997); Sentenza del Corte Militare D'Appello (7 March 1998); Sentenza del Corte Suprema di Cassatione (16 November 1998) (Italy), (all on file with the author) did not require substantial consideration of individual responsibility.

[14] Röling and Rüter, *Tokyo Judgment*, i (1977), (ii) contains the dissenting opinions. See also Pritchard and Zaide, *Tokyo Trial*, xxii (1981). For a recent account, see Cryer and Boister, *Tokyo Tribunal* (2008); Futamura, *War Crimes Tribunals* (2008), pp. 30 ff. (on the Nuremberg legacy), 52 ff. (on the Tokyo Trial), 116 ff. (on the individualization of responsibility in the Tokyo Trial).

[15] US GPO, *TWC*, i–xv (1997).

[16] UNWCC, *LRTWC*, i–xv (1947–1949).

[17] The post-war German literature, however, did not consider the legal nature of the tribunals as a merely formal question; see the fundamental work of Jescheck, *Verantwortlichkeit* (1952), pp. 283–94.

[18] The Statute (8 August 1945) is reprinted in various sources, for example, *UNTS*, 82 (1951), 280 (emphasis added) or *AJIL*, 39 (1945), 258.

[19] See Article 9: 'At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization. … ' (emphasis added).

[20] 20 December 1945 (emphasis added). In four languages in: *Official Gacette of the Control Council No. 3* (1946), 50.

[21] Charter for the International Military Tribunal for the Far East (IMTFE Charter), reprinted in Cryer and Boister, *Tokyo Tribunal* (2008), pp. 7–11.

[22] See also Olásolo, 'Current Trends', in Stahn and van den Herik, *Future Perspectives* (2010), pp. 522 ff.

[23] These theories try to limit attribution by normative criteria (cf. Roxin, *Strafrecht I* (2006), § 11 mn. 39–136; see also Fletcher, *Rethinking* (2000), mn. 6.7.2. On imputation in ICL in general, see Chapter III, Section B.

[24] For an example of the rare English literature on normative attribution in criminal law, see Fletcher, *Rethinking* (2000), mn. 6.7.2.; for the German doctrine, see Roxin, *Strafrecht I* (2006), § 11 mn. 39–136 with further references.

[25] *US v von Weizsaecker et al*. (Ministries trial) (case 11), in US GPO, *TWC*, xiv (1997), pp. 308–942, 888 (dissenting opinion) (11 April 1949).

[26] For more detail on this distinction and the respective models of perpetration/ participation, see Section C. (4)(a) with notes 373 ff.

[27] IMT, *Trial*, xxii (1947), p. 448 (emphasis added).

[28] *US v von Leeb et al*. (High Command trial) (case 12), in US GPO, *TWC*, xi (1997), p. 510 (27 October 1948).

[29] *US v Altstoetter et al*. (Justice trial) (case 3), in US *GPO, TWC*, iii (1997), pp. 954–1201, 985 (4 December 1947). See also UNWCC, *LRTWC*, xv (1949), pp. 53 ff.

[30] *US v Altstoetter et al*. (Justice trial), in US GPO, *TWC*, iii (1997), p. 1063 (emphasis added).

[31] *US v Pohl et al*. (Pohl trial) (case 4), in US-GPO, *TWC*, v (1997), pp. 958–1163, 1173 (3 November 1947) (supplemental judgment) (emphasis added).

[32] cf. Ormerod, *Smith and Hogan's Criminal Law* (2011), pp. 213–15.

[33] See Section C. (2)(b).

[34] Judgment in the Trial of Golkel and Thirteen Others (case 30), in UNWCC, *LRTWC*, v (1948), p. 53 (21 May 1946) (emphasis added). See also Judgment in the Trial of Rohde and Eight Others (case 31), in UNWCC, *LRTWC*, xv (1949), p. 56 (1 June 1946).

[35] Judgment in the Trial of Wielen and Seventeen Others (case 62), in UNWCC, *LRTWC*, xi (1949), pp. 31–52, 46 (3 September 1947) (emphasis added).

[36] Cited in UNWCC, *LRTWC*, iii (1948), p. 94 (emphasis added).

[37] See, for example, Judgment in the Trial of Becker, Weber and Eighteen Others (case 40), in UNWCC, *LRTWC*, vii (1948), pp. 67–73, 70 (17 July 1947).

[38] See the trial *Yamashita v Styer*, 327 U.S. 1, 13–14 (1945); UNWCC, *LRTWC*, iv (1948), pp. 1, 35 (7 December 1946); on the facts of the case see Prévost, *HRQ*, 14 (1992), 309 ff.; Landrum, *MLR*, 149 (1995), 293 ff. and Crowe, *URichLR*, 29 (1994), 194–5. See Darcy, *Collective Responsibility* (2007), pp. 294 ff. (on the historical development of the modern doctrine of superior responsibility), pp. 301 ff. (on the Yamashita Case); Vest,

Völkerrechtsverbrecher (2011), pp. 213 ff. (on the Yamashita Case), pp. 215 ff. (on the following historical development); Frulli, *JCSL*, 15 (2010), 436–44 (on the historical development).

39 Quoted according to Yamashita, 327 U.S. 1, 13–14 (emphasis added).

40 cf. Yamashita, 327 U.S. 1, 51.

41 Quoted according to Prévost, *HRQ*, 14 (1992), 320.

42 Prévost, *HRQ*, 14 (1992), 14 (see also 18).

43 Prévost, *HRQ*, 14 (1992), 15 (see also 2).

44 cf. Prévost, *HRQ*, 14 (1992), 317–19, 325–9, 337; Bassiouni, *Crimes Against Humanity* (1999), pp. 146 ff., 471 ff.; Landrum, *MLR*, 149 (1995), 297, 300; Hessler, *YaleLJ*, 82 (1973), 1283; for a more positive assessment, see Parks, *MLR*, 62 (1973), 22 ff., 87 ff., who, inter alia, rejects a strict liability interpretation. Similarly, Crowe, *URichLR*, 29 (1994), 198–9, refers to the ordering of atrocities by Yamashita.

45 In this sense Prévost, *HRQ*, 14 (1992), 338.

46 See particularly Jude Rutledge's dissent in Yamashita, 327 U.S. 1, 41 ff., for example, 53, with regard to the admission of 'untrustworthy, unverified, unauthenticated evidence … ' or at 61 with regard to denial of fair trial ('departure from the most elementary principles of fairness … ').

47 This was already recognized by the IMT as 'one of the most important [legal principles]'; therefore, 'the Tribunal should make such declaration of criminality [of an organization or group] so far as possible in a manner to ensure that innocent persons will not be punished' (IMT, *Trial*, xxii (1947), 469).

48 Yamashita, 327 U.S. 1, 28.

49 *Pohl et al*. (Pohl trial), in US GPO, *TWC*, v (1997), p. 1011 (emphasis added).

50 See *US v Brandt et al*. (Medical case) (case 1), in US GPO, *TWC*, ii (1997), pp. 171–300, 212, 213 (20 August 1947).

51 See, for example, *US v von List et al*. (Hostages trial) (case 7), in US GPO, *TWC*, xi (1997), pp. 1230–319, 1281 (19 February 1948) ('obliged to know').

52 *von Leeb et al*. (High Command trial), in US GPO, *TWC*, xi (1997), p. 510 ('for the transmittal in any manner whatsoever of a criminal order'). See also, *von List et al*. (Hostages trial), in US GPO, *TWC*, xi (1997), pp. 1281 ff., 1286.

53 *von Leeb et al*. (High Command trial), in US GPO, *TWC*, xi (1997), p. 513.

54 Ibid, p. 489.

55 Röling and Rüter, *Tokyo Judgement*, i (1977), pp. 29–30.

56 Röling and Rüter, *Tokyo Judgement*, i (1977), p. 30 (emphasis added).

57 See, for example, the explicit reference to the Yamashita case in UNWCC, *LRTWC*, xv (1949), p. 66.

58 UNWCC, *LRTWC*, xv (1949), p. 67. See also Brand, 'War Crimes', *BYbIL*, xxvi (1949), 424.

59 UNWCC, *LRTWC*, xv (1949), p. 67.

60 IMT, *Trial*, xxii (1947), pp. 447–9.

61 For the continental criticism against conspiracy, see Jescheck, *Verantwortlichkeit* (1952), pp. 283–94, 272–6, 409–10. Also on conspiracy at the Nuremberg trial, see Safferling, *KritV*, 93 (2010), 65 ff.

62 Röling and Rüter, *Tokyo Judgement*, i (1977), pp. 31–2.

63 See also Vest, *Völkerrechtsverbrecher* (2011), pp. 282–3.

64 IMT, *Trial*, xxii (1947), p. 469 (emphasis added). Thus, in the case of the *Gestapo*, the declaration of criminality did not include 'persons employed … for purely clerical, stenographic, janitorial or similar unofficial routine tasks' (p. 477).

65 *US v Ohlendorf et al.* (*Einsatzgruppen* trial) (case 9), in US GPO, *TWC*, iv (1997), pp. 411–589, at 496 (10 April 1948). See also *von Weizsaecker et al.* (Ministries trial), in US GPO, *TWC*, xiv (1997), p. 855 (11 April 1949) ('membership alone does not constitute proof of guilt').

66 See UNWCC, *LRTWC*, xv (1949), pp. 97–9. Arguably, the same restrictive approach should be pursued with regard to membership in terrorist organizations (cf. Levanon, *NCLR* 15 (2012), esp. pp. 271–4).

67 *Brandt et al.* (Medical trial), in US GPO, *TWC*, ii (1997), pp. 194, 201, 209, 222; *US v Milch* (Milch trial) (case 2), in US GPO, *TWC*, ii (1997), pp. 773–878, at 814 (17 April 1947); *Altstoetter et al.* (Justice trial), in US GPO, *TWC*, iii (1997), p. 1093; *Pohl et al.* (Pohl trial), in US GPO, *TWC*, v (1997), pp. 984, 994, 998, also dissenting opinion at p. 1159; *US v Krauch et al.* (*IG Farben*) (case 6), in US GPO, *TWC*, viii (1997), pp. 1102 (reference to IMT), 1108 (30 July 1948); *von List et al.* (Hostages trial), in US GPO, *TWC*, xi (1997), p. 1286; von Leeb *et al.* (High Command trial), in US GPO, *TWC*, xi (1997), p. 545.

68 *Altstoetter et al.* (Justice trial), in US GPO, *TWC*, iii (1997), p. 977 ('should have known').

69 *von Weizsaecker et al.* (Ministries trial), in US GPO, *TWC*, xiv (1997), p. 339 (11 April 1949); (emphasis in the original). Similarly *US v von Leeb et al.* (High Command trial) (case 12), in US GPO, *TWC*, xi (1997), p. 617 (27 October 1948).

70 *Krauch et al.* (*IG Farben*), in US GPO, *TWC*, viii (1997), p. 1113 (emphasis added).

71 On general and specific intent in US law, see LaFave, *Criminal Law*, ii (2003), pp. 252–4.

72 It was only stated that a 'general criminal intent is sufficient in all cases in which a specific or other particular intent or mental element is not required by the law defining the crime' (cf. *US v Krupp et al.* (Krupp Trial) (case 10), in US GPO, *TWC*, ix (1997), p. 1378, referring to Miller, *Handbook on Criminal Law* (1934), pp. 57–8).

73 Röling and Rüter, *Tokyo Judgement*, i (1977), p. 30.

74 Oberster Gerichtshof für die Britische Zone, *Entscheidungen des Obersten Gerichtshof für die Britische Zone in Strafsachen* (OGHSt), i–iii (Berlin/Hamburg, 1948–1950). Eichmann (Israel), Jerusalem District Court, *ILR*, 36 (1968), 5–14, 18–276 (12 December 1961) and Supreme Court, *ILR*, 36 (1968), 14–17, 277–344 (29 May 1962). Barbie (France), Cour d'assises du départment du Rhône (4 July 1987), *Le Monde* (5/6 July 1987), 1; Cour de Cassation, JCP, ii No. 21149 (1988), ILR, 100 (1995), 330–7 (3 June 1988); see also Cour de Cassation, Gazette du Palais (1983), 710, ILR, 78 (1988), 126, 128–31 (6 October 1983); Cour de Cassation, *JCP*, ii No. 20197 (1984), ILR, 78 (1988), 126–7, 132–6 (26 January 1984); Cour de Casssation, *Bulletin des Arrêts de la Cour de Cassation, Chambre Criminelle* (1985), 1038–55, *JCP*, ii No. 20655 (1986), *ILR*, 78 (1988), 127–8, 136–47 (20 December 1985); Touvier (France), Cour d'assises de Yvelines, in Bédarida, *Touvier* (1996), pp. 353–4 (20 March 1994); Cour de Cassation, *Bulletin des Arrêts de la Cour de Cassation, Chambre Criminelle* (1995), 547–58 (1 June 1995); see also Cour d'appel de Paris, extracts *in ILR*, 100 (1995), 339–40, 341–58 (13 March 1992); Touvier, *Le dossier de l'accusation* (1996), 314–21; Cour de Cassation (27 November 1992), *Bulletin des Arrêts de la Cour de*

Cassation, Chambre Criminelle (1992), 1082–116, *ILR*, 100 (1995), 341, 358–64; Cour d'appel de Versailles (2 June 1993), in Bédarida, *Touvier* (1996), pp. 322–50; Cour de Cassation, *Bulletin des Arrêts de la Cour de Cassation, Chambre Criminelle* (1993), 770–4 (21 October 1993). *R v Finta* (Canada), Ontario Court of Appeal, ILR, 98 (1994), 520–663 (29 April 1992); Supreme Court of Canada, 88 CCC (3d) 417–544 [1994]=1 SCR 701–877 (1994)=*ILR*, 104 (1997), 284–404 (24 March 1994).

75 My Lai (Calley), Court Martial (31 March 1971); Convening Authority (20 August 1971); see for both Hammer, *Lt. Calley* (1971), *passim*; *US v Calley*, Court of Military Review, *CMR* 46 (1972/73), 1131–200, 1163 ff. (16 February 1973); *Appellee v Calley*, Appellant, Court of Military Appeals, *CMR* 48 (1973/74), 19–33 (21 December 1973); *Calley v Gallaway*, US District Court, M. D. Georgia, Columbus Division, *FSupp*, 382 (1974), 650–713 (25 September 1974); US Court of Appeals for Fifth Circuit, in Goldstein, *My Lai Massacre* (1976), pp. 556–73 (10 September 1975). Comandantes (Argentina), Cámara Nacional de Apelaciones en lo Criminal y Correccional de la Capital, in *Colección Oficial de Fallos de la Corte Suprema de Justicia de la Nación* (*Fallos*), 309-II, pp. 33–1657, 1649 ff. (9 December 1985); Corte Suprema de Justicia de la Nación, *Fallos*, 309-II, pp. 1689–923 (30 December 1986). Letelier and Mofitt (Chile), Juez de Instrucción Bañados, *Fallos del Mes*, año xxxv (November 1993), edición suplementaria (12 Novembre 1993); *Corte Suprema de Justicia* (30 May/6 June 1995). GDR (National Defence Council, Generals) (The German Trials), German Federal Court (BGH), No. 5 StR 98/94, in *BGHSt* 40, p. 218 (26 July 1994); District Court (LG) Berlin, No. (536) 2 Js 15/92 Ks (2/95) (10 September 1996); BGH, No. 5 StR 42/97 (30 April 1997).

76 Eichmann (Israel), *ILR*, 36 (1968), 236–7, para. 197 (emphasis added). See for a critical analysis of the mode of participation employed by the Court Ambos, 'Considerations', in Ambos et al., *Eichmann* (2012), pp. 125–34.

77 Roxin, *Täterschaft und Tatherrschaft* (2006), pp. 242–52, 653–4; id, *JICJ*, 9 (2011), pp. 197 ff. For a critical analysis of the dogmatics, see Greco, *ZIS*, 6 (2011), 9 ff. For a general overview, see Werle and Burghardt, *JICJ*, 9 (2011), 191 ff.

78 For a detailed analysis of the Latin American case law, see Muñoz Conde and Olásolo, *JICJ*, 9 (2011), 113–35.

79 Regarding this plan, see Ambos, *RCP*, 3 (1997), *passim*.

80 According to this concept, in German called *mittelbare Täterschaft* (§ 25(1) Alt. 2 of the German Criminal Code ('StGB')), the indirect perpetrator ('man in the background' or *Hintermann*) uses the direct perpetrator (the material actor, the executor) as an instrument to commit the crime, usually because the latter has a (mental or any other legal) defect. For more details, see Section C. (4)(b)(i)(3).

81 Comandantes (Argentina), in *Fallos*, 309-II, pp. 1601–2 (emphasis added). Translation from Spanish by Mónica Karayán, Susan Padman Reich, and the author. The original reads:

Los procesados tuvieron el dominio de los hechos porque controlaban la organización que los produjo. Los sucesos juzgados en esta causa no son el producto de la errática y solitaria decisión individual de quienes los ejecutaron sino que constituyeron el modo de lucha que los comandantes en jefe de las fuerzas armadas impartieron a sus hombres. Es decir que los hechos fuero llevados a cabo a través de la compleja gama de factores (hombres, órdenes, lugares, armas, vehículos, alimentos, etc.), que supone toda operación militar.

…

En este contexto, el ejecutor concreto de los hechos pierde relevancia. El dominio de quienes controlan el sistema sobre la consumación de los hechos que han ordenado es total, pues aunque hubiera algún subordinado que se resisteria a cumplir, sería automáticamente reemplazado por otro que sí lo haria, de lo que se deriva que el plan trazado no puede ser frustrado por la voluntad del ejecutor, quien sólo desempeña el rol de mero engranaje de una gigantesca maquinaria.

No se trata aquí del tradicional dominio de voluntad de la autoría mediata. El instrumento de que se vale el hombre de atrás es el sistema mismo que maneja discrecionalmente, sistema que esta integrado por hombres fungibles en función del fin propuesto. El dominio no es entonces sobre una voluntad concreta, sino sobre una '*voluntad indeterminada*', cualquiera sea el ejecutor, el hecho igual se producirá.

El autor directo pierde trascendencia, pues cumple un papel secundario en la producción del hecho. Quien domina el sistema domina la anónima voluntad de todos los hombres que lo integran.

82 cf. Ambos and Grammar, *JJZG*, 4 (2002/2003), 531; in Spanish: *CDJP* (Argentina), 16 (2003), 163=*RP* (Spain), 12 (2003), 27.

83 Santiago Omar Riveros et al., Tribunal Oral en lo Criminal Federal No. 1 de San Martín, No. 2005/2044, pp. 188 ff. (12 August 2009).

84 See Article 15(2) Chilean Código Penal ('los que fuerzan a otro a cometer un delito') and Letelier and Mofitt (Chile), *Fallos del Mes*, año xxxv (November 1993), edición suplementaria.

85 cf. Guzmán, 'Chile', in Ambos, Malarino and Elsner, *Jurisprudencia latinoamericana* (2008), p. 149 with n. 50 (also discussing other case law).

86 cf. Aponte, 'Colombia', in Ambos, Malarino, and Elsner, *Jurisprudencia latinoamericana* (2008), pp. 200 ff.

87 See, for example, on the important case relating to the *Machuca* massacre, Corte Suprema de Justicia, Sala Penal, casación, No. 23825 (7 March 2007), Magistrado Ponente Javier Zapata Ortiz. On this case Farfán Molina, *Masacre de Machuca* (2006); see also Aponte, 'Colombia', in Ambos, Malarino, and Elsner, *Jurisprudencia latinoamericana* (2008), pp. 201–2. Similarly, the courts of Uruguay have applied co-perpetration as an adequate mode of participation in their post-dictatorial human rights trials (see González and Palermo, 'Uruguay', in Ambos, Malarino, and Elsner, *Jurisprudencia latinoamericana* (2008), pp. 312 ff. (especially 319 with n. 25)).

88 Salvador Arana Sus, Corte Suprema de Justicia, única instancia, No. 32672, Decision (3 December 2009).

89 Álvaro Alfonso García Romero, Corte Suprema de Justicia, única instancia, No. 32805, Decision (23 February 2010).

90 cf. Álvaro Alfonso García Romero, No. 32805, p. 78 ('Ciertamente, cuando se está ante el fenómeno delincuencial derivado de estructuras o aparatos de poder organizados, los delitos ejecutados son imputables tanto a sus dirigentes—gestores, patrocinadores, comandantes—a título de autores mediatos, a sus coordinadores en cuanto dominan la función encargada—comandantes, jefes de grupo—a título de coautores; y a los directos ejecutores o subordinados—soldados, tropa, patrulleros, guerrilleros o milicianos—pues toda la cadena actúa con verdadero conocimiento y dominio del hecho y mal podrían ser amparados algunos de ellos con una posición conceptual que conlleve la impunidad').

91 cf. Álvaro Alfonso García Romero, No. 32805, pp. 74–5.

92 cf. Álvaro Alfonso García Romero, No. 32805, p. 77 (referring to the direct perpetrator as '*instrumento responsable*').

[93] Abimael Guzmán Reinoso et al., Sala Penal Nacional, Decision, expediente acumulado, No. 560–03 (13 October 2006). While the Court considered that the direct perpetrators were fungible (replaceable) instruments, it based Guzmán's domination on their predisposition to execute his orders without further ado. On this case, see Meini, *MRCDDH*, 1 (2007), 49; Caro, 'Perú', in Ambos, Malarino, and Elsner, *Jurisprudencia latinoamericana* (2008), pp. 299 ff. (preferring co-perpetration ('*co-autoría*') over indirect perpetration as the applicable mode of participation, p. 302); id, *ICLR*, 10 (2010), 598–9.

[94] Abimael Guzmán Reinoso et al., Corte Suprema de Justicia (Supreme Court), Segunda Sala Penal Transitoria, No. 5385-2006 (14 December 2007).

[95] Fujimori, Corte Suprema de Justicia de la República del Perú, Sala Penal Especial, exp. No. AV 19–2001, decision (7 April 2009) (Fujimori Judgment); confirmed by the 'Primera Sala Penal Transitoria', exp. No. AV19–2001 (30 December 2009). For an analysis, see Ambos, *JICJ*, 9 (2011), 137 ff.; for various papers, see Ambos and Meini, *Autoría* (2010): id, *RDPC*, 3 (2001), 229–72.

[96] cf. Fujimori Judgment, No. AV 19–2001, paras. 710–17. For more on the legal and political background, see Ambos, *ZIS*, 4 (2009), 552 ff.; Caro Coria, *ZIS*, 4 (2009), 590.

[97] van der Wilt, *ZIS*, 4 (2009), 615.

[98] Fujimori Judgment, No. AV 19–2001, paras. 729 ff.

[99] Ibid, paras. 733 ff.

[100] Ibid, paras. 737 ff.

[101] Ibid, paras. 740 ff.

[102] Ibid, para. 745.

[103] German Federal Constitutional Court (BVerfG), No. 2 BvR 1851/94, 2 BvR 1853/94, 2 BvR 1875/94, 2 BvR 1852/94, in *BVerfGE* 95, pp. 130 ff. (24 October 1996); BGH, No. 5 StR 370/92, in *BGHSt* 39, p. 23 (3 November 1992); BGH, No. 5 StR 111/94, in BGHSt 41, p. 109 (20 March 1995); BGH, No. 5 StR 494/95, in *BGHSt* 42, p. 70 (4 March 1996); BGH, No. 5 StR 322/95, in *NStZ-RR*, 17 (1996), 323 (24 April 1996); BGH, No. 5 StR 731/95, in *BGHR GG*, Art 103 Abs 2, Rückwirkung 5 (12 December 1996). In fact, the jurisprudence declared null and void § 27 of the East German Border Law which allowed for the (deadly) shooting of refugees under certain circumstances and as last resort. It also invoked the famous rule of *Radbruch* according to which 'the positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless the conflict between statute and justice reaches such an intolerable degree that the statute, as "flawed law" ("*unrichtiges Recht*"), must yield to justice' (originally published in *SJZ*, 1 (1946), 107; for an English translation, see 'Statutory Lawlessness and Supra-Statutory Law', *OxfordJLS*, 26 (2006), 7). For a profound critique, see Vest, *Gerechtigkeit* (2006); for more details and references, see Ambos, *Internationales Strafrecht* (2011), § 10 mn. 86–7.

