THE DOCTRINE OF JOINT CRIMINAL ENTERPRISE AT THE *AD HOC* TRIBUNALS AND ITS APPLICABILITY IN THE ROME STATUTE OF THE ICC

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Abstract: The first judgment of the International Criminal Court has confirmed that Article 25(3) of the Rome Statute adopts the theory of control of the act to distinguish between principals and accessories. On the contrary, since 2003, the ad hoc tribunals' case law bases the notion of co-perpetration on the Joint Criminal Enterprise doctrine, using a subjective criterion approach. In this article we will first analyze the problems raised by that case law of the ad hoc tribunals, and then, we will study the article of the Rome Statute which apparently most resembles the Joint Criminal Enterprise doctrine: article 25(3)(d). The article concludes that none of the three categories of that doctrine is included in the said provision.

Key words: International Criminal Court, modes of criminal liability, Article 25(3)(d) Rome Statute, Joint Criminal Enterprise, theory of control of the act.

I. INTRODUCTION

The first judgment of the International Criminal Court (ICC), delivered in the *Lubanga* case, has established some basic concepts about the modes of perpetration and participation envisaged in Article 25(3) of the Rome Statute[1]. In line with the decision of the confirmation of charges in the same case, the judgment adopts the differential participation model that distinguishes between principals and accessories. While the provision in the Statute´s Article 25(3)(a) contains the liability of principals to a crime – distinguishing the three forms: direct perpetration, co-perpetration, and indirect perpetration – , the provisions in Articles 25(3)(b), 3(c) and 3(d) provide for different levels of participation in international crimes[2]: to order, solicit or induce in subparagraph 3(b); to aid, abet or otherwise assist in subparagraph 3(c); and to contribute in any other way to the crime committed by a group of persons acting with a common purpose in subparagraph 3(d).

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[1] Judgment, *Prosecutor v. Thomas Lubanga Dyilo,* Case No. *ICC-01/04-01/06-2842*, ICC, Trial Chamber I, 14 March 2012 (hereinafter *Lubanga*, Trial Judgment).

[2] *Lubanga*, Trial Judgment, *supra* note 2, § 976-1018; Decision on the confirmation of the charges, *Prosecutor v. German Katanga and Mathieu Ngudjolo Chui*, Case No. *ICC-01/04-01/07-717*, ICC, Pre-Trial Chamber I, 30 September 2008 (hereinafter *Katanga*, Confirmation Decision), § 484-486; Decision on the confirmation of the charges, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. *ICC-01/04-01/06-803-TEn*, ICC, Pre-Trial Chamber I, 29 January 2007 (hereinafter *Lubanga*, Confirmation Decision*)*, § 320; A. Eser, "Individual Criminal Responsibility", in A. Cassese, P. Gaeta, and J. R. W. D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002), at 782; K. Ambos, "Article 25/Special Print (update of the pages 743-770)", in O. TRIFFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Beck, 2008), at marginal note 2.

The *Lubanga* judgment relies on the theory of control of the act to distinguish between perpetration and participation[3], and as a result, it interprets the Statute´s Article 25(3)(d) – the Article which most resembles the Joint Criminal Enterprise (JCE) doctrine – as a residual form of accessory liability instead of a form of perpetration[4]. On the contrary, since the *Milutinović* case in 2003, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) base the notion of co-perpetration on the JCE doctrine, using a subjective criterion approach[5].

As a consequence, even if Articles 25(3)(a), 3(b) and 3(c) pose a number of questions, Article 25(3)(d) is the most problematic one, because it is not clear in which cases it can be applied – not even if it can be applied at all –. To answer this question is precisely the purpose of this article. The first part of this article is devoted to the problems raised by the case law of the *ad hoc* tribunals on JCE. This article then focuses on the Article of the Rome Statute which apparently most resembles the JCE doctrine – Article 25(3)(d) –[6], with special reference to how it differs from Article 25(3)(c). The author concludes by arguing that none of the three categories of JCE is included in Article 25(3) of the Rome Statute.