[104] GDR, BGH, 5 StR 98/94, in *BGHSt* 40, pp. 237–8, translation by the author with Susan Padman Reich (emphasis added); the original reads:

'Die Angeklagten waren als Mitglieder des NVR Angehörige eines Gremiums, dessen Entscheidungen zwingende Voraussetzungen für die grundlegenden Befehle waren, auf denen das Grenzregime … beruhte. Sie wußten, daß die auf den Beschlüssen des NVR beruhenden Befehle ausgeführt wurden. Die Meldungen über die Opfer der Grenzverminung und des Schießbefehls lagen ihnen vor. Die Ausführenden der Handlungen, die unmittelbar zur Tötung führten, haben als Untergebene in einer militärischen Hierarchie gehandelt, in der ihre Rolle festgelegt war. Die Angeklagten hatten auch nicht eine gegenüber Honecker ganz untergeordnete Rolle.'

This view has been confirmed by the subsequent jurisprudence: BGH, No. 5 StR 632/98, in *BGHSt* 45, pp. 296 ff. (November 8, 1999); BGH, No. 5 StR 281/01, in *BGHSt* 48, p. 91 (November 6, 2002).

105 BGH, 5 StR 494/95, in *NJW*, 49 (1996), 2043.

106 See Section C. (4)(b)(i)(3).

107 Quoted according to Goldstein, *My Lai Massacre* (1976), p. 467.

108 On *dolus eventualis* and recklessness, see Fletcher, *Rethinking* (2000), para. 6.5.2.; on *dolus eventualis*, see Kindhäuser, *Strafrecht* (2011), § 14 mn. 11 ff.; on recklessness, see American Law Institute, MPC (1985), § 2.02(2)(c).

109 Barbie, Cour de Cassation, in JCP 1988 II No. 21149, in English in *ILR*, 100 (1995), 330–7, para. 42 (3 June 1988); Touvier, Cour d'Appel de Paris, in *ILR*, 100 (1995), 349 ff. (13 April 1992).

110 Touvier, Cour de Cassation, in *ILR*, 100 (1995), 360 ff. (27 November 1992).

111 Finta (Canada), in *ILR*, 98 (1994), 595: '[K]nowledge of the circumstances or facts which bring an act within the definition of a war crime or crime against humanity constitutes the mental component which must coexist with the prohibited acts to establish culpability for those acts'.

112 Calley, Court of Military Review, in *CMR*, 46 (1972/73), 1178 (16 February 1973).

113 See <http://www.icty.org/> accessed 4 June 2012.

114 See <http://www.unictr.org/> accessed 4 June 2012.

115 *Prosecutor v Tadić*, No. IT-94-1-T, Trial Chamber Opinion and Judgment, paras. 663–9 (7 May 1997).

116 Ambos, 'International Criminal Law', in Stahn and van den Herik, *Future Perspectives* (2010), pp. 165–8.

117 *Prosecutor v Tadić*, No. IT-94-1-A, Appeals Chamber Judgment, para. 188 (15 July 1999). Conc. *Prosecutor v Kordić and Čerkez*, No. IT-95-14/2-T, Trial Chamber Judgment, para. 376 (26 February 2001): 'direct personal or physical participation'; *Prosecutor v Krnojelac*, No. IT-97-25-T, Trial Chamber Judgment, para. 73 (15 March 2002); *Prosecutor v Vasiljević*, No. IT-98-32-T, Trial Chamber Judgment, para. 63 (29 November 2002); *Prosecutor v Naletilić and Martinović,* No. IT-98-34-T, Trial Chamber Judgment, para. 62 (31 March 2003). See also *Prosecutor v Blagojević and Jokić*, No. IT-02-60-T, Trial Chamber Judgment, para. 695 (17 January 2005); *Prosecutor v Muvunyi*, No. IT-00-55A-T, Trial Chamber Judgment, para. 463 (12 September 2006); *Prosecutor v Mrkšić et al.*, No. IT-95-13/1-T, Trial Chamber Judgment, para. 542 (27 September 2007).

118 *Prosecutor v Delalić et al.*, No. IT-96-21-A, Appeals Chamber Judgment, paras. 342–3, 346 (20 February 2001).

119 *Prosecutor v Stakić*, No. IT-97-24-T, Trial Chamber Judgment, paras. 438–9 (31 July 2003). With different wording but identical in substance, *Prosecutor v Semanza*, No. ICTR-97-20-T, Trial Chamber Judgment, para. 383 (15 May 2003); also *Prosecutor v Kayishema and Ruzindana*, No. ICTR-95-1-A, Appeals Chamber Judgment, para. 187 (1 June 2001); *Prosecutor v Gacumbitsi*, No. ICTR-2001-64-T, Trial Chamber Judgment, para. 285 (17 June 2004); *Prosecutor v Muvunyi*, No. IT-00-55A-T, para. 763; *Prosecutor v Renzaho*, No. ICTR-97-31-T, Trial Chamber Judgment, para. 739 (14 July 2009) ('primarily, the physical perpetration'); *Prosecutor v Kanyarukiga*, No. ICTR-2002-78-T, Trial Chamber Judgment, para. 622 (1 November 2010). See also Olásolo, *Criminal Responsibility* (2009),

p. 69 (‘physically carries out’); Badar, ‘Participation’, in Schabas and Bernaz, *Routledge Handbook* (2011), pp. 247–69 (for a detailed analysis of the case law).

120 *Prosecutor v Gacumbitsi*, No. IT-01-64-A, Appeals Chamber Judgment, para. 60 (7 July 2006); confirmed in *Prosecutor v Seromba*, No. ICTR-2001-66-A, Appeals Chamber Judgment, para 161 (12 March 2008). Crit. regarding the Seromba Judgment Zorzi Giustiniani, *JICJ*, 6 (2008), 798 ff., who understands the extension of the imputation as ‘inspired by the need to impose an exemplary punishment on Father Seromba’.

121 *Prosecutor v Munyakazi*, No. ICTR-97-36A-T, Trial Chamber Judgment, para. 430 (5 July 2010) (‘Committing is not limited to direct and physical perpetration’); *Prosecutor v Lukić and Lukić*, No. IT-98-32/1-T, Trial Chamber Judgment, para. 899 (20 July 2009); *Prosecutor v Ndindabahizi*, No. ICTR-01-71-A, Appeals Chamber Judgment, para. 123 (16 January 2007); *Prosecutor v Nyiramasuhuko et al.*, No. ICTR-98-42-T, Trial Judgment, para. 5594 (24 June 2011); *Prosecutor v Kalimanzira*, No. ICTR-05-88-A, Appeals Chamber Judgment, para. 219 (20 October 2010); *Prosecutor v Karemera and Ngirumpatse*, No. ICTR-98-44-T, Judgment and Sentence, para. 1432 (2 February 2012); *Prosecutor v Munyakazi*, No. ICTR-97-36A-A, Appeals Chamber Judgment, para. 135 (28 September 2011).

122 *Tadić*, No. IT-94-1-A, para. 188. See also Gless, *Internationales Strafrecht* (2011), pp. 230–1.

123 *Tadić*, No. IT-94-1-A, para. 191; cf. *Prosecutor v Krstić*, No. IT-98-33-T, Trial Chamber Judgment, paras. 601 ff. (2 August 2001); *Prosecutor v Kvočka et al.*, No. IT-98-30/1-T, Trial Chamber Judgment, paras. 244 ff. (2 November 2001); *Prosecutor v Krnojelac*, No. IT-97-25-A, Appeals Chamber Judgment, paras. 64 ff. (17 September 2003); *Prosecutor v Vasiljević*, No. IT-98-32-A, Appeals Chamber Judgment, paras. 94 ff. (25 February 2004); *Prosecutor v Brđanin*, No. IT-99-36-T, Trial Chamber Judgment, paras. 258 ff., 340 ff. (1 September 2004); *Prosecutor v Kvočka et al.*, No. IT-98-30/1-A, Appeals Chamber Judgment, paras. 77 ff. (28 February 2009); *Prosecutor v Kayishema and Ruzindana*, No. ICTR-95–1-T, Trial Chamber Judgment, para. 203 (21 May 1999); *Prosecutor v Stakić*, No. IT-97-24-A, Appeals Chamber Judgment, paras. 64 ff. (22 March 2006); *Prosecutor v Mpambara*, No. IT-01-65-T, Trial Chamber Judgment, para. 13 (11 September 2006); *Prosecutor v Krajišnik*, No. IT-00-39 and 40, Trial Chamber Judgment, paras. 870 ff. (27 September 2006); *Prosecutor v Brđanin*, No. IT-99-36-A, Appeals Chamber Judgment, paras. 363 ff. (3 April 2007); *Prosecutor v Šainović*, No. IT-95-11-T, Trial Chamber Judgment, paras. 435 ff. (12 June 2007); *Mrkšić et al.*, No. IT-95-13/1-T, paras. 543 ff.; *Prosecutor v Šešelj*, No. IT-03-67-I, Indictment (15 January 2003); *Prosecutor v Domingos de Deus*, No. SPS C 2 a/2004, Judgment, p. 13 (12 April 2005); *Prosecutor v Perreira*, No. SPS C 34/2005, Judgment, p. 19 ff. (27 April 2005); *Prosecutor v Cardoso*, No. SPS C 04/2001, Judgment, paras. 369 ff. (5 April 2003); recently *Prosecutor v Krajišnik*, No. IT-00-39-A, Appeals Chamber Judgment, para. 655 (17 March 2009); *Prosecutor v Popović et al.*, No. IT-05-88-T, Trial Chamber Judgment, para. 1021 (10 June 2010); finding against JCE because of a mistake in the indictment *Prosecutor v Brima, Kamara and Kanu*, No. SCS L-04.16-T, Trial Chamber Judgment, para. 1639 (20 July 2007). See Olásolo, ‘Current Trends on Modes of Liability’, in Stahn and van den Herik, *Future Perspectives* (2010), pp. 534–5. For a comparative analysis see Chouliaras, ‘Organizational Parameter’, in Stahn and van den Herik, *Future Perspectives* (2010), pp. 545 ff.

124 *Tadić*, No. IT-94-1-A, para. 220. As evidence the Chamber offers decisions post-WWII, the UN Terrorism Bombing Conventions as well as Article 25(3)(d). For further references, see *Kvočka et al.*, No. IT-98-30/1-T, para. 293 ff.; *Vasiljević*, No. IT-98-32-A, para. 95; *Šainović*, No. IT-95-11-T, para. 126; *Krajišnik*, No. IT-00-39, para. 659.

125 *Tadić*, No. IT-94-1-A, para. 224.

[126] *Tadić*, No. IT-94-1-A, para. 227.

[127] Similarly Cassese, *ICL* (2008), p. 189 without, however, explicitly mentioning the common plan.

[128] *Prosecutor v Furundžija*, No. IT-95-17/1-A, Appeals Chamber Judgment, paras. 117 ff. (21 July 2000).

[129] *Furundžija*, No. IT-95-17/1-A, para. 120.

[130] *Delalić et al.*, No. IT-96-21-A, para. 366. In the same vein, *Stakić*, No. IT-97-24-T, para. 440 ff.; *Prosecutor v Šainović et al.*, No. IT-05-87-T, Trial Chamber Judgment, para. 108 (2 February 2009); *Renzaho*, No. ICTR-97-31-T, para. 741.

[131] *Stakić*, No. IT-97-24-A, para. 62. For a critical analysis of this judgment, see Badar, *ICLR*, 6 (2006), 143 ff.; Olásolo, *Criminal Responsibility* (2009), pp. 307–16 and Boas, Bischoff, and Reid, *Forms of Responsibility* (2007), pp. 105–9 and 114–15.

[132] While most civil law jurisdictions recognize co-perpetration as a separate mode of participation (as ‘Mittäterschaft’ (§ 25(2) German StGB; also Article 18 § 1 Polish CC and Article 32 Russian CC), ‘co-autoria’ (Article 28 b) Spanish CP, Article 26 Portuguese CP) or ‘coaction’/’coauteur’ (implicitly Articles 121–4 French CP; see also Leroy, *Droit pénal* (2010), p. 240; Mayaud, *Droit pénal général* (2010), p. 396; Bouloc, *Droit pénal* (2011), p. 273)), common law jurisdictions speak, at best, of ‘joint commission’ (§ 26(1)(b) *English Draft Criminal Code Bill*, Law Commission (1989); American Law Institute, *Model Penal Code I* (1985), pp. 298–9 speaks of ‘joint criminality’) but either consider the co-perpetrator (often as part of a ‘common design’ or ‘common purpose’) as an accomplice (see, e.g., Fletcher, *Rethinking* (1978), p. 637; Herlitz, *Parties* (1992), pp. 129 ff. (131, 133–3); Ormerod, *Smith and Hogan’s Criminal Law* (2011), pp. 213–15; Allen, *Criminal Law* (2011), p. 224) or as an independent perpetrator in the sense of a parallel perpetratorship or of ‘multiple independent principals’ (‘Nebentäterschaft’, for the later translation, see Bohlander, *Principles* (2009), pp. 160–1; for the English law, see Ormerod, *Smith and Hogan’s Criminal Law* (2011), p. 215; Ashworth, *Principles* (2009), pp. 404–5; Allen, *Criminal Law* (2011), p. 224; Card , *Criminal Law* (2010), p. 766; Simester et al., *Criminal Law* (2010), p. 207). This later classification corresponds to the French ‘coauteur’ who, in the sense of a strict formal theory fulfilling all the definitional elements of the *actus reus* on his own, is also understood as a *Nebentäter* (cf. Leroy, *Droit pénal* (2010), pp. 242–3; Bouloc, *Droit pénal* (2011), p. 274). From a comparative perspective, see Rehaag, *Prinzipien* (2009); Sieber and Cornils, *Nationales Strafrecht*, iv (2010), pp. 3–5, 37–8, 57–8, 61–2, 80, 111–24, 150–1, 176, 209–12, 236–42, 256–7, 291–3, 328–30; Weisser, *Täterschaft* (2011), pp. 328–66, 472–83 (demonstrating that in Austria, England, France, and Germany, Italy being the exception, co-perpetration is recognized as a separate form of participation with the core requirement of a common decision and an, at least partial, common execution of the act).

[133] Crit. previously Ambos, *JICJ*, 5 (2007), 170 with n. 79.

[134] Confirmed, inter alia, by *Krajišnik*, No. IT-00-39-T, para. 655; *Popović et al.*, No. IT-05-88-T, para. 1021; *Prosecutor v Gotovina, Čermak and Markač*, No. IT-06-90-T, Trial Chamber Judgment, paras. 1950–2 (15 April 2011); *Prosecutor v Đorđević*, No. IT-05-87/1-T, Trial Chamber Judgment, paras. 1860–5 (23 February 2011). For a detailed presentation of the history, development and establishment of the JCE doctrine, see Haan, *Joint Criminal Enterprise* (2008), pp. 44 ff., 73 ff., and 96 ff., respectively; Barthe, *JCE* (2009), pp. 27 ff.; Vest, *Völkerrechtsverbrecher* (2011), pp. 278 ff.; Fletcher, *JICJ*, 9 (2011), 186 ff. For a comparative analysis between JCE and similar doctrines in Common Law and Civil Law countries, see Vest, *Völkerrechtsverbrecher* (2011), pp. 105 ff. For a comparative analysis of the ICTY and ICTR case law on this issue with respect to previous developments, see Chouliaras, ‘Organizational Parameter’, in Stahn and van den Herik, *Future Perspectives*

(2010), pp. 561 ff.; Vest, *Völkerrechtsverbrecher* (2011), pp. 288 ff. Critical on the concept of JCE: Vest, *Völkerrechtsverbrecher* (2011), pp. 304 ff., 323 ff., 332 ff.; Boas, 'Individual Criminal Responsibility', in Stahn and van den Herik, *Future Perspectives* (2010), pp. 510 ff. ; Olásolo, 'Current Trends', in ibid, pp. 526 ff.; Ambos, *JICJ*, 5 (2007), 167–76. See also Gless, *Internationales Strafrecht* (2011), pp. 232–3 (on the elements of JCE), 233–4 (for the case law on the respective forms of JCE).

135 *Tadić*, No. IT-94-1-A, paras. 196–201; see also *Delalić et al.*, No. IT-96-21-A, para. 366; *Stakić*, No. IT-97-24-T, para. 440 ff.; *Šainović et al.*, No. IT-05-87-T, paras. 108–9; *Renzaho*, No. ICTR-97-31-T, para. 741. On JCE I in detail, see Haan, *Joint Criminal Enterprise* (2008), pp. 248 ff.; on the ICTY/ICTR case law, see Barthe, *JCE* (2009), pp. 76 ff.

136 *Kvočka et al.*, No. IT-98-30/1-A: 'A participant in a joint criminal enterprise need not physically participate in any element of any crime' (para. 97), or 'make a substantial contribution to the joint criminal enterprise' (para. 99), '[n]or is the participant in a joint criminal enterprise required to be physically present' (para. 112); *Krajišnik*, No. IT-00-39-A, paras. 675, 695 with regard to political speeches ('The Trial Chamber held that a contribution of the accused to the JCE need not, as a matter of law, be substantial.' (para. 675) and 'the contribution to a JCE need not, in and of itself, be criminal' (para. 695)); comp. Haan, *ICLR*, 5 (2005), 183 ff.; Zahar and Sluiter, *ICL* (2008), pp. 236, 240; Boas, Bischoff, and Reid, *Forms of Responsibility* (2007), pp. 44–51.

137 *Tadić*, No. IT-94-1-A, paras. 202–3. On JCE II see Haan, *Joint Criminal Enterprise* (2008), pp. 274 ff.; see also on the ICTY/ICTR case law Barthe, *JCE* (2009), pp. 89 ff.

138 *Tadić*, No. IT-94-1-A, paras. 204–19; *Šainović et al.*, No. IT-05-87-T, para. 96; *Popović et al.*, No. IT-05-88-T, para. 1030 ff.; crit. Eser, 'Individual Criminal Responsiblity', in Cassese, Gaeta, and Jones, *Rome Statute* (2002), pp. 788, 792 with n. 104; Ambos, *CLF*, 20 (2009), 369–74; Barthe, *JCE* (2009), p. 240; Satzger, *Internationales Strafrecht* (2011), § 15 mn. 58;Vest, *Völkerrechtsverbrecher* (2011), pp. 332, 351; summarizing the critique Stewart, *LJIL*, 25 (2012), 171–8; see also Cryer, 'General Principles', in Cryer et al., *Introduction* (2010), pp. 369 ff.; in favour, see Cassese, *ICL* (2008), pp. 199–200; Cassese, Gaeta, and Jones, *CLF*, 20 (2009), 326–9; Provost, *CLF*, 20 (2009), 332–3 (admitting criticism at 346); Haan, *Joint Criminal Enterprise* (2008), pp. 290 ff.; on the ICTY/ICTR case law, see Barthe, *JCE* (2009), pp. 96 ff.; Boas, Bischoff, and Reid, *Forms of Responsibility* (2007), pp. 70–83.

139 Here, as in other parts, the terminology is imprecise because the Chamber seems to equate 'participants' with 'members of a group', see *Tadić*, No. IT-94-1-A, para. 220: ' … the *participants* must have had in mind the intent … to ill-treat prisoners of war … and one or some *members of the group* must have actually killed them'; also *Šainović et al.*, No. IT-05-87-T, para. 111. For more examples, see Haan, *ICLR*, 5 (2005), 191 ff.

140 See on JCE as co-perpetration *Šainović et al.*, No. IT-05-87-T, para. 95. Judge Schomburg, in *Prosecutor v Šainović*, No. IT-95-11-A, Appeals Chamber Judgment, Dissenting Opinion of Judge Schomburg, para. 6 (8 October 2008), criticizes this lack of clarity and, referring to the decisions of the ICC Pre-Trial Chamber I, argues that there should be only one concept of commission in international criminal law ('Suffice it to say that it is not helpful at all, at this stage of the development of international criminal law, that there now exist two competing concepts of commission as a mode of liability. … The unambiguous language of both decisions rendered by Pre-Trial Chamber I of the International Criminal Court endorses the concept of co-perpetration when interpreting the word "to commit" under Article 25(3)(a) of the ICC Statute. For this mode of liability, there can be one definition in international criminal law.')

141 See Section C. (4)(b)(i)(4) with nn. 495 ff.

[142] *Tadić*, No. IT-94-1-A, paras. 188 and 190. For commission in the sense of Article 7(1), see also *Krnojelac*, No. IT-97-25-A, paras. 64 ff.; *Vasiljević*, No. IT-98-32-A, para. 95; *Prosecutor v Blaškić*, No. IT-95-14-A, Appeals Chamber Judgment, para. 33 (29 July 2004); *Prosecutor v Ojdanić*, No. IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction—JCE, para. 20 (21 May 2003); *Stakić*, No. IT-97-24-T, paras. 432, 438; *Krajišnik*, No. IT-00-39-T, paras. 655, 662; *Šainović et al.*, No. IT-05-87-T, para. 95; *Popović et al.*, No. IT-05-88-T, paras. 1021 ff.; *Renzaho*, No. ICTR-97-31-T, para. 739; *Kanyarukiga*, No. ICTR-2002-78-T, paras. 622 ff.; *Prosecutor v Rukundo*, No. ICTR-2001-70-T, Trial Chamber Judgment, para. 22 (27 February 2009), with the explanatory remark that this 'commission' is different to physical perpetration ('When the accused is charged with 'committing' pursuant to Article 6(1) of the Statute, the indictment must specify whether the term is to be understood as physical commission, and/or as participation in a JCE.'); conc. with this extensive interpretation of Article 7(1), see Cassese, *ICL* (2008), pp. 158–9; crit. Ohlin, *JICJ*, 5 (2007), 71–2. See for the development of the JCE doctrine and the case law of the ad hoc tribunals also Darcy, *Collective Responsibility* (2007), pp. 226 ff.; Vest, *Völkerrechtsverbrecher* (2011), pp. 288 ff.

[143] See for all *Prosecutor v Simba*, No. ICTR-01-76-T, Trial Chamber Judgment, para. 387 (13 December 2005) with further references; more detailed *Brđanin*, No. IT-99-36-A, para. 418; *Šainović et al.*, No. IT-05-87-T, para. 97, in detail, regarding the requirements paras. 98 ff.; *Krajišnik*, No. IT-00-39-T, para. 662; *Popović et al.*, No. IT-05-88-T, paras. 1023 ff.; *Renzaho*, No. ICTR-97-31-T, paras. 739 ff.; *Munyakazi*, No. ICTR-97-36A-T, para. 438. However 'joint action' is required in the sense of coordination and cooperation (*Prosecutor v Krajišnik*, No. IT-00-39 and 40-T, Trial Chamber Judgment, paras. 884, 1120; in support Zahar and Sluiter, *ICL* (2008), pp. 225 ff.).

[144] *Brđanin*, No. IT-99-36-A, para. 430. See also *Mrkšić et al.*, No. IT-95-13/1-T, para. 545.

[145] *Mrkšić et al.*, No. IT-95-13/1-T, para. 545; *Vasiljević*, No. IT-98-32-A, para. 100; *Gotovina, Čermak and Markač*, No. IT-06-90-T, para. 1953; *Đorđević*, No. IT-05-87/1-T, para. 1861.

[146] In a similar vein, see *Prosecutor v Nchamihigo*, No. ICTR-01-63-T, Trial Chamber Judgment, para. 328 (12 November 2008) (requiring that the form of participation in the JCE must be specified in the indictment distinguishing between JCE I, II, or III, and that the accused's participation in an alleged crime must be clearly indicated with regard to specific events, since it is not sufficient to mention JCE 'only in general terms'). See also *Prosecutor v Bikindi*, No. ICTR-01-72-T, Trial Chamber Judgment, paras. 398 ff. (2 December 2008).

[147] *Gotovina, Čermak and Markač*, No. IT-06-90-T, para. 1953; *Đorđević,* No. IT-05-87/1-T, para. 1863. Crit. about this requirement Gustafson, *JICJ*, 5 (2007), 141; in favour Cassese, *JICJ*, 5 (2007), 109; Hamdorf, *JICJ*, 5 (2007), 225; Vest, *Völkerrechtsverbrecher* (2011), pp. 328–9 (comparable to direct perpetration, risk-increasing with regard to the criminal enterprise).

[148] See *Brđanin*, No. IT-99-36-A, para. 418 ('In cases where the principal perpetrator shares that common criminal purpose of the JCE or, in other words, is a member of the JCE, and commits a crime in furtherance of the JCE, it is superfluous to require an additional agreement between that person and the accused to commit that particular crime'); conc. *Gotovina, Čermak and Markač*, No. IT-06-90-T, para. 1953. In the same vein, see Gustafson, *JICJ*, 5 (2007), 147 ff. (criticizing the *Brđanin* TC); Vest, *Völkerrechtsverbrecher* (2011), pp. 310–12; doubtful with regard to the consistency of the Chamber's broad approach with the *nullum crimen* principle, Cassese, *ICL* (2008), pp. 194–5; van Sliedregt, *JICJ*, 5 (2007), 201; id, *Criminal Responsibility* (2012), p. 140. In any case, there seems to be consensus as to the requirement of a common purpose or plan as the basis of attribution, while an additional agreement to commit specific crimes is not necessary (see also van Sliedregt, *JICJ*, 5 (2007), 200). See also *Krajišnik*, No. IT-00-39 and 40-T, paras. 884, 1120, requiring

'joint action' in the sense of interaction or coordination; conc. Zahar and Sluiter, *ICL* (2008), pp. 255–6. In addition, it is worthwhile to recall that the criminal means pursued by the members of the JCE can evolve, and therefore the 'JCE … embrace expanded criminal means, as long as the evidence shows that the JCE members agreed on this expansion' (*Krajišnik*, No. IT-00-39, para. 163).

149 *Brđanin*, No. IT-99-36-A, paras. 410 ff., 430; *Đorđević*, No. IT-05-87/1-T, paras. 1866, 1868; for a detailed commentary on this judgment, see Farhang, *LJIL*, 23 (2010), 137. In the same vein, see *Martić*, No. IT-95-11-T, para. 438; this was confirmed also in *Šainović*, No. IT-95-11-A, paras. 170–3. See also *Krajišnik*, No. IT-00-39, para. 226. For the ICTR, following the case law on 'external' perpetrators, see *Prosecutor v Zigiranyirazo*, No. ICTR-01-7-T, Trial Chamber Judgment, para. 384 (18 December 2008). See also Gustafson, *JICJ*, 5 (2007), 147 ff., 154 ff.; Vest, *Völkerrechtsverbrecher* (2011), pp. 312–14 (focusing on the sufficient nexus between the JCE and the direct perpetrator(s)).

150 For this reason it is puzzling that the Prosecutor refers to the direct perpetrators as 'tools', who are used by the members of the JCE (cf. *Brđanin*, No. IT-99-36-A, para. 412).

151 *Prosecutor v Milutinović et al.*, No. IT-05-87-T, Trial Chamber Judgment, para. 103 (26 February 2009).

152 *Krajišnik*, No. IT-00-39-A, paras. 695, 696.

153 *Prosecutor v Haradinaj et al.*, No. IT-04-84-T, Trial Chamber Judgment, para. 476 (3 April 2008); *Munyakazi*, No. ICTR-97-36A-A, para. 160; *Munyakazi,* No. ICTR-97-36A-T, para. 439.

154 *Šainović et al.*, No. IT-05-87-T, para. 109 ('not only … the general intent to commit the underlying offence … but also … that he shared with the other joint criminal enterprise members the specific intent required of the crime or underlying offence'). See also *Kvočka et al.*, No. IT-98-30/1-A, para. 110; and with regard to the systematic form of JCE, *Krnojelac*, No. IT-97-25-A, para. 111.

155 *Đorđević*, No. IT-05-87/1-T, para. 1864; Tadić, No. IT-94-1-A, paras. 202–3, 227–8.

156 Critical on the mental requirements for JCE III Satzger, *Internationales Strafrecht* (2011), § 15 mn. 58.

157 cf. *Prosecutor v Ntakirutimana and Ntakirutimana*, Nos. ICTR-96-10-A and ICTR-96-17-A, Appeals Chamber Judgment, para. 467 (13 December 2004) and *Mrkšić et al.*, No. IT-95-13/1-T, para. 546 with further references; see also *Šainović,* No. IT-95-11-A, para. 83; *Šainović et al.*, No. IT-05-87-T, para. 96; *Gotovina, Čermak and Markač*, No. IT-06-90-T, paras. 1952–3; *Đorđević*, No. IT-05-87/1-T, paras. 1865, 1867. See also Haan, *Joint Criminal Enterprise* (2008), p. 297, who only accepts this mode of liability under the condition that the *mens rea* fulfils the requirements of '*dolus eventualis*/adverted recklessness'.

158 *Prosecutor v Karadžić*, No. IT-95-5/18-AR72.4, Appeals Chamber Decision on Prosecution's Motion Appealing Trial Chamber's Decision on JCE III Foreseeability, para. 18 (25 June 2009).

159 *Prosecutor v Brđanin*, No. IT-99-36-A, Decision on Interlocutory Appeal, para. 6 (19 March 2004): 'to establish that it was reasonably foreseeable to the accused that an act specified in Article 4(2) [ICTYS] would be committed and that it would be committed with genocidal intent.'

160 See Section C. (4)(b)(viii).

[161] See, for example, *Furundžija*, No. IT-95-17/1-A, paras. 117 ff.; *Krnojelac*, No. IT-97-25-A, paras. 29 ff.; *Vasiljević*, No. IT-98-32-A, paras. 95 ff.; *Stakić*, No. IT-97-24-A, paras. 64, 65; *Šainović*, No. IT-95-11-T, paras. 435 ff.; *Krstić*, No. IT-98-33-T, paras. 601 ff.; *Prosecutor v Krstić*, No. IT-98–33-A, Appeals Chamber Judgment, para. 237 (19 April 2004); *Kvočka et al.*, No. IT-98-30/1-T, paras. 244 ff.; confirmed by the AC in *Kvočka et al.*, No. IT-98-30/1-A, paras. 77 ff.; *Mpambara*, No. IT-01-65-T, para. 13; *Krajišnik*, No. IT-00-39 and 40, para. 877; *Brđanin*, No. IT-99-36-A, paras. 363 ff.; *Mrkšić et al.*, No. IT-95-13/1-T, paras. 543 ff.; *Gotovina, Čermak and Markač*, No. IT-06-90-T, paras. 1950 ff. For the ICTR, see *Kayishema and Ruzindana*, No. ICTR-95-1-A, para. 203; *Ntakirutimana and Ntakirutimana*, No. ICTR-96-10-A and No. ICTR-96-17-A, paras. 462 ff.; *Prosecutor v Simba*, No. ICTR-01-76-T, Trial Chamber Judgment, paras. 386–8 (13 December 2005); confirmed in *Prosecutor v Simba*, No. ICTR-01-76-A, Appeals Chamber Judgment, paras. 250 ff. (27 November 2007).

[162] For a more thorough analysis, see Ambos, *JICJ*, 5 (2007), 162 ff. See also Cryer, 'General Principles', in Cryer et al., *Introduction* (2010), pp. 371–2.

[163] *Kordić and Čerkez*, No. IT-95-14/2-T, paras. 395 ff.

[164] *Krstić*, No. IT-98-33-T, para. 611.

[165] Ibid, paras. 608, 610, 612, 653.

[166] Ibid, paras. 621 ff., 636.

[167] Ibid, para. 635.

[168] Ibid, para. 642.

[169] *Kvočka et al.*, No. IT-98-30/1-T, paras. 244 ff.; *Kvočka et al.*, No. IT-98-30/1-A, paras. 77 ff.

[170] *Kvočka et al.*, No. IT-98-30/1-A, para. 86.

[171] Ibid, para. 97; also *Mrkšić et al.*, No. IT-95-13/1-T, para. 545.

[172] *Krnojelac*, No. IT-97-25-A, para. 78.

[173] Ibid, para. 81.

[174] *Vasiljević*, No. IT-98-32-T, paras. 63 ff.

[175] *Ojdanić,* No. IT-99-37-AR72, para. 20.

[176] *Milutinović et al.*, No. IT-05-87-T, para. 103.

[177] *Stakić*, No. IT-97-24-T, para. 435.

[178] Ibid, para. 438.

[179] See Section C. (4)(b)(i)(2) and (3), especially n. 385.

[180] See *Ntakirutimana and Ntakirutimana*, No. ICTR-96-10-A and No. ICTR-96-17-A, paras. 462 ff. summarizing and relying on the ICTY case law, and *Blagojević and Jokić*, No. IT-02-60-T, paras. 695 ff.

[181] *Brđanin*, No. IT-99-36-A, para. 430; *Mrkšić et al.*, No. IT-95-13/1-T, paras. 543 ff.; *Šainović*, No. IT-95-11-T, para. 440.

[182] *Prosecutor v Akayesu*, No. ICTR-96-4-T, para. 482 (2 October 1998) ('prompting another to commit an offence'); *Prosecutor v Ndindabahizi*, No. ICTR-01-71-T, Trial Chamber Judgment, para. 456 (15 July 2004) ('urging or encouraging'); *Prosecutor v Karera*, No. ICTR-01-74-A, Appeals Chamber Judgment, para. 317 (2 February 2009); *Prosecutor v Nchamihigo*, No. ICTR-01-63-A, Appeals Chamber Judgment, para. 188 (18 March 2010); *Kanyarukiga*, No. ICTR-2002-78-T, para. 619; *Prosecutor v Blaškić*, No. IT-95-14-T, Trial Chamber Judgment, para. 280 (3 March 2000); *Krstić*, No. IT-98-33-T, para. 601; *Kvočka et al.*, No. IT-98-30/1-T, para. 243; *Prosecutor v Limaj et al.*, No. IT-03-66-A, Appeals Chamber

Judgment, paras. 514, 270 (27 September 2007); *Naletilić and Martinović*, No. IT-98-34-T, para. 60. The forms of encouragement will be treated in more detail in connection with Article 25(3) ICC Statute (see Section C. (4)(ii)).

183 On the importance of this case for the responsibility of accomplices, see Zorzi Giustiniani, *CLF*, 20 (2009), 419 ff.

184 *Tadić*, No. IT-94-1-T, para. 674.

185 *Tadić*, No. IT-94-1-T, paras. 674, 688–92.

186 *Tadić*, No. IT-94-1-T, para. 688; *Đorđević*, No. IT-05-87/1-T, para. 1874.

187 *Blagojević and Jokić*, No. IT-02-60-T, para. 134; *Prosecutor v Boškoski and Tarčulovski*, No. IT-04-82-T, Trial Chamber Judgment, para. 401 (10 July 2008).

188 *Boškoski and Tarčulovski*, No. IT-04-82-T, para. 401.

189 cf. UNWCC, LRTWC, xv (1949), pp. 49–51. See also, *Tadić*, No. IT-94-1-T, para. 691.

190 *Tadić*, No. IT-94-1-T, para. 687.

191 *Tadić*, No. IT-94-1-T, para. 689; *Popović et al.*, No. IT-05-88-T, paras. 1014, 1018.

192 *Prosecutor v Delalić et al.*, No. 96-21-T, Trial Chamber Judgment, paras. 325–9 (16 November 1998).

193 *Naletilić and Martinović*, No. IT-98-34-T, para. 63; see also *Blagojević and Jokić*, No. IT-02-60-T, para. 726; *Lukić and Lukić*, No. IT-98-32/1-T, para. 901; *Gotovina, Čermak and Markač*, No. IT-06-90-T, para. 1960; *Prosecutor v Perišić*, No. IT-04-81-T, Trial Chamber Judgment, para. 126 (6 September 2011).

194 *Prosecutor v Furundžija*, No. IT-95-17/1-T, Trial Chamber Judgment, paras. 190–249 (10 December 1998).

195 *Furundžija*, No. IT-95-17/1-T, paras. 199, 232.

196 *Furundžija*, No. IT-95-17/1-T, para. 233.

197 *Furundžija*, No. IT-95-17/1-T, paras. 273–4; confirmed by the AC in *Furundžija*, No. IT-95-17/1 A, para. 126 and *Naletilić and Martinović*, No. IT-98-34-T, para. 63.

198 *Furundžija*, No. IT-95-17/1-T, paras. 217, 233–4.

199 Ibid, paras. 235, 249. See also, *Mrkšić et al.*, No. IT-95-13/1-T, para. 551; *Krstić*, No. IT-98-33/T, para. 601; *Prosecutor v Aleksovski*, No. IT-95-14/1-T, Trial Chamber Judgment, para. 162 (25 June 1999). Critical on this case law, Vest, *Völkerrechtsverbrecher* (2011), pp. 196 ff.

200 *Furundžija*, No. IT-95-17/1-A, paras. 117 ff.; *Delalić et al.*, No. IT-96-21-A, para. 352 (emphasizing the ‘substantial effect’ requirement; as to the concrete case, the Chamber held that the position as a camp guard is not per se sufficient, para. 364).

201 *Aleksovski*, No. IT-95-14/1-T, paras. 60 ff.; *Blaškić*, No. IT-95–14-T, para. 245; *Prosecutor v Kunarac, Kovač and Vuković*, No. IT-96-23-T and No. IT-96-23/1-T, Trial Chamber Judgment, paras. 391–3 (22 February 2001); *Kordić and Čerkez*, No. IT-95-14/2-T, paras. 395 ff.; *Krnojelac*, No. IT-97-25-T, paras. 88 ff.; *Kvočka et al.*, No. IT-98-30/1-T, para. 254; *Prosecutor v Limaj et al.*, No. IT-03-66-T, Trial Chamber Judgment, para. 516 (30 November 2005); confirmed by Appeals Chamber Judgment, No. IT-03–66-A, paras. 90 ff.; *Muvunyi*, No. IT-00-55A-T, para. 470; *Mrkšić et al.*, No. IT-95-13/1-T, paras. 551 ff.; *Lukć and Lukić*, No. IT-98-32/1-T, para. 901; *Popović et al.*, No. IT-05-88-T, para. 1018; *Gotovina, Čermak and Markač*, No. IT-06-90-T, para. 1960; *Đorđević*, No. IT-05-87/1-T, paras. 1874–5; *Perišić*, No.

IT-04-81-T, para. 126. For an overview, see also Boas, Bischoff, and Reid, *Forms of Responsibility* (2007), pp. 304–19.

202 *Aleksovski,* No. IT-95-14/1-T, paras. 60–1.

203 *Aleksovski*, No. IT-95-14/1-T, para. 62. See also *Blaškić*, No. IT-95-14-T, para. 284; *Kunarac, Kovač and Vuković*, No. IT-96-23-T and No. IT-96-23/1-T, para. 391; *Kvočka et al.*, No. IT-98-30/1-T, para. 256; *Blaškić*, No. IT-95-14-A, para. 48; with regard to consecutive aiding and abetting limited to acts promised before the actual commission, see *Furundžija*, No. IT-95-17/1-T, para. 229, citing the ILC, 'Report of the International Law Commission on the Work of its 48th Session' (6 May–26 July 1996) UN Doc. A/51/10, p. 24.

204 *Aleksovski*, No. IT-95-14/1-T, para. 61; *Blaškić*, No. IT-95–14-T, para. 284; *Krnojelac*, No. IT-97-25-T, para. 88; *Naletilić and Martinović*, No. IT-98-34-T, para. 63; *Vasiljević*, No. IT-98-32-T, para. 70; *Blaškić*, No. IT-95-14-A, para. 48; *Blagojević and Jokić*, No. IT-02-60-T, para. 726.

205 *Aleksovski*, No. IT-95-14/1-T, paras. 63 ff.; similarly *Krnojelac*, No. IT-97-25-T, para. 89 ('significant legitimising or encouraging effect'); also *Vasiljević*, No. IT-98-32-T, para. 70; *Blagojević and Jokić*, No. IT-02-60-T, para. 726, note 2177 ('"Mere presence" at the scene of the crime is not conclusive of aiding and abetting unless it is demonstrated to have a significant encouraging effect on the principal offender').

206 *Blaškić*, No. IT-95-14-T, para. 284; conc. *Naletilić and Martinović*, No. IT-98-34-T, para. 63; *Gotovina, Čermak and Markač*, No. IT-06-90-T, para. 1960.

207 *Delalić et al.*, No. IT-96-21-A, para. 352. See also *Blaškić*, No. IT-95-14-A, para. 48; *Đorđević*, No. IT-05-87/1-T, para. 1874; *Lukć and Lukić*, No. IT-98-32/1-T, para. 901; *Perišić*, No. IT-04-81-T, para. 126; *Gotovina, Čermak and Markač*, No. IT-06-90-T, para. 1960. For a systematic reasoning, see also Agbor, *ICLR*, 12 (2012), 169.

208 *Prosecutor v Blagojević and Jokić*, No. IT-02-60-T, para. 731 and No. IT-02-60-A, Appeals Chamber Judgment, para. 180 (9 May 2007).

209 *Orić,* No. IT-03-68-A, AC, para. 43 (3 July 2008); *Perišić*, No. IT-04-81-T, paras. 126, 133; *Đorđević*, No. IT-05-87/1-T, para. 1875; *Gotovina, Čermak and Markač*, No. IT-06-90-T, para. 1960; *Đorđević*, No. IT-05-87/1-T, para. 1873; left open by *Blaškić*, No. IT-95-14-A, para. 47 ('in the circumstances of a given case, an omission may constitute the *actus reus* of aiding and abetting').

210 See Section B. (1).

211 *Akayesu*, No. ICTR-96-4-T, para. 484; conc. *Prosecutor v Bagosora et al.*, No. ICTR-98-41-T, Trial Chamber Judgment, para. 2009 (18 December 2008); *Karera*, No. ICTR-01-74-A, para. 321; *Renzaho*, No. ICTR-97-31-T, para. 741; *Prosecutor v Bagaragaza*, No. ICTR-05-86-T, Trial Chamber Judgment, para. 22 (17 November 2009); *Munyakazi*, No. ICTR-97-36A-T, para. 417; *Kanyarukiga*, No. ICTR-2002-78-T, para. 621. For the subsequent case law, see *Prosecutor v Ntakirutimana and Ntakirutimana*, No. ICTR-96-10 and No. ICTR-96-17-T, Trial Chamber Judgment, para. 787 (21 February 2003); *Semanza*, No. ICTR-97-20-T, para. 384 (they also include 'instigating' in the abetting liability); *Gacumbitsi*, No. ICTR-2001-64-T, para. 286; *Prosecutor v Bisengimana*, No. ICTR-00-60-T, Trial Chamber Judgment, para. 32 (13 April 2006); *Prosecutor v Kajelijeli*, No. ICTR-98-44-A-T, Trial Chamber Judgment, para. 765 (1 December 2003); *Prosecutor v Bagilishema*, No. ICTR-95-1A-T, Trial Chamber Judgment, para. 33 (7 June 2001); *Prosecutor v Kamuhanda*, No. ICTR-99-54A-A, Appeals Chamber Judgment, paras. 67 ff. (19 September 2005); *Prosecutor v Karera*, No. ICTR-01-74-T, Trial Chamber Judgment, para. 548 (7 December 2007); *Prosecutor v Kalimanzira*, No. ICTR-05-88-T, Trial Chamber Judgment, para. 161 (22 June 2009); *Prosecutor v Hategekimana*, No. ICTR-00-55B-T, Judgment and Sentence, para. 652 (6 December 2010); *Nyiramasuhuko et al.*, No. ICTR-98-42-T, para. 5595; *Prosecutor v*

Bizimungu et al., No. ICTR-99-50-T, Judgment and Sentence, para. 1900 (30 September 2011); *Prosecutor v Ntawukulilyayo*, No. ICTR-05-82-A, Appeals Chamber Judgment, para. 214 (14 December 2011); *Prosecutor v Ndahimana*, No. ICTR-01-68-T, Judgment and Sentence, paras. 824–32 (30 December 2011); *Karemera and Ngirumpatse*, No. ICTR-98-44-T, paras. 1429–30. On the ICTR case law on aiding and abetting, see Zorzi Giustiniani, *CLF*, 20 (2009), *passim*; for an analysis of the ICTR's complicity concept with regard to genocide, see Obote-Odora, *ICLR*, 2 (2002), 391–2, 400, in particular on the distinction between aiding and abetting.

212 Similarly already, see Triffterer, 'Bestandsaufnahme', in Hankel and Stuby, *Strafgerichte* (1995), p. 229. See also Boas, Bischoff, and Reid, *Forms of Responsibility* (2007), pp. 306–7.

213 *Prosecutor v Rutaganda*, No. ICTR-96-3-T, Trial Chamber Judgment, para. 43 (6 December 1999); *Prosecutor v Musema*, No. ICTR-96-13-T, Trial Chamber Judgment, paras. 125–6 (27 January 2000); *Bagilishema*, No. ICTR-95-1A-T, para. 33; *Semanza*, No. ICTR-97-20-T, para. 385; *Prosecutor v Kamuhanda*, No. ICTR-95-54A-T, Trial Chamber Judgment, para. 597 (22 January 2004); *Bisengimana*, No. ICTR-00-60-T, para. 32.

214 *Seromba*, No. ICTR-2001-66-A, para. 139; *Ntakirutimana and Ntakirutimana*, No. ICTR-96-10-A and No. ICTR-96-17-A, para. 530; *Bagosora et al.*, No. ICTR-98-41-T, paras. 2008–9.

215 *Kayishema and Ruzindana*, No. ICTR-95-1-A, para. 200.

216 *Kayishema and Ruzindana*, No. ICTR-95-1-A, para. 201; *Bagilishema*, No. ICTR-95-1A-T, para. 33; *Kajelijeli*, No. ICTR-98-44-A-T, para. 763; *Kamuhanda*, No. ICTR-95-54A-T, para. 597; *Rutaganda*, No. ICTR-96-3-T, para. 43; *Bisengimana*, No. ICTR-00-60-T, para. 34.

217 *Prosecutor v Rutaganira*, No. ICTR-95–1C-T, Trial Chamber Judgment, paras. 85 ff. (14 March 2005); *Prosecutor v Nzabirinda*, No. ICTR-2001–77-T, Trial Chamber Judgment, para. 16 (23 February 2007); *Bagosora et al.*, No. ICTR-98-41-T, para. 2009; *Renzaho*, No. ICTR-97-31-T, para. 742; *Bagaragaza*, No. ICTR-05-86-A, para. 22; *Kanyarukiga*, No. ICTR-2002-78-T, para. 621; *Munyakazi*, No. ICTR-97-36A-T, para. 433.

218 *Akayesu*, No. ICTR-96–4-T, para. 484; *Musema*, No. ICTR-96-13-T, para. 125; *Bagilishema*, No. ICTR-95-1A-T, para. 33; *Semanza*, No. ICTR-97-20-T, para. 385; *Bagosora et al.*, No. ICTR-98-41-T, para. 2009.

219 *Akayesu*, No. ICTR-96–4-T, para. 484; *Bagilishema*, No. ICTR-95-1A-T, paras. 34–5; *Semanza*, No. ICTR-97-20-T, para. 386; *Brđanin*, No. IT-99-36-A, para. 273; *Nzabirinda*, No. ICTR-2001-77-T, para. 17; *Rutaganda*, No. ICTR-96-3-T, para. 43; *Bisengimana*, No. ICTR-00-60-T, para. 34.

220 *Popović et al.*, No. IT-05-88-T, paras. 1014, 1016, 1017; *Bagosora et al.*, No. ICTR-98-41-T, para. 2009; *Kanyarukiga*, No. ICTR-2002-78-T, para. 621; *Gotovina, Čermak and Markač*, No. IT-06-90-T, para. 1960; *Đorđević*, No. IT-05-87/1-T, para. 1876; *Kanyarukiga*, No. ICTR-2002-78-T, para. 621, *Munyakazi*, No. ICTR-97-36A-T, para. 433.