II. THE DOCTRINE OF JCE IN THE CASE LAW OF THE *AD HOC* TRIBUNALS

When the ICTY formulated the JCE doctrine in the *Tadić* case, the Appeals Chamber did not specify which the nature of such doctrine was, since it applied both concepts of co-perpetration and complicity[7]. However, in its decision in the *Milutinović* case, the ICTY expressly stated that the three categories of JCE were to be understood as a form of perpetration[8]. Such case law raises the question whether it is possible to understand the three forms as a form of principal liability. In order to answer this question, a short description of each category of JCE is required.

II.1. The three categories of JCE

Due to the difficulties to determine the criminal liability of each of the offenders who take part in a collective criminality context, the JCE doctrine was conceived as a means to extend criminal

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[3] *Lubanga*, Trial Judgment, *supra* note 2, § 1003-1006; *Katanga*, Confirmation Decision, *supra* note 3, § 480-486; *Lubanga*, Confirmation Decision, *supra* note 3, § 328-338; H. Olásolo, "El Desarrollo en derecho penal internacional de la coautoría mediata", 40 *Derecho Penal Contemporáneo – Revista Internacional* (2012) 71-95, at 78-85. See also H. Olásolo, "Reflexiones sobre la doctrina de la Empresa Criminal Común en Derecho Penal Internacional", 3 *InDret*, (2009) 1-24, at 5.

[4] *Lubanga*, Trial Judgment, *supra* note 2, § 996; *Katanga*, Confirmation Decision, *supra* note 3, § 483; *Lubanga*, Confirmation Decision, *supra* note 3, § 337; Olásolo, "Reflexiones", *supra* note 4, at 5.

[5] Decision on Dragoljub Ojdanic's Motion challenging Jurisdiction – Joint Criminal Enterprise, *Prosecutor v. Milutinović et al.,* Case No. *ICTY-99-37-AR72*, ICTY, Appeals Chamber, 21 May 2003 (hereinafter *Milutinović*, Decision); Judgment, *Prosecutor v. Vasiljević*, Case No. *IT-98-32-A*, ICTY, Appeals Chamber, 25 February 2004 (hereinafter *Vasiljević*, Appeal Judgment), § 95 and 102; Judgment, *Prosecutor v. Blaškić*, Case No. *IT-95-14-A*, ICTY, Appeals Chamber, 29 July 2004, § 33; Judgment, *Prosecutor v. Kvočka et al.*, Case No. *IT-98-30/1-A*, ICTY, Appeals Chamber, 28 February 2005, § 79; Judgment, *Prosecutor v. Brđanin*, Case No. *IT-99-36-A*, ICTY, Appeals Chamber, 03 April 2007 (hereinafter *Brđanin*, Appeal Judgment), § 434; Judgment, *Prosecutor v. Gerard Ntakirutimana and Elizaphan Ntakirutimana*, Case No. *ICTR-96-10-A, ICTR-96-17-A*, ICTR, Appeals Chamber, 13 December 2004, § 462; Judgment, *Gacumbitsi v. The Prosecutor*, Case No. *ICTR-2001-64-A*, ICTR, Appeals Chamber, 07 July 2006, § 158.

[6] Judgment, *Prosecutor v. Tadić*, Case No. *IT-94-1-A*, ICTY, Appeals Chamber, 15 July 1999, § 222.

[7] *Ibid*., § 220-228; Olásolo, "Reflexiones", *supra* note 4, at 4.

[8] *Milutinović*, Decision, *supra* note 6, § 20 and 31.

liability to all the members of a joint criminal plan[9]. The three categories of JCE share the same objective elements: 1) a plurality of persons; 2) the existence of a common plan, design or purpose; and 3) the participation of the accused in the JCE by any form of assistance in, or contribution to, the execution of the common purpose[10]. However, the subjective requirements vary with each modality[11].

JCE I (*liability for a common purpose*) requires the shared intent of all the members of the JCE, in which case each of them will be held liable as a co-perpetrator, regardless of the role they played in the commission of the crime[12].