221 *Tadić*, No. IT-94-1-T, para. 676; *Delalić et al.*, 96-21-T, para. 328; *Akayesu*, No. ICTR-96-4-T, para. 478; *Prosecutor v Kamuhanda*, No. ICTR-95-54A-T, Trial Chamber Judgment, para. 600 (22 January 2004); *Prosecutor v Milošević*, No. IT-98-29/1-A, Appeals Chamber Judgment, para. 265 (12 November 2009) (although: 'great caution is required'); *Boškoski and Tarčulovski*, No. IT-04-82-A, Appeals Chamber Judgment, para. 125 (19 May 2010); *Đorđević*, No. IT-05-87/1-T, para. 1876.

222 cf. *Tadić*, No. IT-94-1-T, para. 689: ‘if the presence can be shown or inferred, by circumstantial or other evidence, to be knowing … ’; *Delalić et al.*, No. IT-96-21-T, para. 386 with regard to command responsibility: ‘ … such knowledge cannot be presumed but must be established by way of circumstantial evidence’.

223 Ibid, para. 692 (emphasis added).

224 *Delalić et al.*, No. IT-96-21-T, paras. 326, 328.

225 *Furundžija*, No. IT-95-17/1-T, paras. 245–6, 249.

226 *Furundžija*, No. IT-95-17/1-T, paras. 245–6, 249. See also *Krnojelac*, No. IT-97-25-T, para. 90; *Vasiljević*, No. IT-98-32-A, para. 102; *Blaškić*, No. IT-95–14-A, para. 49; *Prosecutor v Aleksovski*, No. IT-95-14/1-A, Appeals Chamber Judgment, paras. 162 ff. (24 March 2000); *Brđanin*, No. IT-99-36-T, para. 273; *Mrkšić et al.*, No. IT-95-13/1-T, para. 556; *Perišić*, No. IT-04-81-T, paras. 130–1; *Gotovina, Čermak and Markač*, No. IT-06-90-T, para. 1960; *Đorđević*, No. IT-05-87/1-T, para. 1876.

227 *Seromba*, No. ICTR-2001-66-A, paras. 56, 146; *Ntakirutimana and Ntakirutimana*, No. ICTR-96-10-A and No. ICTR-96-17-A, para. 530; *Prosecutor v Nahimana et al.*, No. ICTR-99-52-A, Appeals Chamber Judgment, para. 482 (28 November 2007); *Prosecutor v Ntagerura et al.*, No. ICTR-99-46-A, Appeals Chamber Judgment, para. 370 (7 July 2006).

228 *Seromba*, No. ICTR-2001-66-A, para. 56; *Ntakirutimana and Ntakirutimana*, No. ICTR-96-10-A and No. ICTR-96-17-A, para. 370; *Blagojević and Jokić*, No. IT-02-60-A, para. 127; *Prosecutor v Simić et al.*, No. IT-95-9-A, Appeals Chamber Judgment, para. 86 (28 November 2006); *Vasiljević*, No. IT-98-32-A, para. 102; *Blaškić*, No. IT-95-14-A, para. 46. On the *Seromba* Appeals Judgement, see Zorzi Giustiniani, *JICJ*, 6 (2008), passim.

229 *Akayesu*, No. ICTR-96–4-T, paras. 476–9; *Semanza*, No. ICTR-97-20-T, para. 388; *Kamuhanda*, No. ICTR-95-54A-T, para. 599; *Rutaganira*, No. ICTR-95-1C-T, paras. 92 ff. See also *Bagosora et al.*, No. ICTR-98-41-T, para. 2009; *Renzaho*, No. ICTR-97-31-T, para. 742; *Bagaragaza*, No. ICTR-05-86-A, para. 23; *Munyakazi*, No. ICTR-97-36A-T, para. 418; *Kanyarukiga*, No. ICTR-2002-78-T, para. 621; *Prosecutor v Ndindiliyimana et al.*, No. ICTR-00-56-T, Trial Chamber Judgment, para. 1914 (17 May 2011); *Nyiramasuhuko et al.*, No. ICTR-98-42-T, paras. 5595–7; *Bizimungu et al.*, No. ICTR-99-50-T, para. 1900; *Ntawukulilyayo*, No. ICTR-05-82-A, para. 214; *Ndahimana*, No. ICTR-01-68-T, para. 723; *Karemera and Ngirumpatse*, No. ICTR-98-44-T, paras. 1429–30.

230 *Prosecutor v Kambanda*, No. ICTR 97-23-S, Judgment and Sentence, para. 40 (4 September 1998) (count 3).

231 *Akayesu*, No. ICTR-96-4-T, paras. 672–5.

232 *Rutaganda*, No. ICTR-96-3-T, para. 38; *Prosecutor v Ruggiu*, No. ICTR-97-32-I, Trial Chamber Judgment, paras. 13 ff. (1 June 2000); *Prosecutor v Bagilishema*, No. ICTR-95-1A-A, Appeals Chamber Judgment, paras. 51 ff. (7 June 2001); *Prosecutor v Nahimana et al.*, No. ICTR-99-52-T, Trial Chamber Judgment, paras. 325 ff. (3 December 2003); *Kalimanzira*, No. ICTR-05-88-T, paras. 509–16 (22 June 2009); *Nyiramasuhuko et al.*, No. ICTR-98-42-T, paras. 5985–7; *Bizimungu et al.*, No. ICTR-99-50-T, paras. 1973–5; *Karemera and Ngirumpatse*, No. ICTR-98-44-T, paras. 1593–5.

233 *Akayesu*, No. ICTR-96-4-T, para. 555.

234 *Prosecutor v Akayesu*, No. ICTR-96-4-A, Appeals Chamber Judgment, paras. 474 ff. (1 June 2001).

235 *Akayesu*, No. ICTR-96-4-A, paras. 478, 482.

[236] Ambos, *Der Allgemeine Teil* (2002/2004), pp. 652–4.

[237] *Nahimana et al.*, No. ICTR-99-52-A, paras. 720–1. See also *Bikindi*, No. ICTR-01-72-T, para. 419; *Prosecutor v Muvunyi*, No. ICTR-00-55A-T, Trial Chamber Judgment (retrial), para. 24 (11 February 2010).

[238] *Akayesu*, No. ICTR-96–4-T, paras. 561–2. See also *Ruggiu*, No. ICTR-97-32-I, para. 16; *Nahimana et al.*, No. ICTR-99-52-T, para. 1013; *Bikindi*, No. ICTR-01-72-T, paras. 386 ff.; *Kalimanzira*, No. ICTR-05-88-T, paras. 509–10; *Muvunyi*, No. ICTR-00-55A-T, paras. 23 ff.

[239] cf. ILC, *Draft Code* (1996), p. 26; *Akayesu*, No. ICTR-96-4-T, para. 556 (‘public incitement is characterized by a call for criminal action to a number of individuals in a public place or to members of the general public at large by such means as the mass media, for example, radio or television’); *Nahimana et al.*, No. ICTR-99-52-T, paras. 1023 ff. See also Kalimanzira, No. ICTR-05-88-T, paras. 634–6.

[240] *Akayesu*, No. ICTR-96-4-T, para. 556. See also *Muvunyi*, No. ICTR-00-55A-T, para. 27.

[241] cf. ILC, *Draft Code* (1996), p. 26; *Akayesu*, No. ICTR-96-4-T, paras. 555, 557. See also *Nahimana et al.*, No. ICTR-99-52-T, paras. 1000 ff.

[242] *Akayesu*, No. ICTR-96–4-T, para. 557 (‘The ‘direct’ element of incitement implies that the incitement assume a direct form and specifically provoke another to engage in a criminal act, and that more than mere vague or indirect suggestion goes to constitute direct incitement … ’).

[243] *Muvunyi*, No. ICTR-00-55A-T, para. 25. See also *Akayesu*, No. ICTR-96-4-T, para. 557 (‘incitement may be direct, and nonetheless implicit’).

[244] *Akayesu*, No. ICTR-96-4-T, paras. 557–8; *Nahimana et al.*, No. ICTR-99-52-A, para. 697; *Muvunyi*, No. ICTR-00-55A-T, para. 25.

[245] Conc. Eser, ‘Individual Criminal Responsiblity’, in Cassese, Gaeta, and Jones, *Rome Statute* (2002), p. 805 with n. 168.

[246] The specific danger or risk implicit in the act of incitement lies in the potential to trigger a certain course of events. It has been most convincingly described by Dreher, ‘Paragraph’, in Lackner et al., *FS Gallas* (1973), p. 312, who compares the inciter to a person who throws a torch and does not know if it will catch fire or not.

[247] *Kalimanzira*, No. ICTR-05-88-T, para. 516. For a critical analysis of these guidelines, see Agbor, *ICLR*, 12 (2012), 173.

[248] The Trial Chamber in *Bikindi*, No. ICTR-01-72-T, para. 420, considered that ‘[i]n the absence of direct evidence, the genocidal intent may be inferred from relevant facts and circumstances of a case, such as the overall context in which the crime occurred, the systematic targeting of the victims on account of their membership of a protected group, the exclusion of members of other groups, the scale and scope of the atrocities committed, the frequency of destructive and discriminatory acts, or the political doctrine that gave rise to the acts referred to’. See also *Muvunyi*, No. ICTR-00-55A-T, para. 29.

[249] Explicitly *Ruggiu*, No. ICTR-97-32-I, para. 14 (‘must himself have the specific intent to commit genocide’). See also *Akayesu*, No. ICTR-96-4-T, para. 560; *Nahimana et al.*, No. ICTR-99-52-T, para. 1012. See also *Bikindi*, No. ICTR-01-72-T, para. 419 (‘with the intent to directly and publicly incite others to commit genocide, which presupposes a genocidal intent’); *Muvunyi*, No. ICTR-00-55A-T, para. 28. See also Schabas, *ICC Commentary* (2010), p. 439.

[250] *Nahimana*, No. ICTR-99-52-A, para. 560.

251 *Akayesu*, No. ICTR-96-4-T, paras. 485, 540, 546–7.

252 For a critical view, see also Greenawalt, *ColLR*, 99 (1999), 2282 ff.; Schabas, ‘Genocide’, in Fischer, Kreß, and Lüder, *International and National Prosecution* (2001), pp. 469–70.

253 *Musema*, No. ICTR-96-13-T, para. 183.

254 *Musema*, No. ICTR-96-13-T, para. 182. See also *Krstić*, No. IT-98-33-A, paras. 140 ff.

255 For a detailed discussion, see Ambos, *Der Allgemeine Teil* (2002/2004), pp. 793 ff.; id, ‘Reflections’, in Vohrah, *Inhumanity* (2003), pp. 21 ff.; id, *NStZ*, 21 (2001), 631–2. This view is also shared by Vest, *Genozid* (2002), pp. 243 (with n. 33), 248, 265, 385; Werle, *Principles* (2009), mn. 492 (with regard to the aider and abettor); Jones, ‘Genocide’, in Vohrah, *Inhumanity* (2003), pp. 467, 479 arguing for an analogy with the *mens rea* requirement of crimes against humanity. Eser, ‘Individual Criminal Responsiblity’, in Cassese, Gaeta, and Jones, *Rome Statute* (2002), p. 806 only requires that the inciter ‘must merely know and want the incited persons to commit the crime’, but need not herself posses the genocidal intent. It is difficult to see, however, how this position may be reconciled with his—convincing—conclusion that the link between incitement and genocide is ‘a subjective “volitional” one in terms of being directed at the genocidal aim of the inciting act’ (ibid, p. 805).

256 *Furundžija*, No. IT-95-17/1-T, paras. 257, 273–4; confirmed by the AC in *Furundžija*, No. IT-95-17/1-A, para. 126 and *Naletilić and Martinović*, No. IT-98-34-T, para. 63; see also Section C. (2)(c) n. 189 and corresponding text.

257 See also *Lubanga*, No. ICC-01/04-01/06-803, para. 329.

258 *Tadić*, No. IT-94-1-A, para. 229.

259 *Krstić*, No. IT-98-33-T, para. 642.

260 *Kvočka et al.*, No. IT-98-30/1-T, paras. 249, 284.

261 *Krnojelac*, No. IT-97-25-T, para. 77. See also *Prosecutor v Vasiljević*, No. IT-98-32-T, Trial Chamber Judgment, para. 67 with n. 131 (29 November 2002); *Prosecutor v Simić et al.*, No. IT-95-9-T, Trial Chamber Judgment, para. 138 (17 October 2003). Somewhat critical *Prosecutor v Milutinović et al.*, No. IT-99-37-AR72, Decision on Draguljub Ojdanić’s Motion Challenging Jurisdiction—Joint Criminal Enterprise, para. 20 (21 May 2003): ‘The Prosecution pointed out in its indictment against Ojdanić that its use of the word “committed” was not intended to suggest that any of the accused physically perpetrated any of the crimes charged, personally. “Committing”, the Prosecution wrote, “refers to participation in a joint criminal enterprise as a co-perpetrator”. *Leaving aside the appropriateness of the use of the expression “co-perpetration” in such a context*, it would seem therefore that the Prosecution charges co-perpetration in a joint criminal enterprise as a form of “commission” pursuant to Article 7(l) of the Statute, rather than as a form of accomplice liability.’ (emphasis added).

262 *Krnojelac*, No. IT-97-25-T, para. 87, requiring that the accused—as a co-perpetrator—shares the state of mind necessary for the crimes committed as part of the criminal enterprise.

263 *Vasiljević*, No. IT-98-32-A, para. 102 (emphasis added). See previously *Tadić*, No. IT-94-1-A, para. 229.

264 *Kvočka et al.*, No. IT-98-30/1-A, para. 89. See further para. 92, where the Appeals Chamber notes that ‘the distinction between these two forms of participation is important, both to accurately describe the crime and to fix an appropriate sentence. Aiding and

abetting generally involves a lesser degree of individual criminal responsibility than co-perpetration in a joint criminal enterprise.'

265 For a general account, see Ambos and Othman, *New Approaches* (2003); Ambos, *Internationales Strafrecht* (2011), § 6 mn. 41 ff.; Kroker, *ZStW*, 122 (2010), 686 ff. (for background information on the historical conflict), 689 ff. (for information on the establishment of the ECCC), 691 ff. (for the structure of the ICC), 695 ff. (for information on the cases brought before the ECCC).

266 <http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3d&tabid=176> accessed 4 June 2012.

267 <http://www.derechos.org/human-rights/seasia/doc/krlaw.html> accessed 4 June 2012.

268 <http://www.un.org/en/peacekeeping/missions/past/etimor/untaetR/Reg0015E.pdf> accessed 4 June 2012.

269 See <http://law.case.edu/saddamtrial/documents/ist_statute_official_english.pdf> accessed 4 June 2012.

270 On the wording, see Section C. (1).

271 It reads as follows:

> 1. A person shall be individually responsible for crimes within the jurisdiction of the Special Tribunal if that person:
>
> > (a) Committed, participated as accomplice organized or directed others to commit the crime set forth in article 2 of this Statute; or
> >
> > (b) Contributed in any other way to the commission of the crime set forth in article 2 of this Statute by a group of persons acting with a common purpose, where such contribution is intentional and is either made with the aim of furthering the general criminal activity or purpose of the group or in the knowledge of the intention of the group to commit the crime.
> >
> > (The Statute of the Special Tribunal for Lebanon is attached to UN SC Res. 1757 (30 May 2007) UN Doc. S/RES/1757, 12).

272 With regard to Kosovo only the official EULEX website provides access to the case law, <http://www.eulex-kosovo.eu/en/judgments/index.php> accessed 4 June 2012, but the case law of the UNMIK administration is not accessible. See also Risch, 'Practical Issues', in Ambos and Othman, *New Approaches* (2003), pp. 61 ff.

273 See Chapter I, F. (1)(a) and (b).

274 *Prosecutor v Rudolfo Alves Correia*, No. 27/2003, Final Judgment, para. 61 (25 April 2005).

275 *Rudolfo Alves Correia*, No. 27/2003, para. 64. On the requisite *mens rea*, see ibid, paras. 65–6; *Prosecutor v Joni Marques et al.*, No. 9/2000, Judgment, para. 717 (11 December 2001); *Prosecutor v Anton Lelan Sufa*, No. 4a/2003, Judgment, para. 16 (25 November 2004). On the special requirements of ordering, see *Prosecutor v Jose Cardoso*, No. 4c/2001, Judgment, paras. 481–2 (5 April 2003).

276 *Rudolfo Alves Correia*, No. 27/2003, para. 63.

277 *Prosecutor v Francisco dos Santos Laku*, No. 08/2001, Decision, p. 11 (25 July 2001).

278 *Rudolfo Alves Correia*, No. 27/2003, para. 68.

[279] cf. *Prosecutor v Damiao da Costa Nunes*, No. 01/2003, Decision, para. 63 (10 December 2003) available at <www.jsmp.minihub.org/Court%20Monitoring/spsccaseinformation2003.htm> accessed 4 June 2012; with reference to *Tadić*, No. IT-94-1-A, para. 192. See also *Prosecutor v Lino de Carvalho*, No. 10/2001, Judgment, para. 61 (18 March 2004); *Prosecutor v Agostinho Cloe et al.*, No. 4/2003, Judgment, para. 12 (16 November 2004); *Prosecutor v Lino Beno*, No. 4b/2003, Judgment, para. 12 (16 November 2004); *Prosecutor v Domingos Metan*, No. 4c/2003, Judgment, para. 12 (16 November 2004); *Lelan Sufa*, No. 4a/2003, para. 29; *Prosecutor v Francisco Pedro*, No. 1/2001, Judgment, para. 14 (14 April 2005).

[280] *Prosecutor v Sisto Barros and Cesar Mendonca*, No. 01/2004, Decision, para. 123 (12 May 2005) available at <http://www.wcl.american.edu/warcrimes/wcro_docs/collections/spscet/SPSC,_East_Timor_-_Judgmts,_Indmts_&_Docs/> accessed 4 June 2012.

[281] cf. *Prosecutor v Sisto Barros and Cesar Mendonca*, No. 01/2004, para. 131; *Prosecutor v Joseph Leki*, No. 05/2000, Decision, p. 10 (11 June 2001), available at <http://www.wcl.american.edu/warcrimes/wcro_docs/collections/spscet/SPSC,_East_Timor_-_Judgmts,_Indmts_&_Docs/> accessed 4 June 2012: the fact of joining a group (in the sense of s. 14.3(d)(i)) means obviously knowing about the purposes of the group.

[282] cf. *Francisco Perreira*, SPS C 34/2005, p. 19–20. Also see ibid, Separate Opinion of Judge Phillip Rapoza, pp. 4–5, 17–18, 25.

[283] According to *Prosecutor v Domingos de Deus*, No. SPS C 2 a/2004, p. 13 <http://www.jsmp.minihub.org/Court%20Monitoring/spsccaseinformation2004.htm> accessed 4 June 2012, it is not necessary for the defendant to have been beating or inflicting wounds himself as long as he had *assisted* in a criminal act or participated in the *common enterprise*; it is enough to be 'part of an organized force intent on killing' by the 'threatening posture of carrying a gun', 'uttering scolds and verbal threats, thereby intimidating the unarmed people … and strengthening the criminal resolve of the other members of the group'. The defendant is then responsible according to s. 14.3(d)(ii) 'as part of a *joint criminal enterprise*' (emphasis added).

See also *Prosecutor v Cardoso*, No. SPS C 04/2001, paras. 369 ff. available at <http://www.jsmp.minihub.org/Court%20Monitoring/spsccaseinformation2001.htm> accessed 4 June 2012.

[284] cf. *Prosecutor v Januario Da Costa and Mateus Punef*, No. 22/2003, Decision, p. 13 (25 April 2005), available at <http://www.wcl.american.edu/warcrimes/wcro_docs/collections/spscet/SPSC,_East_Timor_-_Judgmts,_Indmts_&_Docs/> accessed 4 June 2012. See also in this sense *Prosecutor v Anastacio Martins and Domingos Goncalves*, No. 11/2001, Decision, p. 14 (13 November 2003), available ibid, accessed 4 June 2012.

[285] cf. *Prosecutor v Joseph Leki*, No. 05/2000, Decision, p. 8 (11 June 2001), available at <http://www.jsmp.minihub.org/Court%20Monitoring/spsccaseinformation2000.htm> accessed 4 June 2012.

[286] *Prosecutor v Brima, Kamara and Kanu*, No. SCSL-04.16-T, and *Prosecutor v Fofana and Kondewa*, No. SCSL-04-14-T, Trial Chamber Judgment (2 August 2007) respectively.

[287] *Prosecutor v Brima, Kamara and Kanu*, No. SCSL-04-16-T, Indictment, paras. 35–6 (18 February 2005).

[288] *Kvočka et al.*, No. IT-98-30/1-A, para. 79; *Vasiljević*, No. IT-98-32-A, para. 95.

[289] *Brima, Kamara and Kanu*, SCS L-04-16-T, para. 761; *Fofana and Kondewa*, SCSL-04-14-T, para. 202.

[290] *Brima, Kamara, Kanu*, SCS L-04-16-T, para. 762. Also see similar position held by ICTY in *Tadić*, No. IT-94-1-A, para. 188; *Krnojelac*, No. IT-97-25-T, para. 73.

[291] *Brima, Kamara and Kanu*, SCS L-04-16-T, para. 764.

[292] *Brđjanin*, No. IT-99-36-T, para. 357.

[293] *Brima, Kamara and Kanu*, SCS L-04-16-T, para. 768.

[294] *Prosecutor v Charles Taylor*, No. SCSL-03-01-T, Trial Chamber Judgment, para. 6957 ('plan … a factor which substantially contributed to the commission … ') (18 May 2012).

[295] *Taylor*, SCSL-03-01-T, para. 6957 (not necessary 'that the crimes charged would not have been perpetrated but for the Accused's plan').

[296] *Prosecutor v Brima, Kamara and Kanu*, No. SCSL-04-16-A, Appeals Chamber Judgment, paras. 76, 80 (22 February 2008).

[297] *Brima, Kamara and Kanu*, SCS L-04-16-T, para. 775; also confirmed by the AC in *Prosecutor v Fofana and Kondewa*, No. SCSL-04-14-A-829, Appeals Chamber Judgment, paras. 71–2 (28 May 2008); Taylor, SCSL-03-01-T, para. 6905.

[298] *Limaj et al.*, No. IT-03-66, para. 516; *Orić*, No. IT-03-68-T, para. 282.

[299] *Brima, Kamara and Kanu*, SCSL-04-16-T, para. 775; see also *Fofana and Kondewa*, SCSL-04-14-A-829, paras. 71–2.

[300] *Orić*, No. IT-03-68-T, para. 283.

[301] *Kayishema and Ruzindana*, No. ICTR-95-1- A, para. 201; *Orić*, No. IT-03-68-T, para. 283; *Aleksovski*, No. IT-95-14/1-T, para. 65.

[302] See also *Fofana and Kondewa*, SCSL-04-14-A-829, para. 84. The AC found that 'Fofana's provision of logistics is not sufficient to establish beyond reasonable doubt that he contributed as an aider and abetter to the commission of specific criminal acts in Bo District' (para. 102, see also paras. 333, 813).

[303] *Taylor*, SCSL-03-01-T, para. 6978.

[304] *Brima, Kamara and Kanu*, SCSL-04-16-T, para. 778.

[305] Ibid, para. 67.

[306] *Fofana and Kondewa*, SCSL-04-14-T, paras. 206–19.

[307] Ibid, para. 206.

[308] *Fofana and Kondewa*, SCSL-04-14-T, para. 208; *Prosecutor v Milutinović et al.*, No. IT-05-87-AR73.1, Appeal Decision on Joint Criminal Enterprise, paras. 20, 31 (20 April 2007).

[309] *Fofana and Kondewa*, SCSL-04-14-T, para. 210.

[310] *Fofana and Kondewa*, SCSL-04-14-T, para. 216; *Brdjanin et al.*, No. IT-99-36, paras. 413, 430. See also *Prosecutor v Hassan Sesay et al.*, No. SCSL-04-15-A, Appeals Chamber Judgment, paras. 394, 400 (26 October 2009).

[311] *Taylor*, SCSL-03-01-T, para. 6899.

[312] Ibid.

[313] Ibid.

[314] *Taylor*, SCSL-03-01-T, para. 6899.

[315] *Hassan Sesay et al.*, SCSL-04-15-A, para. 397.

[316] *Prosecutor v Kaing Guek Eav*, No. 001/18-07-2007/ECCC-TC, Trial Chamber Judgment (26 July 2010). For an analysis, see Marsh and Ramsden, *ICLR*, 11 (2011), 137–54.

[317] *Kaing Guek Eav*, 001/18-07-2007/ECCC-TC, paras. 470 ff.

[318] *Kaing Guek Eav*, 001/18-07-2007/ECCC-TC, paras. 504 ff. For a brief review of the case law on this issue, see Kroker, *ZStW*, 122 (2010), 701 ff.

[319] The invited specialists were Prof. Cassese and editorial members of JICJ, the Center for Human Rights and Legal Pluralism of McGill University, and this author. The briefs have been published as Cassese, *CLF*, 20 (2009), 289; Provost, *CLF*, 20 (2009), 331 and Ambos, *CLF*, 20 (2009), 353.

[320] Case *Kaing Guek Eav*, No. 001/18-07-2007/ECCC-TC, Closing Order Indicting Kaing Guek Eav alias Duch, Investigation No. 001/18-07-2007-ECCC-OCIJ, Criminal Case File No. 002/14-08-2006 (8 August 2008). For a detailed analysis of the JCE doctrine with consideration of these *amicus curiae* briefs, see Olásolo, *CLF*, 20 (2009), 263; for a comparative analysis of the case law, see Gustafson, *JICJ*, 8 (2010), 1323 ff.; on the customary law status of JCE Clarke, *JICJ*, 9 (2011), 839 ff.

[321] cf. Cassese, *CLF*, 20 (2009), 307 ff., 330; Provost, *CLF*, 20 (2009), 333 ff., 351.

[322] Ambos, *CLF*, 20 (2009), 385–6. For a critical analysis of this question and a different opinion, see Karnavas, *CLF*, 21 (2010), 445 ff.; Scharf, *CornILJ*, 43 (2010), 439 ff. and especially 453 ff.; see also Vest, *Völkerrechtsverbrecher* (2011), pp. 304 ff., especially pp. 307 ff. for critical observations on the customary law status of JCE.

[323] *Kaing Guek Eav*, 001/18-07-2007/ECCC-TC, paras. 511 ff.

[324] *Prosecutor v Ieng Sary, Ieng Thirith and Khieu Samphan*, PTC Decision on the Appeal Against the Co-Investigating Judges Order on Joint Criminal Enterprise, No. 002/19-09-2007-ECCC/OCIJ (PTC 28), para. 69 (20 May 2010).

[325] The Chamber found Duch responsible under JCE II (para. 516) and additionally affirmed his responsibility under other forms of participation as a guideline for sentencing (planning (para. 521), instigation (para. 526), ordering (para. 531), aiding and abetting (para. 537), superior responsibility (para. 549)). This was not challenged in the Appeal.

[326] *Prosecutor v Ieng Sary, Ieng Thirith and Khieu Samphan*, No. 002/19-09-2007-ECCC/TC, TC Decision on the Applicability of Joint Criminal Enterprise (12 September 2010).

[327] *Ieng Sary, Ieng Thirith and Khieu Samphan*, 002/19-09-2007-ECCC/OCIJ (PTC 28), para. 78 ff. (for an analysis of this decision, see Berster, *ZIS*, 5 (2010), 538 ff.) and *Ieng Sary, Ieng Thirith and Khieu Samphan*, 002/19-09-2007-ECCC/TC, para. 29.

[328] For a detailed analysis see Ambos and Pirmurat, *JZ*, 62 (2007), 824 ff.

[329] The so-called Anfal campaign took place in four phases between 1986 and 1988 and led to the destruction of approx. 5,000 Kurdish villages and the forced deportation and mass killings of about 100 to 182,000 Kurds. The name 'Anfal' comes from a verse of the Koran justifying the killing of unbelievers (cf. Aziz, Al-Ibada Al-Jamaiya fi Iraq, and Ala Al-Akrad, *Das Völkermordverbrechen im Irak* (2002), p. 77).

[330] *Ali Hassan Al-Majid*, 'Chemical Ali', Head of North Organizing Office, directly responsible for issuing orders to all the military and civilian people who carried out the Anfal campaigns against the Kurdish people, sentenced according to Article 11(1)(A), (B), (C), Article 12(1)(A), (B), (D), (F), (I), (J), Article 13(4)(A), (D), (C), (H), (L) in connection with Article 15(1), (2), (4), Article 24 Statute IHT 2005; *Sultan Hashim Ahmad Al-Tai*, Commander of the 1st Corps, convicted according to Article 11(1) (A), (B), (C), (2)(E), Article 12(1)(A), (B), (D), (E), Article 13(4)(A), (D), (H), (L) in connection with Article 15(1), (2), Article 24 Statute IHT 2005; *Hussayn Rashid Muhammad*, Assistant to the Army Chief of Staff for Operations in the Iraqi Armed Forces, sentenced according to Article 11(1)(A),

(B), (2)(E), Article 12(1)(A), (B), (2)(E), Article 13(4)(A), (D) in connection with Article 15(1), (2), Article 24 Statute IHT 2005; the Law of the Supreme Iraqi Criminal Tribunal is available at <http://law.case.edu/saddamtrial/documents/ist_statute_official_english.pdf> accessed 4 June 2012.

331 *Farhan Mutlak Salih Al-Jaburi*, Director of the Military Intelligence Organization for the Eastern Region, sentenced according to Article 11(1)(A), (2)(E), 12(1)(A), (D) in connection with Article 15(1), (2), Article 24 Statute IHT 2005; *Sabir Abdul-al-Aziz Hussain Al-Duri*, Head of Military Intelligence, sentenced according to Article 11(1)(A), (B), (2)(E), Article 12(1)(A), Article 13(4)(A), (L) in connection with Article 15(1), (2), Article 24 Statute IHT 2005.

332 The former governor of Mossul, *Tahir Taufiq Yousif Al-Aani*.

333 *Prosecutor v Anfal*, Judgment, pp. 943–63 (24 June 2007); available at <http://law.case.edu/grotian-moment-blog/anfal/opinion.asp> accessed 4 June 2012. Only Al-Jaburi was not sentenced for war crimes.

334 *Al-Majid* was hanged on 25 January 2010. See for the Trial Judgment <http://law.case.edu/grotian-moment-blog/anfal/opinion.asp> and for the High Tribunal Appellate Chamber Judgment <http://law.case.edu/grotian-moment-blog/anfal/cassation.asp> both accessed 4 June 2012. For further information, see Trahan, *MichJIL*, 13 (2009), 305–412.

335 STL Appeals Chamber, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, STL-11-01/I, paras. 204–64 (16 February 2011). For the problematic application of international forms of criminal responsibility with regard to the Lebanese domestic crimes contained in the Statute, see Milanovic, *JICJ*, 5 (2007), 1142 ff. (regarding command responsibility), 1144 ff. (regarding JCE). On the terrorism part of this decision see Ambos, *LJIL*, 24 (2011), 655 ff.

336 Interlocutory Decision, STL-11-01/I, paras. 211, 263: ‘(i) evaluate on a case-by-case basis whether there is any actual conflict between the application of Lebanese law and that of the international criminal law embodied in Article 3; (ii) if there is no conflict, apply Lebanese law; and (iii) if there is a conflict, apply the law that would lead to a result more favourable to the rights of the accused’.

337 Ibid, paras. 212–62.

338 Ibid, para. 264.

339 Ibid, para. 216.

340 Ibid.

341 Ibid, paras. 253, 256.

342 Ibid, para. 236.

343 The Chamber’s president was the late Antonio Cassese, as judge and president of the ICTY responsible, inter alia, of the seminal *Tadić* jurisdictional decision and judgment.

344 Interlocutory Decision, STL-11-01/I, para. 241.

345 Ibid, para. 243.

346 Ibid.

347 Interlocutory Decision, STL-11-01/I, para. 242.

348 See note 159 and main text.

349 Interlocutory Decision, STL-11-01/I, para. 248.

350 Interlocutory Decision, STL-11-01/I, para. 249. See for the same criticism previously Ambos, *JICJ*, 5 (2007), 175–6, 181.

351 Interlocutory Decision, STL-11-01/I, para. 226.

352 Ibid.

353 Interlocutory Decision, STL-11-01/I, para. 227.

354 Ibid.

355 Ibid.

356 IMT, *Trial*, xxii (1947), p. 447 (*The Trial*). See also the statement of English Chief Prosecutor *Sir Hartley Shawcross*, ibid, iii (1946), pp. 123, 124. See note 2 and main text.

357 See *Tadić*, No. IT-94-1-AR72, paras. 128–37, 134.

358 See note 2.

359 'Proposal submitted by France, Article 23, Individual criminal responsibility, legal persons' UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome 15 June–17 July 1998) (16 June 1998) UN Doc. A/CONF. 183/C.1/L.3 (1998), Article 23(5), (6). See also Wise, 'General Principles', in Sadat Wexler, *Model Draft Statute* (1998), p. 42; Sereni, 'Individual Criminal Responsibility', in Lattanzi, *The International Criminal Court* (1998), pp. 145–6; Schabas, *EJCCLCJ*, 6 (1998), 400.

360 'Working Paper on Article 23 Paragraphs, 5 and 6' UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (3 July 1998) UN Doc. A/CONF.183/C.1/WGGP/L.5.

361 While corporate criminal liability is widely recognized in common law jurisdictions, within the civil law families there is a particularly interesting division between, on the one hand, Germany, rejecting it (Roxin, *Strafrecht I* (2006), § 8 mn. 59–63; Joecks, '§ 25 Täterschaft', in Joecks and Miebach, *Münchener Kommentar*, i (2011), mn. 16–20; for a more liberal, policy-oriented approach recently Vogel, *StV*, 32 (2012), 427 ff.), and, on the other hand, Austria, France, and Spain having implemented it a long time ago (see generally Eser, Huber, and Cornils, *Einzelverantwortung und Mitverantwortung* (1998); for Austria see Boller, *Verbandsverantwortlichkeitsgesetz* (2007); for France see Article 121–2 Code Pénal; Pradel, *Droit Pénal Général* (2010), pp. 427 ff.; Pfützer, 'Frankreich', in Sieber and Cornils, *Nationales Strafrecht*, iv (2010), pp. 391 ff.; for Spain see Article 31*bis* Código Penal; Gil Gil, *Derecho Penal, Parte General* (2011), pp. 1070 ff).

362 cf. Williams, 'Article 17', in Triffterer, *Commentary* (2008), mn. 1 ff., 21 ff.

363 Clapham, *JICJ*, 6 (2008), 907 ff., arguing that corporations could be 'complicit in a violation of international law by a government' (907); van den Herik and Jernej, *JICJ*, 8 (2010) 725 ff.; Farell, *JICJ*, 8 (2010), 873 ff.; Kremnitzer, *JICJ*, 8 (2010) 909 ff.; crit. Weigend, *JICJ*, 6 (2008), 927 ff.

364 For a correct critique of the misnomer 'modes of liability', cf. Stewart, *LJIL*, 25 (2012), 166 with n. 2. However, he subsequently uses this expression throughout his article.

365 Bohlander, *Principles* (2009), p. 153 and *passim* speaks of a 'principal by proxy'.

366 Law Commission, *Assisting and Encouraging* (1993), paras. 4.7–4.11, 4.13; conc. Law Commission, *Participating* (2007), para. 2.21 and *passim* (with a Draft Bill providing for liability for 'assisting or encouraging an offence', ibid, pp. 155, 157); see also Kutz, 'Foundations', in Deigh and Dolinko, *Handbook* (2011), p. 151.

367 See Section C. (4)(b)(ii).

[368] For a historical explanation (referring to s. 8 of the Accessories and Abettors Act 1861), see Law Commission, *Assisting and Encouraging* (1993), paras. 1.11, 2.7–2.12.

[369] Law Commission, *Assisting and Encouraging* (1993), paras. 1.11, 4.16. The same terminology was adopted, for example, by Part II of the UK Serious Crimes Act 2007. It is also recognized in civil law jurisdictions, see for example, § 27 German StGB (*Beihilfe*, 'aiding', cf. Bohlander, *German Criminal Code* (2008), p. 43). In a similar vein with regard to subparagraph (c), see Vest, *Völkerrechtsverbrecher* (2011), p. 198.

[370] Attempt will be treated in Chapter VI.

[371] ILC, *Draft Code* (1954), Article 2(13); ILC, *Draft Code* (1991), Article 3; ILC, *Draft Code* (1996), Article 2.

[372] See Section C. (2).

[373] For a return to such a model abolishing all modes of participation developed so far, including those of Article 25, see recently Stewart, *LJIL*, 25 (2012), 214, 216 (arguing that this system could 'preclude the uncertainties of custom infiltrating the criminal process'). However, Stewart's argument rests on some incorrect and imprecise assumptions (most importantly the 'Hitler-as-accomplice' assumption, at 167, which runs through the whole paper), he takes the Austrian system as the applicable model of a unitarian system (at 205; apparently, despite n. 194, not fully grasping its functional unitarian orientation similar to Article 25) and, most importantly, he neither provides an analysis of Article 25 (apparently assuming that it is based on the differentiated system) nor further elaborates on his (alternative) 'theory'.

[374] See generally Triffterer, 'Völkerstrafrecht', in Hankel and Stuby, *Strafgerichte* (1995), p. 226; Pradel, *Droit pénal comparé* (2008), pp. 117 ff.; Fletcher, *Rethinking* (2000), para. 8.5.; id, *Basic Concepts* (1998), pp. 188 ff.; Mantovani, *JICJ*, 1 (2003), 34; Olásolo, 'Distinction', in Stahn and Sluiter, *Practice of the ICC* (2009), *passim*. This is also, and in particular, true for Anglo-American criminal law doctrine where for a long time different forms of participation distinguishing, in particular, between principal and secondary/ accessorial/derivative responsibility have been discussed, see, for example, Williams, *Criminal Law* (1961), pp. 346–427 (principal vs. and accessorial liability); Ormerod, *Smith and Hogan's Criminal Law* (2011), pp. 184–245 (principal offender vs. secondary participation); Ashworth, *Principles* (2009), pp. 403–36 (principals vs. accessories); Card, *Criminal Law* (2010), pp. 765–814 (perpetrators vs. accomplices); Simester et al., *Criminal Law* (2010), pp. 203–62 (at 205 explaining 'modes of participation'); see also Wilson, *Issues* (2002), pp. 195–223 (secondary participation); Kutz, 'Foundations', in Deigh and Dolinko, *Handbook* (2011), especially pp. 154–5; Weisser, *Täterschaft* (2011), pp. 61–5 (demonstrating the substantive differentiation between perpetration and secondary participation in English law). Even (functional) Unitarian systems like the ones of Austria and Italy have ultimately to distinguish between criminally relevant and irrelevant contributions, that is, even these systems have to develop criteria of delimitation, see Weisser, *Täterschaft* (2011), p. 146 (on the basis of a thorough comparison of the participation models of Austria, England, France, Germany, and Italy).

[375] In the same vein, see Vest, *Völkerrechtsverbrecher* (2011), p. 377.

[376] See Rule 145(1)(c) RPE.

[377] The term 'functional' in this context refers to the distinction between the different functions assigned to each participant.

[378] Mantovani, *JICJ*, 1 (2003), 35 ('categorization of criminal conduct'); Di Martino, 'La disciplina del concorso', in Cassese et al., *Problemi attuali* (2005), p. 199; Amati and Costi, 'Autoria', in Amati et al., *Introduzione* (2010), p. 111; Separate Opinion of Judge Schomburg, *Gacumbitsi*, No. IT-01-64-A, para. 6; for a unitarian concept Kreß, *HuV-I*, 12

(1999), 9. For a good comparative analysis on the German and US law on complicity, see Dubber, *JICJ*, 5 (2007), 977 ff.

379 cf. Hamdorf, *Beteiligungsmodelle* (2002), pp. 43 ff., 75 ff., 104 ff.; Ambos, *Der Allgemeine Teil* (2002/2004), pp. 543–6 with further comparative law references; Weisser, *Täterschaft* (2011), pp. 125–45 (on the Austrian law); see also Mitgutsch, 'Beteiligungsregelung', in Geisler et al., *FS Geppert* (2011), pp. 359–64 who correctly sees the lack of a 'qualitative accessorial' dependence of the complicity from the main act ('qualitative Akzessorietät'), that is, the lack of minimum legal requirements with regard to the quality of the main act—apart from a uniform sentencing regime (Article 77)—as the main feature of a (functional) unitarian system. Yet, while it is clear that Article 25(3) provides for a quantitative accessorial dependence ('quantitative Akzessorietät') in the sense of a factual derivative liability (cf. Ambos, *Der Allgemeine Teil* (2002/2004), pp. 617–18; see also Section C. (4)(b)(ii)), I am not as sure as Mitgutsch that the Statute cannot be interpreted in the sense of a value-based differentiation typical for *qualitative Akzessorietät* (see discussion above in main text). In any case, I agree with Mitgutsch's conclusion (based on an analysis of the case law) that Article 25(3) provides for a functional unitarian system with elements of the differentiated system (ibid, 374).

380 See conc. Werle, *Principles* (2009), mn. 447 ff., identifying a *four-tiered system of participation* where the contribution to a group crime is included ('At the top, commission as a perpetrator constitutes the gravest form of criminal liability. On the second level, inducement, which may take different forms, is found. Assistance follows at the third level, while contribution to a group crime constitutes the lowest level of participation', mn. 449). See also id, *JICJ*, 5 (2007), 957, 961; Werle and Burghardt, 'Die mittelbare Mittäterschaft', in Bloy et al., *FS Maiwald* (2010), p. 853; Jessberger and Geneuss, *JICJ*, 6 (2008), 869 ('Rightly, the ICC Statute has been applauded for codifying general principles of international criminal law. As regards the modes of liability in Article 25(3), it does so in a uniquely differentiated way, and deliberately avoids the broad definitions found in the respective provisions of the previously existing statutes of international tribunals.'); Vest, *JICJ*, 2 (2010), 856 with n. 19 ('differentiating model with uniform (unified) range of punishment'); id, *Völkerrechtsverbrecher* (2011), pp. 179, 427; Eser, 'Individual Criminal Responsibility', in Cassese, Gaeta, and Jones, *Rome Statute*, i (2002), p. 788 with n. 86.

381 *Prosecutor v Thomas Lubanga Dyilo*, No. ICC-01/04-01/06-803, Decision on the Confirmation of Charges, para. 320 (29 January 2007). Olásolo, 'Distinction', in Stahn and Sluiter, *Practice of the ICC* (2009), pp. 343, 351 ff. argues that this decision can be seen as 'the final step in the process of adopting the distinction between principal and accessorial liability in international criminal law'; for a discussion of this part, see also Ambos, 'Commentary', in Klip and Sluiter, *ALC*, xxiii (2010), pp. 744–8.

382 Judges Blattmann and Odio Benito, Judge Fulford dissenting (arguing that the different forms of participation in Article 25(3) are not clearly distinguishable (Dissent, para. 7) and rejecting any hierarchy between them (ibid, para. 8)). For a discussion, see Ambos, *ICLR*, 12 (2012), 141, 144–5.

383 *Prosecutor v Thomas Lubanga Dyilo*, No. ICC-01/04-01/06-2842, TC Judgment pursuant to Article 74 of the Statute, para. 999 (14 March 2012).

384 Ibid, para. 997 ('If accessories must have had 'a substantial effect on the commission of the crime' to be held liable, then co-perpetrators must have had, pursuant to a systematic reading of this provision, more than a substantial effect', nn. omitted).

385 Ibid, para. 996 ('systematic reading of these provisions leads to the conclusion that the contribution of the co-perpetrator who "commits" a crime is necessarily of greater

significance than that of an individual who "contributes in any other way to the commission" of a crime').

[386] Ibid, para. 998 ('Only those individuals who attempt "to commit" a crime, as opposed to those who participate in a crime committed by someone else, can be held liable under that provision').

[387] Ibid, para. 998 ('The same conclusion is supported by the plain language of Articles 25(3)(b) and (c), which require for secondary liability that the perpetrator at least attempt to commit the crime. As such, secondary liability is dependent on whether the perpetrator acts'). The same is true for subparagraph (d) referring to 'the commission or attempted commission of such a crime … '.

[388] Ibid, para. 999.

[389] See already note 379.

[390] cf. Law Commission, *Participating* (2007), paras. 1.55, 2.7; Kutz, 'Foundations', in Deigh and Dolinko, *Handbook* (2011), p. 151.

[391] Note 387 and main text.

[392] See also Vest, *Völkerrechtsverbrecher* (2011), p. 210.

[393] See on this theory of complicity as an 'accessorial assault on the protected legal good' ('*akzessorischer Rechtsgutsangriff*') Roxin, *Strafrecht II* (2003), § 26 mn. 11, 26–31. For the essentially same view in Anglo-American Law, for example, Ashworth, *Criminal Law* (2009), p. 404; LaFave, *Criminal Law*, ii (2003), pp. 337, 356. For other views focusing on either the own wrong realized by the accomplice or his derivative/accessorial wrong see Roxin, *Strafrecht II* (2003), § 26 mn. 12–25 with further references; for a strict inchoate understanding of accomplice liability focusing exclusively on the act of assistance Law Commission, *Assisting and Encouraging* (1993), paras. 4.18–4.46, 4.144–4.145; in the same vein Kutz, 'Foundations', in Deigh and Dolinko, *Handbook* (2011), pp. 150, 158, 161, 164 (accomplice liability 'as a form of inchoate liability at the level of act-type criminalization' stressing its 'risk enhancing character' and the 'participatory intent'); for a more nuanced approach, however, Law Commission, *Participating* (2007), paras. 1.36, 1.38–1.40, 3.1–3.167 (retaining the doctrine of 'secondary liability' and proposing a statutory scheme).

[394] See Chapter III, Section B.

[395] See American Law Institute, MPC (1985), § 2.06(1): 'committed by his own conduct'; Article 28 of the Spanish Criminal Code ('Código Penal'): '*por sí solo*'; § 25(1) of the German Criminal Code ('StGB'): '*selbst … begeht*' ('acting himself' [translation by J. J. Darby, *The American Series of Foreign Penal Codes*, xxviii: *The Penal Code of the Federal Republic of Germany* (Littleton: F.B. Rothman; London: Sweet & Maxwell, 1987)], 'commits himself' [translation by Bohlander, *German Criminal Code* (2008)]).

[396] I am grateful to Hsiang Pan, LLM, doctoral candidate Georg-August-Universität Göttingen for this clarification.

[397] I am grateful to Dr Mohammed El-Zeidy, The Hague, for this clarification.

[398] Conc. Eser, 'Individual Criminal Responsibility', in Cassese, Gaeta, and Jones, *Rome Statute*, i (2002), p. 789 with n. 89.

[399] See, for example, *Tadić*, No. IT-94-1-A, para. 188. Conc. *Kordić and Čerkez*, No. IT-95-14/2-T, para. 376.

[400] Conc. Vest, *Genozid* (2002), p. 185; id, *Völkerrechtsverbrecher* (2011), pp. 183, 342; van Sliedregt, *Criminal Responsibility* (2003), pp. 71 ff.; id, *Criminal Responsibility* (2012), p. 99. From a comparative perspective, see the references in *supra* note 132.

[401] For a similar definition invoking Roxin, *Täterschaft und Tatherrschaft* (2006), pp. 242–52, 653–4, see now *Stakić*, No. IT-97-24-T, para. 440. See also Eser, 'Individual Criminal Responsibility', in Cassese, Gaeta, and Jones, *Rome Statute* (2002), pp. 789 ff.; Werle, *Principles* (2009), mn. 457.

[402] *Stakić*, No. IT-97-24-A, para. 62. For a critical analysis of this judgment, see Badar, *ICLR*, 6 (2006), 143 ff.