Concerning JCE II (*liability for participation in a common criminal plan within an institutional framework*), it demands the perpetrator´s personal knowledge of the system of ill-treatment implemented in an institution, such as a concentration camp. In JCE II, it is understood that every person who knows about the system of ill-treatment – even if he or she only fulfils administrative tasks in the camp – and continues performing his or her task, implicitly shares the criminal intent of the members of the JCE who directly commit the crimes[13]. Consequently, JCE II requires the same subjective element as JCE I: (explicitly or implicitly) shared intent of the co-perpetrators.

With regard to JCE III (*criminal liability based on foresight and voluntary assumption of risk*), if a member has the intention to participate in and further the criminal purpose of the group, he or she will be held liable as a co-perpetrator for the crimes which were not part of the common criminal design, provided that the commission of the additional crimes by other members was foreseeable and the accused willingly took that risk[14].

II.2. Criminal liability of members of a JCE I for the crimes committed by non-members of the enterprise

In the *Brđanin* case, the ICTY Trial Chamber rejected the possibility of holding a member of a JCE I liable for the crimes committed by non-members of such JCE[15]. The Appeals Chamber, in contrast, accepted it, provided that the Prosecution proved that the crime had been committed by a person who had been used by a member of the JCE in order to further the common criminal purpose[16].

As Olásolo points out, this new concept of JCE, as developed by the Appeals Chamber in the *Brđanin* case, solves the problems related to the application of the traditional JCE doctrine to political and military leaders. However, it changes the nature of the JCE liability: there is no longer a common intention between the direct perpetrators of the crimes and the leaders who plan them; on the contrary, the latter take advantage of their control over the organisations they lead to use

[9] A. Cassese, *International Criminal Law* (Oxford University Press, 2008), at 189-190; J.D. Ohlin, "Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise", 5 *JICJ* (2007) 69-90, at 69-70.
[10] K. Ambos, "Joint Criminal Enterprise and Command Responsibility", 5 *JICJ* (2007) 159-183, at 160-161.
[11] *Ibid*., at 160-161; Ambos, "Article 25", *supra* note 3, at marginal note 9.
[12] Cassese, *International, supra* note 10, at 191-192; Ohlin, "Three Conceptual", *supra* note 10, at 75.
[13] Cassese, *International, supra* note 10, at 195-196.
[14] Cassese, *International, supra* note 10, at 199-200; Ohlin, "Three Conceptual", *supra* note 10, at 75.
[15] Judgment, *Prosecutor v. Brđanin*, Case No. *IT-99-36-T*, ICTY, Trial Chamber, 1 September 2004, § 340-356.
[16] *Brđanin*, Appeal Judgment, *supra* note 6, § 410-414. The Appeals Chamber accepted the possibility of convicting a member of a JCE in such cases (when the direct perpetrators of the crimes are not part of the JCE) even under the third category of JCE.

the former in order to commit the crimes[17]. As a consequence, the subjective criterion approach adopted by the traditional concept of JCE seems to be replaced by the theory of control of the act[18].

II.3. Problems of conceiving JCE III as a form of co-perpetration

Even if it is problematic to understand the JCE doctrine in general as a form of co-perpetration, these problems are most apparent in relation to JCE III[19]. As Ambos has stated, the attribution of a mere "foreseeable consequence" that had not been previously agreed upon and that was not intended by all the members of the JCE (the third scenario of JCE) cannot amount to co-perpetrator liability[20], since it is essential that the contributions of each member of the JCE be related to a common purpose/plan (or to an organisational framework) in order to attribute them to each other as a form of co-perpetration[21]. In other words, the foreseeability standard in JCE III does not require that the awareness and acceptance of the risk of the commission of the crime is shared with the rest of the members, consequently JCE III does meet the standards of co-perpetration in this regard. Furthermore, JCE III – as well as JCE I and II – fails to reach the essential contribution threshold of co-perpetration.