[403] *Lubanga*, No. ICC-01/04-01/06-803, paras. 326 ff. Facts: as part of a recruitment policy of the *Forces Patriotiques pour la Libération du Congo* (FPLC), many children under the age of fifteen were forced to join the FPLC (or joined the group voluntarily). The FPLC recruited groups of children in several localities in Ituri such as the areas surrounding Bunia in August 2002, in Sota at the beginning of 2003 and in Centrale. These recruitments were carried out by *various* FPLC commanders. *Thomas Lubanga Dyilo* was Commander-in-Chief of the FPLC and participated himself on at least one occasion in the conscription of a group of children, some of whom were under 15 years old. These recruitments were made in order to train the children militarily and then use them as fighters or bodyguards for senior FPLC military commanders (paras. 251–2).

[404] The 'control over' or 'domination of the act' theory (*Tatherrschaftslehre*) was developed in a more elaborate form for the first time by Prof. Claus Roxin in his postdoctoral work *Täterschaft und Tatherrschaft* (1963/2006), pp. 60 ff.; see also id, *Strafrecht II* (2003), § 25 mn. 10 ff. Accordingly, in Roxin's own words recently made available in English (*JICJ*, 9 (2011), 196), '[a] person is a perpetrator if he controls the course of events; one who, in contrast, merely stimulates in someone else the decision to act or helps him to do so, but leaves the execution to the attributable act of the other person' is a mere accomplice. In other words, the decisive criterion of all forms of perpetration is 'domination of' or 'control over the act'. For Roxin, a perpetrator is a person who 'dominates' or 'controls' the commission of the criminal offence, who holds the course of events in his own hands, who has the ultimate power to determine whether and how the relevant acts are carried out (cf. Werle and Burghardt, *JICJ*, 9 (2011), 191 with a helpful explanation of the jurisprudential context of Roxin's theory). It is important to note that Roxin himself always understood the concept of *Tatherrschaft* as an 'open concept' and a 'guiding principle' (*Leitprinzip*) which needs to be further refined by the case law and the doctrine (id, *Täterschaft und Tatherrschaft* (1963/2006), pp. 122–6; id, '§ 25', in Jähnke, Laufhütte, and Odersky, *Leipziger Kommentar*, i (2003), mn. 35. Thus, the widespread criticism against its vagueness misses the point (cf. Vest, *Völkerrechtsverbrecher* (2011), pp. 356–8).

[405] The objective approach ought to be rejected since 'the notion of committing an offence through another person cannot be reconciled with the idea of limiting the class of principals to those who physically carry out … objective elements of the crime'. *Lubanga*, No. ICC-01/04-01/06-803, para. 333.

[406] The existence of subparagraph (d) strikes in favour of rejecting the subjective approach, since subparagraph (d), explicitly constituting accomplice liability for a contribution made in full knowledge of the intent of a group, would be inconsistent with a system in which every contribution with sufficient knowledge incurred liability as a *perpetrator*. The Chamber stated that 'the latter concept (scil, subparagraph (d)) would have been the basis of the concept of co-perpetration within the meaning of Article 25(3)(a), had the drafters of the Statute opted for a subjective approach for distinguishing between principals and accessories'. cf. *Lubanga*, No. ICC-01/04-01/06-803, para. 335 and later

Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui, No. ICC-01/04–01/07-717, Decision on the Confirmation of Charges, para. 483 (30 September 2008).

407 *Lubanga*, No. ICC-01/04-01/06-803, para. 341 'joint control'. See also Roxin, *Strafrecht II* (2003), § 25 mn. 188 ff., Satzger, *Internationales Strafrecht* (2011), § 15 mn. 54; Separate Opinion of Judge Schomburg, *Gacumbitsi*, No. IT-01-64-A, para. 17; thereto Badar and Karsten, *ICLR*, 7 (2007), 172 ff.

408 *Lubanga*, No. ICC-01/04-01/06-803, para. 342 quoting *Stakić*, No. IT-97-24-T, para. 440. Followed by *Katanga and Chui*, No. ICC-01/04–01/07-717, paras. 520 ff.

409 *Lubanga*, No. ICC-01/04-01/06-803, paras. 343–5.

410 Ibid, paras. 346–8.

411 Ibid, paras. 349–60.

412 Ibid, paras. 361–5.

413 Ibid, paras. 366–7.

414 *Katanga and Chui*, No. ICC-01/04–01/07-717. Facts: on or about 24 February 2003 the combatant groups *Force de Résistence Patriotique en Ituri* (FRPI), and *Front des Nationalistes et Intégrationnistes* (FNI) attacked the Bogoro village (in the Bahema Sud *collectivité*, Irumu territory, Ituri district). During the attack both groups, acting in coordinated and joined form, inflicted serious injuries, detained and threatened with weapons, raped, looted goods, destroyed the property of the residents, and killed at least 200 civilians. In the operation, children under fifteen, previously trained in FRPI and FNI camps, were also used as soldiers. Germain Katanga was the top commander of the FRPI and Mathieu Ngudjolo Chui of the FNI. They jointly ordered the attack and directed the implementation of the plan and provided weapons to their respective groups (paras. 33–5). See also Weigend, *JICJ*, 9 (2011), 92 and Olásolo, *Criminal Responsibility* (2009), pp. 318–20 .

415 *Prosecutor v Jean-Pierre Bemba Gombo*, No. ICC 01/05–01/08-424, Decision Pursuant to Article 61(7)(a) and (b) on the Charges against Jean-Pierre Bemba Gombo (15 June 2009). Case facts: from or about 26 October 2002 to 15 March 2003 the troops of the non-governmental force *Mouvement de Libération du Congo* attacked the population of the Central African Republic (CAR) in Boy Rabé, Mongoumba, Bangui and Fou, among other places. During this time the MLC soldiers looted goods, raped, performed house-to-house searches, and killed civilians, often inside their homes or in their courtyards. *Jean-Pierre Bemba Gombo* was MLC President and Commander-in-Chief of its military wing, and *authorized* the military operation, which involved intimidating the CAR population, and annihilating their ability to support rebel groups. *Bemba* had effective authority and *control* over the troops, and was informed about the crimes committed by them during their operation in CAR (paras. 94, 109, 118, 125, 341 ff.). For a detailed analysis of this case, see Ambos, *LJIL*, 22 (2009), 715.

416 *Bemba Gombo*, No. ICC 01/05–01/08-424, para. 348.

417 Ibid, para. 350.

418 *Lubanga*, No. ICC-01/04-01/06-2842, Fulford Dissent.

419 *Lubanga*, No. ICC-01/04-01/06-2842, paras. 976–1018 (see also paras. 918–33 where the Chamber presents the PTC's view in a systematic fashion).

420 Critical on the *Lubanga* approach, qualifying the common plan as a pure objective element Weigend, *JICJ*, 6 (2008), 480 with n. 37. For a mixed objective-subjective understanding of the plan (after all, based on the original will of the parties), see Ambos, *LJIL,* 22 (2009), 715, 721; id, *ICLR,* 12 (2012), 140.

421 Vest, *Völkerrechtsverbrecher* (2011), p. 369 argues that the 'ability to significantly shape' the crime should suffice; 'ability to frustrate the crime', in his opinion, demands too much, especially in the context of collective criminal settings.

422 See Roxin, *Täterschaft und Tatherrschaft* (2006), pp. 283–4.

423 *Bemba Gombo*, No. ICC 01/05–01/08-424, para. 350.

424 This was the Defence position, see *Lubanga*, No. ICC-01/04-01/06-803, paras. 955, 983.

425 *Lubanga*, No. ICC-01/04-01/06-803, para. 984, also 987 (confirming *Lubanga*, No. ICC-01/04-01/06-803, para. 344). See also *Prosecutor v Callixte Mbarushimana*, No. ICC-01/04-01/10-465, Decision on the Confirmation of Charges, para. 291 (with regard to Article 25(3)(d)) (16 December 2011); *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, No. ICC-01/09-02/11-382-Red, Decision on the confirmation of charges, para. 399 (23 January 2012); *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, No. ICC-01/09-01/11-373, Decision on the Confirmation of Charges, para. 301 (23 January 2012). The Chamber invokes a 'combined reading of Articles 25(3)(a) and 30' in support of its view concluding that 'committing the crime in question does not need to be the overarching goal of the co-perpetrators' (*Lubanga*, No. ICC-01/04-01/06-803, para. 985; crit. Ambos, *ICLR*, 12 (2012), 139–40).

426 On the crucial element of the mutual attribution, see previously note 401 with main text.

427 National criminal law theory takes it for granted that the plan must contain (more or less) concrete offences, see for Germany: Roxin, *Strafrecht II* (2003), § 25 mn. 196; Joecks, '§ 25 Täterschaft', in Joecks and Miebach, *Münchener Kommentar*, i (2011), mn. 237; for England: Simester et al., *Criminal Law* (2010), p. 234 ('There must be … an agreement, or reciprocal understanding, between S and P **to pursue crime A**'; Ormerod, *Smith and Hogan's Criminal Law* (2011), p. 218 (' … in the case of joint enterprise *based on joint principalship*, … it is necessary for there to be an **agreement to commit crime X** and for a shared **common purpose to commit crime X**'); Card, *Criminal Law* (2010), p. 783 ('A joint criminal venture exists where two (or more) people engage together with the **common purpose that an offence be committed**') (italics in original, bold-print added).

428 Perhaps one may read the same view in the Chamber's—pretty unclear—statement that 'the mental requirement that the common *plan included* the commission of a **crime** [sic!] will be satisfied if the co-perpetrators knew that, in the ordinary course of events, implementing the plan will lead to that result' (*Lubanga*, No. ICC-01/04-01/06-803, para. 986 (emphasis added)).

429 *Lubanga*, No. ICC-01/04-01/06-803, paras. 999, 1006 (with detailed references in n. 2705).

430 Note 383 and main text.

431 See Subsection (ii) of this Section (4)(b).

432 See Section (2)(c) of Part C of this chapter.

433 See also Cryer, 'General Principles', in Cryer et al., *Introduction* (2010), p. 366; Vest, *Völkerrechtsverbrecher* (2011), p. 368 (demanding a '*wesentlich*' contribution); Werle, *Principles* (2009), mn. 466–7. On the other hand, Weigend, *JICJ*, 6 (2008), 480 and van Sliedregt, *Individual Criminal Responsibility* (2012), p. 99 doubt that the 'essential task' test will be particularly strict in practice, since it requires a hypothetical assessment in retrospection. According to the *Oxford Online Dictionary* (<http://oxforddictionaries.com>

accessed 4 June 2012), substantial means 'of considerable importance', whereas essential means 'absolutely necessary; extremely important'.

434 *Lubanga*, No. ICC-01/04-01/06-2842, paras. 1003–5 and ibid, Fulford Dissent, paras. 12, 15. Contrast ('personal and direct participation') the Defence position, ibid, paras. 949, 1002. The PTC did not deal with the issue (see Ambos, 'Commentary', in Klip and Sluiter, *Annotated Leading Cases*, xxiii (2010), p. 745).

435 *Lubanga*, No. ICC-01/04-01/06-2842, Fulford Dissent, para. 15. For a critical discussion, see Ambos, *ICLR*, 12 (2012), 142–5, 147.

436 This is the reason why the absence of a co-perpetrator is not considered a problem by the dominant view in Germany (Jescheck and Weigend, *Strafrecht* (1996), p. 680; Roxin, *Strafrecht II* (2003), § 25 mn. 200), but not so in England. There, it is normally required that two co-principals must 'together … satisfy the definition of the substantive offence', 'each of them by his own act' contribute 'to the causation of the conduct element of the offence, if all their acts together fulfill all the conduct elements … ' (Ashworth, *Principles* (2009), p. 404) or 'each with the relevant mens rea does distinct acts which together constitute the sufficient act for the actus reus of an offence' (Card, *Criminal Law* (2010), p. 766). Thus, the question is whether the respective fulfilment of the definitional elements of the offence requires presence. According to Card, ibid, that seems, at least, to be required by the law of Australia. See also Weisser, *Täterschaft* (2011), pp. 330–41, 346–8, 349–51, 357–8, 360–2 (demonstrating that in Austria, England, and France at least a partial common execution is required).

437 It is, however, controversial whether an important participation in the preparatory stage can compensate for the lack of participation in the execution stage. Vest, *Völkerrechtsverbrecher* (2011), pp. 181–2 answers this in the affirmative for ICL crimes *a fortiori* because of the particular importance of the planning stage. See, however, for the national debate Jescheck and Weigend, *Strafrecht* (1996), p. 680; Roxin, *Strafrecht II* (2003), § 25 mn. 198–218; Stratenwerth and Kuhlen, *Strafrecht*, i (2011), § 12 mn. 90–4.

438 Note 401 and main text.

439 *Bemba Gombo*, No. ICC 01/05–01/08-424, para. 351.

440 cf. *Katanga and Chui*, No. ICC-01/04–01/07-717, para. 535; but compare the recent referral to the requirement in *Muthaura, Kenyatta and Ali*, No. ICC-01/09-02/11, para. 297 and *Ruto, Kosgey and Sang*, No. ICC-01/09-01/11-373, para. 292.

441 On this discussion, see Ambos, *LJIL*, 22 (2009), 719 ff. cf. also Manacorda and Meloni, *JICJ*, 9 (2011), 169.

442 *Bemba Gombo*, No. ICC 01/05–01/08-424, paras. 372, 400–1.

443 *Lubanga*, No. ICC-01/04-01/06-2842, para. 1357 ('Lubanga acted with the intent and knowledge … required by Article 30'); conc. ibid, Fulford Dissent, para. 17 letter d.

444 Crit. Ambos, *ICLR,* 12 (2012), 148–9.

445 *Lubanga*, No. ICC-01/04-01/06-2842, para. 1013.

446 cf. Eser, 'Individual Criminal Responsibility', in Cassese, Gaeta, and Jones, *Rome Statute* (2002), pp. 793 ff.; van Sliedregt, *Criminal Responsibility* (2003), p. 70; Cryer, 'General Principles', in Cryer et al., *Introduction* (2010), p. 364 (speaking of a 'background man'); Vest, *Völkerrechtsverbrecher* (2011), pp. 183–4.

[447] The translation of the German '*Hintermann*' as 'mastermind' (by Silverman, in Roxin, *IsLR*, 30 (1996), 71) may omit cases in which the dominance of the '*Hintermann*' is physical (e.g., by coercion) rather than intellectual.

[448] See generally for perpetration by means, Fletcher, *Criminal Law* (1978/2000), p. 639; id, *Concepts* (1998), pp. 197–200; Jescheck and Weigend, *Strafrecht* (1996), pp. 662 ff.; for a good summary of the **German** case law Bohlander, *Principles* (2009), pp. 156–60. In French criminal law the '*auteur médiat*' is not codified in the General Part of the *Code Pénal*, but exceptionally recognized if the direct perpetrator is used as a 'simple instrument' (cf. Czepluch, *Täterschaft und Teilnahme* (1994), pp. 30–3), for example, in the case of falsification of documents using an ignorant public official (Pfützner, 'Frankreich', in Sieber and Cornils, *Nationales Strafrecht*, iv (2010), p. 81); the concept is also contained in some offences in the special part (e.g., Articles 211–1 ('*faire commettre*' a genocide); for further examples, see Mayaud, *Droit pénal* (2010), pp. 394–6; generally also Bouloc, *Droit pénal* (2011), pp. 274–5).

[449] See on these constellations from a comparative perspective (taking into account Austria, England, France, Germany, and Italy) Weisser, *Täterschaft* (2011), pp. 190–276, 441–61.

[450] See, for an exemplary case of duress, *Prosecutor v Erdemović*, No. IT-96-22-T, Judgment Trial Chamber (29 November 1996); for more on this case see Chapter VIII, C. (5)(b)(iii) and (iv). For an analysis of indirect perpetration in situations of duress, see Ambos, *Der Allgemeine Teil* (2002/2004), pp. 574–81 and for the normative reasons of attribution id, *Internationales Strafrecht* (2011), § 7 mn. 24.

[451] See American Law Institute, MPC (1985), s. 2.06(2)(a) and comments thereto.

[452] cf. Weisser, *Täterschaft* (2011), pp. 176–89.

[453] Chapter III, Section B.

[454] See the fundamental work of Roxin, *Täterschaft und Tatherrschaft* (2006), pp. 242–52, 653–4; also Ambos, *Der Allgemeine Teil* (2002/2004), pp. 590 ff. with further references; with regard to genocide Kreß, '§ 220a/§ 6 VStGB', in Joecks and Miebach, *Münchener Kommentar*, iii (2003), mn. 100 ff.; Radtke, *GA*, 153 (2006), 350. Werle, *Principles* (2009), mn. 475 with n. 227, also considers that the concept of the '*Täter hinter dem Täter*' is recognized by Article 25(3)(a). Whereas the author in the first edition of his work expressed doubts as to the application of the German doctrine on acting through an organizational power structure in ICL (id, *Principles* (2005), mn. 355 with n. 196), he recognizes in his second edition the significance gained by this concept in the ICC decisions (id, *Principles* (2009), mn. 476 ff.). The doctrine is not uncontroversial, however. For a critique, see Rotsch, *NStZ*, 25 (2005), 13 ff.; van Sliedregt, *Criminal Responsibility* (2003), p. 70; id, *Criminal Responsibility* (2012), pp. 83–6; Weigend, *JICJ*, 9 (2011), 100–1; critical on the basis of a social theory of control of the act ('*soziale Tatherrschaftslehre*') Schlösser, *Verantwortlichkeit* (2004), pp. 59 ff.; contrasting it with an, albeit very vague, 'doctrine of leaders' liability' as 'a subcategory of senior accountability' Eldar, *Cr.L.Phil.*, 6 (2012), 207 ff. For a defence, see Roxin, *ZStR*, 125 (2007), 3 ff.; id, *GA*, 159 (2012), 395 ff.; Schünemann, 'Schrumpfende Basis', in Heinrich et al., *FS Roxin* (2011), pp. 799–817; Jessberger and Geneuss, *JICJ*, 6 (2008), 859; Vest, *Völkerrechtsverbrecher* (2011), pp. 183–92. From a comparative perspective (Austria, England, France, Germany, and Italy) see Weisser, Täterschaft (2011), 277–99, 461–2 (arguing that the doctrine is specifically recognized only in Germany and in ICL but not in Austria, England, France, and Italy).

[455] See note 76 and main text.

456 See notes 93–102 with main text; cf. most recently Ambos, *JICJ*, 9 (2011), 137–45.

457 *Lubanga*, No. ICC-01/04-01/06-803, para. 332; *Prosecutor v Thomas Lubanga Dyilo*, No. ICC-01/04-01/06-2, Arrest warrant decision, paras. 94 ff. (24 February 2006); *Katanga and Chui*, No. ICC-01/04–01/07-717, paras. 487 ff., 495 ff.

458 *Lubanga,* No. ICC-01/04-01/06-2, paras 94–6.

459 See also the Confirmation Decision, *Lubanga*, No. ICC-01/04-01/06-803, para. 332; nevertheless, the Chamber did, *in casu*, not employ indirect perpetratorship but took recourse to (mere) co-perpetratorship. Conc. also Werle, *Principles* (2009), mn. 475 with n. 227.

460 *Prosecutor v Jean-Pierre Bemba Gombo*, No. ICC-01/05-01/08-14, Decision on the Prosecutor's Application for a Warrant of Arrest, para. 78 (10 June 2008) ('as a result of his authority over his military organisation, *Jean-Pierre Bemba* had the means to exercise control over the crimes committed by MLC troops deployed in the CAR').

461 *Katanga and Chui*, No. ICC-01/04–01/07-717, paras. 488, 494–539.

462 *Katanga and Chui*, No. ICC-01/04–01/07-717, para. 495.

463 Ibid, paras. 496 ff.

464 Ibid, paras. 498, 500 ff. See also Werle, *Principles* (2009), mn. 478.

465 *Katanga and Chui*, No. ICC-01/04–01/07-717, paras. 494 ff., 511 ff.: hierarchical relationship, enough subordinates, compliance with orders.

466 Ibid, paras. 515 ff.

467 Ibid, para. 502. Criticizing that the Chamber would exaggerate the real importance of the doctrine throughout universal legal systems Weigend, *JICJ*, 9 (2011), 105–6; Manacorda and Meloni, *JICJ*, 9 (2011), 170; Werle and Burghardt, 'Mittelbare Mittäterschaft', in Bloy et al., *FS Maiwald* (2010), pp. 854–5.

468 See note 131 with main text (regarding indirect co-perpetration); on the STL dismissal of indirect perpetration, see note 341 with main text.

469 *Katanga and Chui*, No. ICC-01/04–01/07-717, paras. 506–8 (stating at 508 that it 'need not to transfer the ad hoc tribunals' case law mechanically to the system of the Court'); concurring *Ruto, Kosgey and Sang*, No. ICC-01/09-01/11-373, para. 289; see also *Černič, CLF*, 22 (2011), 558.

470 See for these (and the other) requirements Ambos, *JICJ*, 9 (2011), 153–4, 157. See also Werle and Burghardt, 'Mittelbare Mittäterschaft', in Bloy et al., *FS Maiwald* (2010), pp. 856–7; Weigend, *JICJ*, 9 (2011), 94–9. Jessberger and Geneuss, *JICJ*, 6 (2008), 859–62.

471 See in this context Weigend, *JICJ*, 9 (2011), 103 criticizing the concept's 'vagueness of dominance' and advocating instead for a case-by-case assessment of the indirect perpetrator's control over the direct perpetrators, independent of the eventual existence of an organizational structure (at 109).

472 *Katanga and Chui*, No. ICC-01/04–01/07-717, paras. 518, 547 (by way of example mentioning 'abducting minors and subjecting them to punishing training regimens in which they are taught to shoot, pillage, rape and kill'). Conc. with this approach, see van der Wilt, *JICJ*, 7 (2009), 372; Manacorda and Meloni, *JICJ*, 9 (2011), 172; Ambos, 'Organisation', in Heinrich et al., *FS Roxin* (2011), p. 846 (see for the particularities regarding non-state organizational structures ibid, pp. 847–9).

473 *Ruto, Kosgey and Sang*, No. ICC-01/09-01/11-373, paras. 320–3 and 324–6.

[474] For more details, see Vest, *Völkerrechtsverbrecher* (2011), p. 362 with n. 42.

[475] *Katanga and Chui*, No. ICC-01/04–01/07-717, paras. 489 ff. (492), 519 ff., 540 ff. (561).

[476] *Katanga and Chui*, No. ICC-01/04–01/07-717, para. 489; conc. *Černič, CLF*, 22 (2011), 565; critical Manacorda and Meloni, *JICJ*, 9 (2011), 174–5 warning that the concept could ‘overly broaden’ the frontiers of attribution.

[477] cf. Weigend, *JICJ*, 9 (2011), 110; Vest, *Völkerrechtsverbrecher* (2011), p. 433 (with regard to *mittäterschaftliche mittelbare Täterschaft*).

[478] cf. Werle and Burghardt, ‘Mittelbare Mittäterschaft’, in Bloy et al., *FS Maiwald* (2010), pp. 860–3; Weigend, *JICJ*, 9 (2011), 111.

[479] Conc. Werle, *Principles* (2009), mn. 479; *Černič, CLF*, 22 (2011), 557.

[480] cf. Werle and Burghardt, ‘Mittelbare Mittäterschaft’, in Bloy et al., *FS Maiwald* (2010), p. 861 demanding that only those crimes which are committed jointly by the different organizations (and not those committed by one organisation alone) should be mutually attributed to the co-perpetrators; conc. Vest, *Völkerrechtsverbrecher* (2011), p. 433.

[481] cf. OTP, Prosecutor’s Application for Warrant of Arrest under 58 Against Omar Hassan Ahmad Al Bashir, para. 38 (14 July 2008). See on this Application Jessberger and Geneuss, *JICJ*, 6 (2008), 853 ff., 862 ff., agreeing with the position of PTC I and of the OTP (‘Within this statutory framework also perpetration-by-means of criminally responsible persons has its place, whether one likes it or not’, at 869). Indirect perpetration was also charged in *Prosecutor v Abdel Raheem Muhammad Hussein*, No. ICC-02/05-01/12-2, Warrant of Arrest, p. 3 (1 March 2012).

[482] Concerning the element of ‘co-perpetration’ within the notion of indirect co-perpetration, Judge Usacka did not agree that the (other) alleged co-perpetrators had been able to frustrate the commission of the crime and therefore she intended to charge Al Bashir exclusively with indirect perpetratorship. See her Partly Dissenting Opinion, *Al Bashir*, No. ICC-02/05-01/09, Dissenting Opinion of Judge Usacka, para. 104. Critical in the same vein Manacorda and Meloni, *JICJ*, 9 (2011), 175 and van der Wilt, *JICJ*, 7 (2009), 314.