And the problem of considering JCE III as a form of co-perpetration becomes even worse in relation to specific intent crimes, such as genocide (which requires the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such)[22]. In the *Brđanin* case, the Trial Chamber held that the *dolus specialis* required for genocide could not be reconciled with the *mens rea* required for a conviction pursuant to JCE III[23]. No one can be held responsible as a principal to a crime that requires *dolus specialis* unless it is proved that he or she actually possessed that specific intent.

However, it could still be possible to convict that person for complicity in genocide, since this form of participation does not require the accused to share the intent of the principal, but only to be aware of it[24]. As a result, only if JCE III is understood as a form of accomplice liability – as it was originally understood – can it be applied to specific intent crimes[25]. However, bearing in mind that the *ad hoc* tribunals conceive JCE III as a form of co-perpetration, the Trial Chamber´s decision in the *Brđanin* case seems to be the correct one. Nevertheless, the Appeals Chamber rejected that interpretation and accepted the possibility of convicting someone for genocide pursuant to JCE III, which means that an accused can be held liable for committing genocide as a principal, even if he or she did not share the specific intent required for that crime[26].

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[17] Olásolo, "Reflexiones", *supra* note 4, at 13-14.
[18] *Ibid*., at 13-14.
[19] Ohlin, "Three Conceptual", *supra* note 10, at 76.
[20] Ambos, "Joint", *supra* note 11, at 168-169.
[21] K. Ambos, *La Parte General del Derecho Penal Internacional. Bases para una Elaboración Dogmática* (Konrad-Adenauer-Stiftung E. V., 2005), at 75; H. Jescheck, *Tratado de Derecho Penal. Parte General. Volumen Segundo* (Bosch Casa Editorial S.A., 1981), at 941. *Lubanga*, Trial Judgment, *supra* note 2, § 980-988.
[22] Cassese, *International, supra* note 10, at 205-206; Ambos, *La Parte*, *supra* note 22, at 422.
[23] Decision for Acquittal Pursuant to Rule 98 bis, *Prosecutor v. Brđanin*, Case No. *IT-99-36-T_*, ICTY, Trial Chamber, 28 November 2003, § 57; Cassese, *International, supra* note 10, at 206-209.
[24] Ambos, *La Parte*, *supra* note 22, at 422-423.
[25] Olásolo, "Reflexiones", *supra* note 4, at 18.
[26] Decision on interlocutory appeal, *Prosecutor v. Brđanin*, Case No. *IT-99-36-A*, ICTY, Appeals Chamber, 19 March 2004, § 9-10.

In conclusion, the *ad hoc* tribunals´ case law on JCE, as developed since the *Milutinović* case (understanding it as a form of co-perpetration), poses a high number of problems, especially with regard to JCE III. Furthermore, the public policy reasons invoked by its supporters[27] cannot justify the serious violations of basic principles of criminal law[28].

III. THE THEORY OF CONTROL OF THE ACT AS THE MEANS TO DISTINGUISH BETWEEN PRINCIPALS AND ACCESSORIES IN ARTICLE 25(3) OF THE ROME STATUTE

The *Lubanga* judgment adopts a differential participation model, since it confirms the existence of a hierarchical structure in the Rome Statute´s Article 25(3), according to which the forms of perpetration envisaged in Article 25(3)(a) prevail over the rest of (accessorial) forms of criminal participation referred to in Articles 25(3)(b), 3(c) and 3(d) of the Statute[29]. And as a result, the contribution of a perpetrator has to be more serious than that of an accessory[30].

In contrast to the *ad hoc* tribunals´ case law, the ICC does not base the concept of co-perpetration on the JCE doctrine, but instead it adopts the theory of control of the act to attribute liability as a co-perpetrator[31]. According to the ICC, the theory of control of the act contains three forms of principal liability provided for in Article 25(3)(a) of the Rome Statute[32]:

> 1) Direct perpetration or commission of the crime as an individual, which is applicable when the accused possesses the required subjective elements and he or she physically carries out the objective elements of the offence[33].
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> 2) Co-perpetration or commission of the crime jointly with others, which applies when the accused has, together with others, control over the offence by reason of the essential tasks assigned to them[34]. In these cases, although none of the co-perpetrators 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 performing his or her essential task[35].
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> 3) Indirect perpetration or commission of the crime through another person, which applies if the accused has control over the will of those who carry out the objective elements of the offence (although the accused does not carry out any of the objective elements of the crime)[36]. According to Article 25(3)(a) of the Rome Statute, the person who acts through

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[27] Cassese, *International, supra* note 10, at 201-205.

[28] Olásolo, "Reflexiones", *supra* note 4, at 13-14; Ohlin, "Three Conceptual", *supra* note 10, at 85-88.

[29] *Lubanga*, Trial Judgment, *supra* note 2, § 999; K. Ambos, "El primer fallo de la corte Penal Internacional (Prosecutor v. Lubanga): un análisis integral de las cuestiones jurídicas", 3 *InDret* (2012) 1-47, at 25-37.

[30] *Lubanga*, Trial Judgment, *supra* note 2, § 999; K. Ambos, "El primer fallo", *supra* note 30, at 25-37.

[31] *Lubanga*, Trial Judgment, *supra* note 2, § 980-988 and 1356-1358; K. Ambos, "El primer fallo", *supra* note 30, at 25-37.

[32] *Katanga*, Confirmation Decision, *supra* note 3, § 488; *Lubanga*, Confirmation Decision, *supra* note 3, § 332; Olásolo, "El Desarrollo", *supra* note 4, at 85-92.

[33] Ambos, *La Parte*, *supra* note 22, at 174-175.

[34] *Katanga*, Confirmation Decision, *supra* note 3, § 520; *Lubanga*, Confirmation Decision, *supra* note 3, § 326; Ambos, *La Parte*, *supra* note 22, at 179-184.

[35] *Katanga*, Confirmation Decision, *supra* note 3, § 488 and 519-526; *Lubanga*, Confirmation Decision, *supra* note 3, § 332 and 342; Olásolo, "El Desarrollo", *supra* note 4, at 87-88.

[36] *Katanga*, Confirmation Decision, *supra* note 3, § 488 and 495-502; *Lubanga*, Confirmation Decision, *supra* note 3, § 332.

> another person may be individually criminally responsible, regardless of whether the direct perpetrator is also responsible or not. In the scenarios where the direct perpetrator is also responsible, the theory of control of the act by means of a hierarchical organisation – which proves to be very useful in international criminal law – plays an extremely important role[37].

When the requirements of the theory of control of the act by virtue of a hierarchical organisation are not met, the leader can only be held liable as an accessory for ordering, soliciting or inducing the subordinates (direct perpetrators) the commission of the crimes[38]. And even when the ordering, soliciting or inducing by the leader cannot be proved, he or she could still be held liable under the other forms of participation in Articles 25(3)(c) and 3(d) of the Rome Statute – or under the provision on Superior Responsibility envisaged in the Statute´s Article 28 –.

IV. ARTICLE 25(3)(D) OF THE ROME STATUTE

IV.1. The nature of Article 25(3)(d) of the Rome Statute

Most of the scholars agree that the language for Article 25(3)(d) of the Rome Statute was borrowed from Article 2(3) of the 1997 International Convention on the Suppression of Terrorist Bombing, which allegedly stems from the controversial theory of "

conspiracy[39]. According to Cassese, although the provision in the mentioned Article 2(3) could have been justified because of the considerable increase in terrorist criminality, its adoption by the Rome Statute was not made thoughtfully[40].

Ambos believes that the Statute´s Article 25(3)(d) was designed to reconcile the interests of those opposed to the traditional notion of conspiracy and those who supported some kind of collective responsibility[41]. Furthermore, he defends that the traditional concept of conspiracy was left aside because that concept only requires the planning of the crime, while Article 25(3)(d) of the Rome Statute demands the actual commission or the attempted commission of such a crime[42]. In a similar sense, Fletcher and Ohlin affirm that the law of conspiracy found its way into modern international criminal law through the JCE doctrine[43]. However, they think that in the Rome Statute the JCE doctrine – and thus, conspiracy too – has been replaced by an specific provision in the Statute´s Article 25(3)(d) imposing liability for contributing to a group crime[44].