[483] *Al Bashir*, No. ICC-02/05-01/09, para. 223. For a detailed analysis of this arrest warrant decision against Al Bashir, see van der Wilt, *JICJ*, 7 (2009), 313–14, who argues that at the end it will need to be decided whether Al Bashir ‘as primus inter pares, exercises absolute control over the entire state apparatus’, or if he ‘shares command, and control over the state apparatus with others, and that he may even be dependent on the cooperation of other senior leaders (military or civilians)’.

[484] *Al Bashir*, No. ICC-02/05-01/09, para. 221.

[485] Ibid, para. 222.

[486] On the application of the theory in the *Al Bashir* case, see van der Wilt, *JICJ*, 7 (2009), 309–10, 312 ff.

[487] Weigend, *JICJ*, 9 (2011), 111; Werle and Burghardt, ‘Mittelbare Mittäterschaft’, in Bloy et al., *FS Maiwald* (2010), pp. 862–3.

[488] *Al Bashir*, No. ICC-02/05-01/09, para. 216 (emphasis added).

[489] *Ruto, Kosgey and Sang*, No. ICC-01/09-01/11-373, para. 315; *Muthaura, Kenyatta and Ali*, No. ICC-01/09-02/11, para. 408; both decisions refer to *one* organization.

[490] *Prosecutor v Laurent Koudou Gbagbo*, No. ICC-02/11-01/11-1, Warrant of Arrest, para. 10 (23 November 2011) and *Prosecutor v Saif Al-Islam Gaddafi*, No. ICC-01/11-01/11-3, Warrant of Arrrest, p. 6 (27 June 2011).

[491] Conc. Eser, 'Individual Criminal Responsibility', in Cassese, Gaeta, and Jones, *Rome Statute* (2002), p. 795 with n. 111. On the proximity between command responsibility and *Organisationsherrschaft*, see also Vest, *Genozid* (2002), p. 300; also Roxin, *ZStR*, 125 (2007), 12, calling this type of control '*Anordnungsgewalt*' ('force to order').

[492] cf. Ambos, *Der Allgemeine Teil* (2002/2004), pp. 594, 597–8, 614 with further references and Roxin, *ZStR*, 125 (2007), 13 ff.

[493] Note 474.

[494] On this concept with regard to the direct perpetrator—as opposed to the leaders and organizers—see Vest, *Völkerrechtsverbrecher* (2011), pp. 358–60.

[495] Vest, *Völkerrechtsverbrecher* (2011), p. 363.

[496] cf. Vest, *Völkerrechtsverbrecher* (2011), p. 186.

[497] For further explanation, cf. Ambos, 'Command Responsibility', in Nollkaemper and van der Wilt, *System Criminality* (2009), pp. 148–51 with n. 98; id, *JICJ*, 9 (2011), 155–6.

[498] Ambos, *Der Allgemeine Teil* (2002/2004), pp. 602 ff., 614; id, 'Command Responsibility', in Nollkaemper and van der Wilt, *System Criminality* (2009), p. 154; id, 'Organisation', in Heinrich et al., *FS Roxin* (2011), pp. 850–1.

[499] See for example, Osiel, *CornILJ*, 39 (2005), 807 who, however, apparently fails to grasp the different forms of participation provided for by the differentiated concepts of perpetration, according to which '*Organisationsherrschaft*' is more than mere accessorship. Further, it is misleading to state that prosecutions in Latin America 'rely heavily on … superior responsibility' (ibid, 808). The truth is that most prosecutions invoke Roxin's theory, especially the *Organisationsherrschaftslehre*, since it can be based on the general rules of perpetration by means (*autoría mediata*) which are—unlike the command responsibility doctrine—well recognized in civil law systems (i.e., also in Latin American). Finally, the fine distinctions between modes of participation discussed in a differentiated system of perpetration as the German or Spanish one demonstrate that 'simplicity' is not, as suggested by Osiel, *ICLR*, 105 (2005), 1753, the preferred option for criminal law doctrine, at least not for that of the core civil law countries. Pleading for a renaissance of 'Dogmatik' thinking at the ICC, see Fletcher, *JICJ*, 9 (2011), 184.

[500] cf. Vest, *Genozid* (2002), pp. 220, 249; id, *Völkerrechtsverbrecher* (2011), p. 375.

[501] For a different view, see Vest, *Völkerrechtsverbrecher* (2011), p. 430–2 rejecting 'undisturbed control' as an additional requirement of organizational control, considering 'ordering' as the appropriate mode of liability for top-level participants (also pp. 364–5) and indirect perpetration for mid-level participants since only they normally dispose of a considerable autonomy and—unlike the top-level participants—of replaceable executors. Admittedly, if the structure of the criminal apparatus, as was the case with the Nazi system (cf. ibid, pp. 276–7 with further references), facilitates the individual initiative and autonomous decision-making of the mid and top bureaucrats, these may qualify as indirect perpetrators.

[502] Conc. van Sliedregt, *Criminal Responsibility* (2003), p. 71; Mitgutsch, 'Beteiligungsregelung', in Geisler et al., *FS Geppert* (2011), p. 362 with further references.

[503] See Section C. (2)(b), notes 163 ff.

[504] cf. Vest, *Völkerrechtsverbrecher* (2011), p. 334.

[505] For this reason in favour, in principle, of JCE I Vest, *Völkerrechtsverbrecher* (2011), pp. 311, 338, 351, 386, 389–90; but against JCE II and III, ibid, pp. 306, 332, 337, 351, 387.

506 cf. *Kvočka et al.*, No. IT-98-30/1-T, para. 307.

507 Critical on such broad interpretations Danner and Martínez, *CalLR*, 93 (2005), 135 ff.; crit. also Osiel, *ColLR*, 105 (2005), 1796 ff., 1802 ff. and id, *CornILJ*, 39 (2005), 799–800; Vest, *Völkerrechtsverbrecher* (2011), pp. 314–15.

508 Vogel, *ZStW*, 114 (2002), 421; see also van Sliedregt, *JICJ*, 5 (2007), 200, 203.

509 cf. van der Wilt, *JICJ*, 5 (2007), 99 ff., 107. Yet, an additional agreement between the superior and the direct perpetrators is not necessary, see previously note 146.

510 cf. Jung, 'Zurechnung', in Eser, Huber, and Cornils, *Einzelverantwortung und Mitverantwortung* (1998), pp. 175, 183 ff.; in favour of a 'form of criminal participation' van Sliedregt, *JICJ*, 5 (2007), 201–2.

511 cf. Vogel, *ZStW*, 114 (2002), 420 ff.; see for a systemic imputation ('global approach') also Piacente, *JICJ*, 2 (2004), 446 ff.

512 On this nexus, see previously note 149.

513 Vest, *Völkerrechtsverbrecher* (2011), pp. 316–17, 324–5.

514 Note 142.

515 This goes back to the 14th century when liability was based on a 'common consent' (Smith, *Criminal Complicity* (1991), p. 209 n. 1). Later, in the 17th century, the private law concept of 'acting in concert' or 'conspiracy' was used to punish specific agreements to commit unlawful acts (see *Ordinance of Conspirators* (1305), 33 Edward I; generally *HarvLR*, 72 (1959), 922–3). On 'joint criminal venture' as (secondary) participation, see Law Commission, *Participating* (2007), paras. 1.20–1.27.

516 Vest, *Völkerrechtsverbrecher* (2011), pp. 305, 386.

517 Ibid ('funktionales Äquivalent'); see also ibid, pp. 339–40, arguing that the case law used the term 'co-perpetration' only as a synonym for JCE without adopting the actual civil law concept.

518 See note 138 with main text.

519 See also Vest, *Völkerrechtsverbrecher* (2011), p. 332.

520 On the correct form of participation in the case law and the related question of whether aiding and abetting a JCE is possible at all, see Ambos, *JICJ*, 5 (2007), 169–70.

521 See Ormerod, *Smith and Hogan's Criminal Law* (2011), p. 190, referring to Stephen, J. F., *A Digest of the Criminal Law* (London: MacMillan, 5th ed., 1894), Article 38. See also ibid, pp. 214–15 (JCE as cases of secondary participation, parties to JCE as accessories).

522 *Tadić*, No. IT-94-1-A, para. 188; *Krnojelac*, No. IT-97-25-A, para. 33. *Vasiljević*, No. IT-98-32-A, para. 102; *Kvočka et al.*, No. IT-98-30/1-A, para. 89; *Prosecutor v Babić*, No. IT-03-72-A, Appeals Judgment, para. 38 (18 July 2005). On the difficult issue of what (objective) acts are required for JCE I, see Ambos, *JICJ*, 5 (2007), 171.

523 cf. van Sliedregt, *JICJ*, 5 (2007), 198–9; Vest, *Völkerrechtsverbrecher* (2011), pp. 381–7. See also *Stakić*, No. IT-97-24-T, para. 439; *Munyakazi*, No. ICTR-97-36A-T, para. 438, the participant in a joint criminal enterprise is to be seen as a 'co-perpetrator' (para. 438 with n. 881). See already note 517.

524 While the Anglo-American Law on 'complicity' requires a (causal) contribution of the accomplice, the JCE doctrine renounces this requirement and thus overcomes, from a prosecutional perspective, this 'defect' of the 'ordinary' Anglo-American law, see van

Sliedregt, *JICJ*, 5 (2007), 196–7. See on common law common purpose responsibility note 132.

[525] van Sliedregt, *JICJ*, 5 (2007), 202.

[526] cf. Powles, *JICJ*, 2 (2004), 610–11; Haan, *ICLR*, 5 (2005), 201. See also, albeit more radically, *Simić*, No. IT-95-9/2-T, Separate and Partly Dissenting Opinion of Judge Lindholm, paras. 2 ff. (17 October 2003) dissociating himself from JCE.

[527] Note 516 with main text.

[528] *Lubanga*, No. ICC-01/04-01/06-803, para. 323. The Chamber considers JCE as a form of co-perpetration in a subjective sense, stressing the mental state in which the participant carries out his contribution (para. 329).

[529] In this vein, see Haan, *Joint Criminal Enterprise* (2008), p. 305, who argues that JCE I is covered by Article 25(3)(a) 2nd alternative as co-perpetration and leaves the question open with regard to JCE III.

[530] Sato, *ICLR*, 12 (2012), 297–300 considers ordering within the meaning of Article 25(3)(b) as a form of principal responsibility as recognized by *Katanga/Chui* PTC by *Organisationsherrschaft*.

[531] ILC, *Draft Code* (1996), p. 25 (para. 14).

[532] *Akayesu*, No. ICTR-96–4-T, para. 483. In the same vein, see Krstić, No. IT-98-33/T, para. 601; *Stakić*, No. IT-97-24-T, para. 445; *Mrkšić et al.*, No. IT-95-13/1-T, para. 550; *Blaškić*, No. IT-95–14-T para. 280; *Kordić and Čerkez*, No. IT-95-14/2-A, para. 387; *Semanza*, No. ICTR-97-20-A, para. 361 (20 May 2005); *Boškoski and Tarčulovski*, No. IT-04-82-A, para. 160; *Bagosora et al.*, No. ICTR-98-41-T, para. 2008; *Renzaho*, No. ICTR-97-31-T, para. 738; *Munyakazi*, No. ICTR-97-36A-T, para. 432; *Kanyarukiga*, No. ICTR-2002-78-T, para. 620; *Ndahimana*, No. ICTR-01-68-T, para. 719; *Karemera and Ngirumpatse*, No. ICTR-98-44-T, paras. 14–28.

[533] cf. for example, *Boškoski and Tarčulovski*, No. IT-04-82-A, para. 164 and *Prosecutor v Ntawukulilyayo*, No. ICTR-05-82-T, Trial Chamber Judgment, para. 416 (3 August 2010).

[534] *Delalić et al.*, No. IT-96-21-T, paras. 348 ff.

[535] cf. Chapter V, C. (2)(b).

[536] In the same vein, see Eser, 'Individual Criminal Responsibility', in Cassese, Gaeta, and Jones, *Rome Statute* (2002), p. 797 who, however, correctly clarifies (in n. 123) that the *Akayesu* Trial Chamber considers 'ordering' as a form of complicity; conc. also Faraldo Cabana, 'Formas de autoría y participación en el estatuto de la CPI y su equivalencia en el derecho penal español', *RDPC*, 16 (2005), 29, 47. Contrary to this view Werle, *Principles* (2009), mn. 486 and Satzger, *Internationales Strafrecht* (2011), § 15 mn. 61 who consider ordering as a 'special form of instigation'. See also Cryer, 'General Principles', in Cryer et al., *Introduction* (2010), p. 379, who considers conceptualizing ordering as a form of perpetration by means.

[537] Contrary Werle, *Principles* (2009), mn. 488.

[538] Garner, *Law Dictionary* (2004/2007), p. 1427; American Law Institute, *MPC* (1985), § 5.02(1).

[539] Garner, *Law Dictionary* (2004/2007), p. 790.

[540] cf. Ambos, *Der Allgemeine Teil* (2002/2004), pp. 481 ff. For an 'umbrella' function of soliciting, see also Eser, 'Individual Criminal Responsibility', in Cassese, Gaeta, and Jones, *Rome Statute* (2002), p. 797 with n. 117. Also Werle, *Principles* (2009), mn. 482–3.

541 Unlike *vis absoluta, vis compulsiva* still leaves the person a certain freedom to act and make decisions (cf. Jescheck and Weigend, *Strafrecht* (1996), mn. 224).

542 cf. Vest, *Genozid* (2002), pp. 203 ff., 238.

543 In this sense, see also *Nchamihigo*, No. ICTR-01-63-A, para. 188 (‘a position of authority is not a required element under this mode of liability’).

544 Section (4)(a) of this Part C.

545 *Furundžija*, No. IT-95-17/1-T, para. 231.

546 For an interesting discussion, see Law Commission, *Assisting and Encouraging* (1993), paras. 4.64–4.68.

547 ILC, ‘Report of the International Law Commission on the Work of its 48th Session’ (6 May–26 July 1996) UN Doc. A/51/10, p. 24 (para. 10).

548 *Tadić*, No. IT-94-1-T, paras. 674, 688–92.

549 In the same vein, see Schabas, *ICC Commentary* (2010), p. 435 and id, *Introduction* (2011), p. 228.

550 Werle, *Principles* (2009), mn. 491; Eser, ‘Individual Criminal Responsibility’, in Cassese, Gaeta, and Jones, *Rome Statute* (2002), p. 801 (arguing the substantiality standard can function as a ‘monitor by which, for instance, casual remarks, though perceived by the principal as encouragement, are obviously irrelevant, because easily exchangeable, and can thus be excluded’); Vest, *Völkerrechtsverbrecher* (2011), p. 199 (referring to the gravity threshold of Article 17 and further arguing that the ‘substantial’ effect might not necessarily influence he outcome of the crime, but change the way it is executed).

551 *Mbarushimana*, No. ICC-01/04-01/10-465, para. 280.

552 See Chapter III, C. (1). Interestingly, Law Commission, *Participating* (2007), paras. 3.18–3.22 rejects the substantial qualifier since it ‘would lead to uncertainty and difficulty’ (para. 3.22).

553 cf. Stewart, *LJIL*, 25 (2012), 204, who strikes for a combination of causation and normative contribution to create a ‘defensible notion of complicity’.

554 See generally, Roxin, *Strafrecht I* (2006), § 11 mn. 1 ff.; Jakobs, *Strafrecht* (1991/1993), pp. 185 ff. Conc. Eser, ‘Individual Criminal Responsibility’, in Cassese, Gaeta, and Jones, *Rome Statute* (2002), p. 801 with n. 141; Vest, *Völkerrechtsverbrecher* (2011), p. 210.

555 The theory of risk increase has been applied by the *Bemba* Confirmation Decision in the context of command responsibility, holding the superior liable because his failure to intervene increased the risk for crimes being executed: *Bemba Gombo*, ICC 01/05–01/08-424, para. 435; for an analysis, see Ambos, *LJIL*, 22 (2009), 721–2. In favour of this theory in our context see also Vest, *Völkerrechtsverbrecher* (2011), pp. 210, 253 (regarding command responsibility).

556 For a detailed discussion, see Ambos, *Der Allgemeine Teil* (2002/2004), pp. 619 ff., 663–4.

557 For a good summary of the discussion, see Roxin, *Strafrecht II* (2003), § 26 mn. 218 ff.; Joecks, ‘§ 27’, in Joecks and Miebach, *Münchener Kommentar*, i (2011), mn. 48–89; see also Ambos, *JA*, 32 (2000), 721–5 (in Spanish in *RDPC*, 2 (2001), 195–206). For an analysis of neutral acts in macrocriminal contexts cf. Rackow, *Handlungen* (2007), pp. 551–2; Vest, *Völkerrechtsverbrecher* (2011), pp. 204–10. The discussion also takes place in other jurisdictions, although less intensive than in Germany: for Italy see Bianchi, *L’indice penale*, 12 (2009), 37–86; for Spain see Landa Gorostiza, *Complicidad* (2002); for Brasil: Greco, *Cumplicidade* (2004); for an analysis of the similar English discussion on a relevant ‘deviation from standard commercial behavior’, see Rackow, *Handlungen* (2007), pp. 450 ff.

The problem of a neutral contribution (delivering mustard gas to the Iraqi regime) was the core issue in the Dutch *Van Anraat Case*, see for an analytical summary van der Wilt, *JICJ,* 6 (2008), 563–4.

558 *Mbarushimana*, No. ICC-01/04-01/10-465, para. 277 (calling, albeit with regard to subparagraph (d), for 'some threshold level of assistance').

559 Vest, *Völkerrechtsverbrecher* (2011), pp. 208–9.

560 Ibid, pp. 204–5.

561 cf. Chapter VII, Section A.

562 *MPC* (1985), § 2.06. Conc. Eser, 'Individual Criminal Responsibility', in Cassese, Gaeta, and Jones, *Rome Statute* (2002), p. 801; Satzger, *Internationales Strafrecht* (2011), § 15 mn. 62; Cryer, 'General Principles', in Cryer et al., *Introduction* (2010), p. 377. For Schabas, *ICC Commentary* (2010), p. 436, this special purpose can be inferred from the acts of the accused, which, in cases of abetting (mostly involving an expression), will not be problematic, but may be in cases of mere physical support. In contrast for Vest, *JICJ*, 2 (2010), 862 the purpose requirement must be interpreted in line with Article 30. Critical of this requirement as an overly high threshold, which eventually may lead to 'serious underpunishment', see Stewart, *LJIL*, 25 (2012), 197.

563 cf. Section C. (2)(c).

564 Stressing this subjective difference between subparagraph (c) and the ad hoc tribunals' understanding of aiding and abetting, see *Mbarushimana*, No. ICC-01/04-01/10-465, para. 281.

565 Werle, *Principles* (2009), mn. 492. With respect to the 'normal', lower intent of the accomplice, Vest, *JICJ*, 2 (2010), 861 inquires at 'which point in time the assistant's knowledge of the principal's purpose' would turn into shared intent.

566 Conc. Eser, 'Individual Criminal Responsibility', in Cassese, Gaeta, and Jones, *Rome Statute*, i (2002), p. 801 with n. 145.

567 UN GA 'International Convention for the Suppression of Terrorist Bombings' (9 January 1997) UN Doc. A/RES/52/164, Annex, Article 2(3)(c).

568 For example. see Preparatory Committee Draft, Article 23(7)(e)(ii).

569 See, for example, Pella, *YbILC*, ii, 2 (1950), 278, 357; Graven, *RCD*, 67 (1950-I), 502–3; Jescheck, *ZStW*, 66 (1954), 193, 213; Rayfuse, *CLF*, 8 (1997), 52; Cassese, *ICL* (2008), pp. 227 ff. The concept was, however, in principle recognized by the ILC Special Rapporteur Doudou Thiam, cf. Thiam, *YbILC*, ii/1, 42 (1990), 34, and also exists today in civil law jurisdictions in a similar form (see, e.g., § 30(2) Alt. 3 StGB).

570 *YbILC*, ii/2, 43 (1991), 99 (commentary to Article 3).

571 ILC, *Draft Code* (1996), Article 2(3)(e).

572 For the drafting history cf. Saland, 'Principles', in Lee, *The International Criminal Court* (1999), pp. 199–200.

573 In this vein, see Eser, 'Individual Criminal Responsibility', in Cassese, Gaeta, and Jones, *Rome Statute* (2002), pp. 802–3; Satzger, *Internationales Strafrecht* (2011), § 15 mn. 63; van Sliedregt, *Criminal Responsibility* (2003), p. 107; Werle, *Principles* (2009), mn. 493 (calling it the 'least grave' mode of liability); Manacorda and Meloni, *JICJ*, 9 (2011), 176 ('lowest degree of responsibility').

574 *Lubanga*, No. ICC-01/04-01/06-803, para. 337; *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, No. ICC-01/09-01/11-01, Decision on the Prosecutor's Application for Summons to Appear, para. 44 (8 March 2011) (with respect to Joshua Arap Sang); *Prosecutor v Callixte Mbarushimana*, No. ICC-01/04-01/10-1, Decision on the Prosecutor's Application for a Warrant of Arrest, para. 36 (28 September 2010) and *Mbarushimana*, No. ICC-01/04-01/10-465, para. 279.

575 In the arrest warrant against Harun, fifty out of fifty-one counts were based on Article 25(3)(d), see *Prosecutor v Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman*, No. ICC 02/05-01/07-2, Warrant of Arrest for Ahmad Harun (27 April 2007).

576 Mantovani, *JICJ*, 1 (2003), 35 argues that subparagraph (d) is superfluous. Eser, 'Individual Criminal Responsibility', in Cassese, Gaeta, and Jones, *Rome Statute*, i (2002), p. 803 doubts its necessity and sees only a 'symbolic relevance' of the provision, due to its 'group factor'. Schabas, *ICC Commentary* (2010), p. 436 mentions its 'minor role'. Crit. also Satzger, *Internationales Strafrecht* (2011), § 15 mn. 63. Ohlin, *NCLR*, 12 (2009), 416 regards it doctrinally incoherent as Article 25 would not contain any 'primary offense of direct participation in a group crime' but only provide for accomplice liability for contributions to such a group crime, and strikes for revision of the whole article. However, contrary to Ohlin's opinion, the wording 'jointly with another' in subparagraph (a) which is different to the 'common purpose group' does not justify to regard subparagraph (d) as inconsistent with subparagraph (a).

577 This terminology is virtually identical in the French, Russian, Chinese, and Arabic versions of the Statute: toute autre forme—toute autre manière; каким-糶ибо иным образом—糶юбым другим образом; 以其他方式—以任何其他方式; بطريقة اخرى—اية طريقة اخرى. The Spanish translation of the Rome Statute uses identical terminology ('algún modo').

578 In a similar vein, see Vest, *Völkerrechtsverbrecher* (2011), pp. 379–80.

579 For the different standards of gravity cf. Stegmiller, *Pre-Investigation Stage* (2011), pp. 332–56, 425–6.

580 For the same conclusion, see Vest, *Völkerrechtsverbrecher* (2011), p. 349 arguing that subparagraph (d), due to its residual function on the subjective side, serves to cover contributions which are often objectively graver than those covered by subparagraph (c).

581 *Mbarushimana*, No. ICC-01/04-01/10-465, para. 283; confirmed by Ruto, Kosgey, and Sang, No. ICC-01/09-01/11, para. 354.

582 *Mbarushimana*, No. ICC-01/04-01/10-465, paras. 283, 285. In *Ruto, Kosgey and Sang*, No. ICC-01/09-01/11, para. 354, the 'significance' standard is replaced by a threshold of 'less than substantial' (with respect to Sang). In *Prosecutor v Callixte Mbarushimana*, No. ICC-01/04-01/10 OA 4, Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I, paras. 65–9 (30 May 2012), the Appeals Chamber abstained from deciding on the merits since the Pre-Trial Chamber has not even found that the FDLR constitutes a 'group acting with a common purpose' within the meaning of subparagraph (d); apart from that, the Appeals Chamber criticized the Pre-Trial Chamber's findings as to the contribution as 'ambiguous' and abstained from entering into a 'purely academic discussion' in this regard.