It should be borne in mind that Pre-Trial Chamber I, in the decision on the confirmation of charges in the *Mbarushimana* case, pointed out the following differences between the JCE doctrine and the provision in Article 25(3)(d) of the Rome Statute: 1) liability as a principal (JCE) or as an accessory

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[37] Olásolo, "El Desarrollo", *supra* note 4, at 89; Ambos, *La Parte*, *supra* note 22, at 196-197; *Katanga*, Confirmation Decision, *supra* note 3, § 496-501.

[38] *Katanga*, Confirmation Decision, *supra* note 3, § 517; Olásolo, "El Desarrollo", *supra* note 4, at 92.

[39] Eser, "Individual", *supra* note 3, at 802; Cassese, *International, supra* note 10, at 213; Ambos, "Article 25", *supra* note 3, at marginal note 24.

[40] Cassese, *International, supra* note 10, at 213.

[41] Ambos, *La Parte*, *supra* note 22, at 269-272.

[42] *Ibid*., at 269-272. Eser, "Individual", *supra* note 3, at 802, believes that such concept of conspiracy converges with the provisions in subparagraphs 3(b) and 3(c), which means that the Rome Statute has abandoned the traditional theory of conspiracy.

[43] G. P. Fletcher and J. D. Ohlin, "The Commission of Inquiry on Darfur and its follow-up: a Critical View", 3 *JICJ*, (2005) 539-561, at 548-550.

[44] *Ibid*., at 548-550.

(art. 25(3)(d) RS); 2) the requirement that the accused be part of the group acting with the common purpose (JCE) or not (art. 25(3)(d) RS); 3) the contribution to the common purpose (JCE) or to the crimes committed (art. 25(3)(d) RS); 4) requiring some sort of intent (JCE) or mere knowledge (art. 25(3)(d) RS)[45].

IV.2. The objective and subjective elements in the Statute´s Article 25(3)(d) and its delimitation from the Statute´s Article 25(3)(c)

Many scholars find that Article 25(3)(d) of the Rome Statute is superfluous, unnecessary or difficult to apply due to the fact that it is hard to imagine other cases that would not fall under the broad categories mentioned in the Statute´s Article 25(3)(c)[46]. These scholars believe that the Statute´s Article 25(3)(c) covers the "classical" field of complicity as a form of accessorial liability, which requires the commission of the crime or at least the attempt thereof[47]. Nevertheless, there seem to be significant differences – namely objective ones – between subparagraphs 3(c) and 3(d).

IV.2.1. The objective elements

With regard to the objective elements, some scholars defend that the only difference lies in the fact that Article 25(3)(c) refers to complicity in every individual crime, while Article 25(3)(d) contains the contribution to the commission of a crime perpetrated by a group[48].

However, in the decision on the confirmation of charges in the *Mbarushimana* case, Pre-Trial Chamber I stated that there was another difference with regard to the objective elements[49]. The Chamber convincingly set the requirement that the contribution to a crime reaches a certain threshold of significance, otherwise any member of a community who, in the knowledge of the group´s criminality (even when such criminality is public knowledge), provides any kind of contribution to a criminal organisation would be held liable under the Statute´s Article 25(3)(d)[50]. As a result, the Chamber held that the different types of contributions required in the Statute´s Article 25(3) are arranged in accordance with "a value oriented hierarchy of participation in a crime under international law, where the control over the crime decreases as one moves down the subparagraphs", and it relied on that hierarchy to justify the requirement of a minimum objective threshold in relation to the contributions referred to in Article 25(3)(d) RS: an essential contribution for co-perpetration (Article 25(3)(a) RS); a substantial one in subparagraphs 3(b) and 3(c) RS; and a significant one in subparagraph 3(d)[51].