583 The Chamber (*Mbarushimana*, No. ICC-01/04-01/10-465, paras. 280–2) argues that both subparagraph (d) and JCE, although they are not identical modes of responsibility, focus on group criminality and that JCE, as understood by the ad hoc tribunals, requires a lower threshold than a substantial contribution required for aiding and abetting.

584 *Mbarushimana*, No. ICC-01/04-01/10-465, para. 283.

585 Ibid, para. 284: ‘(i) the sustained nature of the participation after acquiring knowledge of the criminality of the group’s common purpose, (ii) any efforts made to prevent criminal activity or to impede the efficient functioning of the group’s crimes, (iii) whether the person creates or merely executes the criminal plan, (iv) the position of the suspect in the group or relative to the group and (v) perhaps most importantly, the role the suspect played vis-à-vis the seriousness and scope of the crimes committed’.

586 Ibid, paras. 303, 315, 320, 339. But compare *Ruto, Kosgey and Sang*, No. ICC-01/09-01/11, para. 355, confirming the charges against Sang for his alleged broadcasting of hate messages and false news via Kass FM, a regional radio station, inflaming the violent atmosphere.

587 *Mbarushimana*, No. ICC-01/04-01/10-465, para. 282 (discussing JCE and stating that it requires ‘a lower threshold of contribution than aiding and abetting … ’).

588 *Ruto, Kosgey and Sang*, No. ICC-01/09-01/11, para. 354.

589 *Furundžija*, No. IT-95-17/1-T, paras. 216, 249.

590 cf. Cassese, *ICL* (2008), p. 213. For a discussion, see Ohlin, *NCLR*, 12 (2009), 410 ff., 415.

591 *Mbarushimana*, No. ICC-01/04-01/10-465, para. 274 (arguing that an exclusive application of subparagraph (d) to non-members (outsiders) would ‘run contrary to any literal, systematic or teleological interpretation of the principles established in the Statute’). For the same view, see Vest, *Völkerrechtsverbrecher* (2011), pp. 349–50, 378–9.

592 Fletcher and Ohlin, *JICJ*, 3 (2005), 549 correctly alert that, reducing the intentional element to the conduct, the ‘culpability nexus between the contribution and the ultimate criminal harm’ would remain ‘vague’.

593 *Mbarushimana*, No. ICC-01/04-01/10-465, para. 288, stating that the accused must ‘(i) mean to engage in the relevant conduct that allegedly contributes to the crime and (ii) be at least aware that his or her conduct contributes to the activities of the group of persons … ’.

594 La Fave, *Criminal Law* (2003), para. 3.5, pp. 302–3.

595 cf. Fletcher, *Basic Concepts* (1998), p. 112.

596 To avoid confusion I use ‘intent’ in the sense of *dolus* in general and ‘intention’ in the sense of first-degree *dolus*.

597 For the same conclusion, see *Mbarushimana*, No. ICC-01/04-01/10-465, para. 288. Conc. van Sliedregt, *Criminal Responsibility* (2012), p. 145.

598 Conc. Eser, ‘Individual Criminal Responsibility’, in Cassese, Gaeta, and Jones, *Rome Statute* (2002), p. 803 with n. 155.

599 *Furundžija*, No. IT-95-17/1-T, para. 246.

600 But compare *Mbarushimana*, No. ICC-01/04-01/10-465, para. 289, stating that the contributor is not required to have the intent to commit any specific crime. This formulation obviously negates the literal phrasing of (ii) (*the* crime).

601 *UNTS*, 78 (1951), 277. See, for example, Lemkin, *AJIL*, 41 (1947), 145; Kunz, *AJIL*, 43 (1949), 738; Vest, *Genozid* (2002), pp. 189 ff.; Ambos, *Der Allgemeine Teil* (2002/2004), pp. 415 ff.

602 Section C. (2)(d).

603 Similarly, see Eser, ‘Individual Criminal Responsibility’, in Cassese, Gaeta, and Jones, *Rome Statute* (2002), p. 804.

[604] See Section C. (4)(b)(ii).

[605] cf. Ambos, *Der Allgemeine Teil* (2002/2004), pp. 651, 653–4.

[606] ILC, *Draft Code* (1996), pp. 26–7 (para. 16). See also Agbor, *ICLR*, 12 (2012), 172.

[607] Section C. (2)(d).

[608] *Akayesu*, No. ICTR-96-4-T, paras. 561–2. See also *Ruggiu*, No. ICTR-97-32-I, para. 16; *Nahimana et al.*, No. ICTR-99-52-T, para. 1013; *Bikindi*, No. ICTR-01-72-T, paras. 386 ff.; *Kalimanzira*, No. ICTR-05-88-T, paras. 509–10; *Muvunyi*, No. ICTR-00-55A-T, paras. 23 ff.

[609] cf. Weigend, 'Article 3', in Bassiouni, *Commentaries* (1993), pp. 115–16 (regarding the ILC, *Draft Code* (1991), Article 2(3)) distinguishing between soliciting and aiding on the one hand, and inciting and conspiring on the other. See also Cryer, 'General Principles', in Cryer et al., *Introduction* (2010), p. 380.

[610] See already notes 379 and 390 with main text.

[611] Conc. Vest, *Genozid* (2002), p. 195.

[612] Section C. (2)(d) with notes 248 ff.

[613] The leadership clause is provided for by Article 8*bis*(1) as follows: ' … "crime of aggression" means the planning, preparation, initiation or execution, by a *person in a position effectively to exercise control over or to direct the political or military action of a State*, of an act of aggression … ' (emphasis added).

[614] Assembly of State Parties, Review Conference Res 6 (11 June 2010), RC/Res.6.

[615] Heller, *EJIL*, 18 (2007), 479–80.

[616] Ambos, *GYbIL*, 53 (2010), 490.

[617] Ambos, *GYbIL*, 53 (2010), 492 with n. 137. Contra Wilmshurst, 'Aggression', in Cryer et al., *Introduction* (2010), p. 319 arguing that 'there is no evidence in customary law … to extend the crime to acts committed by individual mercenaries not sponsored by a State'.

[618] cf. Ambos, *GYbIL*, 53 (2010), 493.

[619] *YbILC*, ii/2, 43 (1991), 98; *YbILC*, i, 43 (1991), 188, para. 21 (Mr Pawlak, chairman of the Drafting Committee). See also *YbILC*, i, 42 (1990), 17, 23, 28, 48; *YbILC*, i, 42 (1990), 31–2 (paras. 28 ff.); *YbILC*, ii, Part 2, 42 (1990), 13 (para. 50). cf. also MPC (1985), § 2.06; van den Wyngaert, 'Structure', in Bassiouni, *Commentaries* (1993), pp. 55–6; Weigend, 'Article 3', in Bassiouni, *Commentaries* (1993), pp. 116–17; Triffterer, 'Völkerstrafrecht', in Hankel and Stuby, *Strafgerichte* (1995), p. 228.

[620] cf. '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, p. 19 with n. 47.

[621] *Mbarushimana*, No. ICC-01/04-01/10-465, para. 286.

[622] *Mbarushimana*, No. ICC-01/04-01/10-465, para. 286.

[623] Note 390.

[624] cf. Chapter III, C. (2).

[625] In US law, however, the doctrine of vicarious liability serves as the basis for the formal equivalence of perpetrators and accomplices, cf. Fletcher, *Basic Concepts* (1998), pp. 190 ff.

[626] cf. Wise, 'General Principles', in Sadat Wexler, *Model Draft Statute* (1998), pp. 42–3; Sereni, 'Individual Criminal Responsibility', in Lattanzi, *The International Criminal Court* (1998), p. 139.

627 *Mbarushimana*, No. ICC-01/04-01/10-465, para. 287 (emphasis added).

628 cf. Chapter III, C. (1) and (2).

629 Section (4)(b)(i)(4) of this Part C. See also Vest, *Völkerrechtsverbrecher* (2011), p. 342.

630 See also Powles, *JICJ*, 2 (2004), 612–13 (seeing an incompatibility between aiding and abetting and JCE III).

631 *Tadić*, No. IT-94–1-A, para. 222. In favour of a general similarity, see also Khan and Dixon, *Practice, Procedure and Evidence* (2009), paras. 10–47; Kittischaisaree, *ICL* (2002), pp. 236 ff.; Gustafson, *JICJ*, 5 (2007), 158 (without further explanation).

632 Although only as a point of reference without defining it, cf. Vest, *Völkerrechtsverbrecher* (2011), pp. 349, 351, 378.

633 In the same vein, see *Mbarushimana*, No. ICC-01/04-01/10-465, para. 282. See also Cryer, 'General Principles', in Cryer et al., *Introduction* (2010), p. 374; Schabas, *ICC Commentary* (2010), p. 436; Gless, *Internationales Strafrecht* (2011), mn. 769, 777; Fletcher and Ohlin, *JICJ*, 3 (2005), 546, 549 (subparagraph (d) as a 'statutory surrogate of JCE'); Fletcher, *JICJ*, 9 (2011), 188; critical also Powles, *JICJ*, 2 (2004), 617–18; van Sliedregt, *Criminal Responsibility* (2003), p. 108 (arguing that, with respect to mid-level perpetrators, JCE II could be equated with subparagraph (d)(ii), presupposing knowledge of the system of ill-treatment); id, *Criminal Responsibility* (2012), p. 146. Unclear, Vest, *Völkerrechtsverbrecher* (2011), pp. 351, 386, who regards subparagraph (d) closely akin to JCE and even argues that JCE might in the future encompass accomplice liability (p. 379).

634 In this sense, see Ohlin, *JICJ*, 5 (2008), 85; van Sliedregt, *Criminal Responsibility* (2003), p. 108.

635 In the same vein Vest, *Völkerrechtsverbrecher* (2011), p. 350. The counter argument of Cassese, *JICJ*, 5 (2007), 132; id, *ICL* (2008), p. 212, demanding an extensive interpretation of the term 'intentional' ('requiring that the intent be referred to the common criminal plan, and, as such, may also embrace acts performed by one of the participants outside that criminal plan … ') conflicts with the principle of legality, in particular with the prohibition of analogy provided for in Article 22(2); the same applies to his interpretation of 'knowledge' in Article 25(3)(d)(ii), extending it to a 'foresight and voluntary taking of a risk'. The contradiction between 'intention' and 'foreseeability' can only be resolved by distinguishing between the object of reference of the intention required in Article 25(3)(d): while the concrete contribution of the participant to the collective act may well be intentional, she or he does not act intentionally with regard to the excesses—rather they only have to be 'foreseeable'. Also critical with regard to Cassese's position Ohlin, *JICJ*, 5 (2007), 78–81; id, *NCLR*, 12 (2009), 414–15, arguing that importing different or lower requirements for the mental element from customary international law would make the crafting of Article 30 ICC Statute pointless. See also van Sliedregt, *Criminal Responsibility* (2012), p. 146.

636 cf. Fletcher and Ohlin, *JICJ*, 3 (2005), 548, who apparently refer to JCE III although they do not make that sufficiently clear. See also Ambos, *JICJ*, 5 (2007), 167–8; Powles, *JICJ*, 2 (2004), 606, 613; Piacente, *JICJ*, 2 (2004), 451; Danner and Martinez, *CalLR*, 93 (2005), 118–19; Osiel, *ICLR*, 105 (2005), 1785, 1791–2; van der Wilt, *JICJ*, 5 (2007), 96; Ohlin, *NCLR*, 12 (2009), 408; Schabas, *Introduction* (2011), pp. 229–30; Kutz, 'Foundations', in Deigh and Dolinko, *Handbook* (2011), p. 160; Vest, *Völkerrechtsverbrecher* (2011), pp. 287, 318. See also van Sliedregt, *Criminal Responsibility* (2003), p. 355; however, id, *JICJ*, 5 (2007), 201–2 clarifies that 'JCE is not a "preparatory" crime like conspiracy'.

637 cf. Section B. (1)(b)(iii)(3). For a detailed analysis, see van Sliedregt, *Criminal Responsibility* (2003), pp. 17 ff., 20 ff., 352 ff. (conceiving JCE as 'membership responsibility' distinguishing between 'institutionalized' and 'collateral' membership responsibility); Danner and Martinez, *CalLR*, 93 (2005), 113–14; Römer, *Mitglieder* (2005),

pp. 28 ff.; Osiel, *ICLR*, 105 (2005), 1799–800. Yet, Piacente, *JICJ*, 2 (2004), 452 advocates the Nuremberg 'judicial recognition of the common illegal purpose'.

638 Section (4)(b)(iv) of this Part C.

639 In the same vein, see *Mbarushimana*, No. ICC-01/04-01/10-465, para. 282; see also van Sliedregt, *Criminal Responsibility* (2003), p. 354. For a more detailed discussion, see Olásolo, *Criminal Responsibility* (2009), pp. 258 ff. (explicitly rejecting the possibility that a lower level of contribution could give rise to principal liability—as in the case of JCE III—whereas a higher level of contribution gives rise to accessorial liability, as in the case of aiding and abetting); see also id, *CLF* (2009), 278–86; Marsh and Ramsden, *ICLR*, 11 (2011), 152–4. See also previously note 520 with main text.

640 See in this respect Ohlin, *NCLR*, 12 (2009), 419, arguing that if the ASP were to explicitly codify JCE into the ICC Statute, it should distinguish between co-perpetrating a JCE and aiding and abetting a JCE in order to establish a hierarchy of relative culpability among participants in a joint criminal endeavour. Thus, so Ohlin, '[t]hey should also explicitly exclude vicarious liability for acts that fall outside the scope of the criminal plan'.

641 For a convincing criticism of JCE II because of the equal treatment of all members of the systemic JCE (from the camp leader to the simple guard) independent of their concrete contributions and status, see Vest, *Völkerrechtsverbrecher* (2011), pp. 306, 337, 422–5.

642 See Section C. (3)(b)(v).

643 cf. Cassese, *ICL* (2008), p. 151; Cassese et al., *CLF*, 20 (2009), 236 justifying JCE III by way of a 'causal nexus between the concerted crime, the secondary offender's mental attitude and conduct and the extra crime perpetrated by the primary offender'.

644 *Versanti in re illicita imputantur omnia, quae sequuntur ex delicto* (he who commits an illicit act, is liable for everything—even accidental consequences—flowing from this act). See for the historical background of the rule Rüping and Sellert, *Studien- und Quellenbuch* (1989), p. 249; with regard to general criminal law see Hall, *Principles* (1960), p. 6; Ashworth, *Principles* (2009), p. 77; Roxin, *Strafrecht I* (2006), § 10 mn. 122. From a comparative perspective, see Weisser, *Täterschaft* (2011), pp. 368–72, 374–95, 414–17, 418–28, 434–6, 437 (demonstrating that essential deviations from the common plan—in England called 'fundamentally different acts'—cannot be imputed to the other perpetrators in Austria, England, France, and Germany).

645 See also van Sliedregt, *Criminal Responsibility* (2003), pp. 106 ff., 357 ff.; Mettraux, *Crimes* (2005), pp. 292–3; Haan, *ICLR*, 5 (2005), 200; Fletcher and Ohlin, *JICJ*, 3 (2005), 550. If this is true it is not possible to construe responsibility based on negligence as done by Ohlin, *JICJ*, 5 (2007), 83.

646 cf. Fletcher and Ohlin, *JICJ*, 3 (2005), 550. See also the examples given by Haan, *ICLR*, 5 (2005), 191–2.

647 Crit. also Olásolo, *ICLR*, 7 (2007), 157–8. For this reason Cassese's argument in Cassese, *ICL* (2008), pp. 151–2, that the culpability of a member of the JCE lies in the fact that he has not 'prevented the further crime, or disassociated himself from its likely commission' is not convincing; in fact, it presupposes something (possible knowledge of the crime) which needs to be proved in the first place (this actual knowledge) and therefore is a classical *petitio principii*.

648 cf. Vogel, *ZStW*, 114 (2002), 421; Haan, *ICLR*, 5 (2005), 172 ff.; Danner and Martinez, *CalLR*, 93 (2005), 134; van Sliedregt, *JICJ*, 5 (2007), 185–7.

649 Cryer, 'General Principles', in Cryer et al., *Introduction* (2010), p. 373.

650 See, for example, *Blagojević*, No. IT-02-60-T, paras. 725, 775; *Kvočka et al.*, No. IT-98-30/1-T, paras. 253, 409.

651 *Kvočka et al.*, No. IT-98-30/1-A, para. 86; conc. *Limaj et al.*, No. IT-03-66-T, para. 512.

652 cf. the judgments and references in note 157 and main text: the accused (willingly) took that risk. In favour of a recklessness standard Vest, *Völkerrechtsverbrecher* (2011), pp. 332, 351.

653 This view has been adopted by the *Krajišnik* Trial Chamber, *Krajišnik*, No. IT-00-39-T, para. 882. The same position is taken by Cassese, *ICL* (2008), pp. 149–51 but with the argument (among others) that international crimes are normally committed in armed conflict and are so serious that the foreseeability threshold must be lowered. Ohlin, *JICJ*, 5 (2007), 81 conflates the objective and subjective level if he requires foreseeability from the defendant, that is, argues subjectively, and, in the next phrase, affirms that 'if it is objectively foreseeable that other members of the enterprise might extend their actions beyond their agreement, then all members … can be charged with the crime'.

654 Although the case law is not clear, such an objective-subjective interpretation may be read into various statements requiring awareness with regard to possible (unintended) crimes. See, for example, *Blaškić*, No. IT-95-14-A, para. 33. See also Powles, *JICJ*, 2 (2004), 609. Cassese et al., *CLF*, 20 (2009), 324–5, even sustain, with regard to JCE, the view of French case law as to the notion of '*complicité*': 'the accused was responsible for all the aggravating circumstances committed by the principal perpetrators, even if he was not aware of them'. Crit. insofar Olásolo, *CLF*, 20 (2009), 281.

655 See previously note 159.

656 *Prosecutor v Milošević*, No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, paras. 291–2, 300 (16 June 2004). See Ambos, *JZ*, 59 (2004), 966.

657 *Stakić*, No. IT-97-24-T, para. 530; *Prosecutor v Brđanin*, No. IT-99-36-T, Decision on Motion for Acquittal pursuant to Rule 98bis, para. 30 (28 November 2003). In this sense see also Cassese, *ICL* (2008), pp. 141 ff. See also the separate opinion of Judge Shahabuddeen to the *Brđanin* Appeals Decision, *Brđanin*, No. IT-99-36-A, requiring, not entirely clearly, on the one hand, 'always' specific intent (para. 4), but, on the other hand, stating that it is 'shown by the particular circumstances' of JCE III (para. 5).

658 *Krstić*, No. IT-98–33-A, paras. 134 ff.; therefore, the Chamber convicted *Krstić* 'only' for aiding and abetting genocide.

659 Crit. also Mettraux, *Crimes* (2005), pp. 215, 264–5, 289; Haan, *ICLR*, 5 (2005), 198–200; Danner and Martínez, *CalLR*, 93 (2005), 151; van Sliedregt, *JICJ*, 5 (2007), 191 ff.; Ambos, *JICJ*, 5 (2007), 175–6, 181; Satzger, *Internationales Strafrecht* (2011), § 15 mn. 58; Vest, *Völkerrechtsverbrecher* (2011), p. 322. On this point see also Cryer, 'General Principles', in Cryer et al., *Introduction* (2010), p. 373 with further references.

660 On the problematic delimitation between co-perpetration and assistance, see Ambos, 'Article 25', in Triffterer, *Commentary* (2008), mn. 44; Vest, *Völkerrechtsverbrecher* (2011), p. 370.

661 Section C. (4)(b)(iv).

662 In the same vein, see *Lubanga*, No. ICC-01/04-01/06-803 para. 337 ('Article 25(3)(d) provides for a residual form of accessory liability … , by reason of the state of mind in which the contributions were made').Vest, *JICJ*, 2 (2010), 851 reaching a similar conclusion, refers to subparagraph (d) as a 'rescue clause'; id, *Völkerrechtsverbrecher* (2011), pp. 379, 381.

See also Jessberger and Geneuss, *JICJ*, 6 (2008), 865; Safferling, *Internationales Strafrecht* (2011), § 5 mn. 88.

663 See Section C. (2)(c), notes 223 ff.

664 For a more detailed discussion, see Ambos, *Der Allgemeine Teil* (2002/2004), pp. 641 ff. drawing an analogy to *Tadić*. In the same vein, see Weigend, *JICJ*, 6 (2008), 478, accepting that Article 25(3)(d) could 'probably cover at least some forms of jce'.

665 cf. Chapter III, Section B.

666 On this new concept of attribution for collective criminality see the fundamental work of Dencker, *Kausalität und Gesamttat* (1996), pp. 125 ff., 152 ff., 229, 253 ff. and *passim*; id, 'Beteiligung' in Prittwitz et al., *FS Lüderssen* (2002), pp. 534 ff. The concept was further elaborated by Vest, *Genozid* (2002), pp. 214 ff., 236 ff., 303, 304 ff., 359 ff. referring in particular to the crime of genocide; more recently id, *Völkerrechtsverbrecher* (2011), pp. 186, 373–8, 390–1, 414–16, 434–5. See also Ambos, 'Organisation', in Heinrich et al., *FS Roxin* (2011), pp. 846–9, 851–2. Recent proposals by Weisser, *Täterschaft* (2011), pp. 490–511 and Robles, *GA*, 159 (2012), 276–80, albeit developed with a view to ordinary criminal law, go in a similar direction. Both Weisser and Robles distinguish between two steps or stages of imputation in participation. According to Weisser in a first step it must be established which parts of the respect individual conduct belong to the respective context of collective commission ('Mitwirkungszusammenhang') or, shorter, to the relevant collective act (pp. 492–9); in a second step, this collective act must be imputed to the individual participants or, in other words, their participation in and culpability with regard to this collective act must be determined (pp. 499–511). According to Robles, the first stage of imputation refers to the establishment of the individual responsibility by way of the rules of (objective) imputation with a view to the concrete criminal act, that is, it concerns the link of the agent with the crime; the second stage deals with the nature and quality of the contribution with a view to the concrete punishment.

667 Section C. (4)(b)(i)(2).

668 Crit. in this sense of the alleged co-perpetrator's capacity to frustrate the commission Vest, *Völkerrechtsverbrecher* (2011), pp. 328, 340, 369, 382.

669 See previously Ambos, *GA*, 145 (1998), 237–8; conc. Vest, *Genozid* (2002), p. 239.

670 Section C. (4)(a).

671 For a comprehensive, hierarchical model of different levels of systemic domination of the act, see Vest, *Genozid* (2002), pp. 29–30, 240 ff., 302; id, *Völkerrechtsverbrecher* (2011), pp. 409–12, 414–35 (helpful figures on pp. 436–7), 439.

672 Vest, *Völkerrechtsverbrecher* (2011), p. 425 and previously note 498.

673 Vest, *Völkerrechtsverbrecher* (2011), pp. 364–5, 427–9, 431, 442 rather considers them as perpetrators by ordering (*Anordnungstäter*) or by co-perpetration/JCE I.

674 See previously note 501 with main text referring to the different view of Vest, which may be correct in situations of sufficient autonomy of the mid-level participants.

675 On the irrelevance of presence at the scene of the crime, see Section C. (4)(b)(i)(2) with notes 434–8.

676 See previously note 494 with main text.

677 cf. Ambos, 'Command responsibility', in Nollkaemper and van der Wilt, *System Criminality* (2009), pp. 156–7; conc. Vest, *Völkerrechtsverbrecher* (2011), p. 442.

678 Vest, *Völkerrechtsverbrecher* (2011), p. 412.

679 Vest, *Völkerrechtsverbrecher* (2011), pp. 417 ff., 425 ff.

680 See also Vest, *Völkerrechtsverbrecher* (2011), pp. 211–12, 389–90.

681 Section C. (2)(b) and (4)(b)(i)(4).

682 In the same vein, Vest, *Völkerrechtsverbrecher* (2011), p. 389 focusing on the systemic dimension.