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[45] Decision on the confirmation of the charges, *Prosecutor v. Callixte Mbarushimana*, Case No. *ICC-01/04-01/10*, ICC, Pre-Trial Chamber I, 16 December 2011 (hereinafter *Mbarushimana*, Confirmation Decision), § 282; H. Olásolo, *Tratado de Autoría y Participación en Derecho Penal Internacional* (Tirant lo Blanch, 2013), at 733-734.

[46] Eser, "Individual", *supra* note 3, at 803; F. Mantovani, "The General Principles of International Criminal Law: The Viewpoint of a National Criminal Lawyer", 1 *JICJ* (2003) 26-38, at 35.

[47] Eser, "Individual", *supra* note 3, at 798.

[48] While Eser, "Individual", *supra* note 3, at 802-803, considers that the group factor may still have some symbolic relevance; G. P. Fletcher and J. D. Ohlin, "The Commission", *supra* note 44, at 548-550, declare that the group factor itself is not enough to defend a separate regulation. Nevertheless, they defend such a separate regulation due to the existence of some differences with regard to the subjective elements.

[49] *Mbarushimana*, Confirmation Decision, *supra* note 46, § 276-279 and 283-285.

[50] *Mbarushimana*, Confirmation Decision, *supra* note 46, § 277; Olásolo, *Tratado*, *supra* note 46, at 681-682; Ohlin, "Three Conceptual", *supra* note 10, at 89.

[51] *Mbarushimana*, Confirmation Decision, *supra* note 46, § 279 and 283; *Lubanga*, Trial Judgment, *supra* note 2, § 999; Olásolo, *Tratado*, *supra* note 46, at 682-683 and 728-730.

Although it stated that a case-by-case assessment is required, the Chamber suggested the following factors in order to help assess whether the suspect´s relevant conduct amounts to a "significant" contribution: 1) the fact that the accused continued to contribute after acquiring knowledge of the criminality of the group´s common purpose; 2) the efforts made to prevent criminal activity or to impede the efficient functioning of the group´s crimes; 3) whether the person creates or merely executes the criminal plan; 4) the position of the suspect in the group or relative to the group; and 5) the role the suspect played vis-à-vis the seriousness and scope of the crimes committed[52].

As opposed to Pre-Trial Chamber I, Pre-Trial Chamber II, in the *Muthaura et al.* and *Ruto et al.* cases, has not required that the contribution to the crime be "significant" in order to yield criminal liability under Article 25(3)(d) RS – although it has taken into account the aforesaid factors –[53]. Pre-Trial Chamber II concluded that, as far as the contribution results in the commission of the crimes charged, the threshold under subparagraph 3(d) is satisfied by a less than a "substantial" contribution[54]. As to Trial Chamber II, in its recent decision in the *Katanga* y *Ngudjolo Chui* case, it relied on the case law of Pre-Trial Chamber I and it confirmed that the contribution to a crime must reach a certain threshold of relevance, making explicit reference to the "significance" threshold[55].

Regardless of the position that future ICC case law adopts on this issue, both positions confirm that the different contributions required in the Statute´s Article 25(3) are arranged in accordance with a hierarchy. Therefore, there is no doubt that subparagraphs 3(c) and 3(d) differ from each other on the question of their objective elements in that subparagraph 3(c) requires a larger contribution than subparagraph 3(d)[56]. Even if he believes that it is not necessary that the contribution to the crime be "significant" in order to yield criminal liability under Article 25(3)(d) RS, Kiss defends the

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[52] *Mbarushimana*, Confirmation Decision, *supra* note 46, § 284; Olásolo, *Tratado*, *supra* note 46, at 685-686.

[53] Decision on the Prosecutor's Application for Summonses to Appear, *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Case No. *ICC-01/09-02/11*, ICC, Pre-Trial Chamber II, 08 March 2011 (hereinafter *Muthaura, Kenyatta and Ali*, Decision), § 49; Decision on the Prosecutor's Application for Summons to Appear, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Case No. *ICC-01/09-01/11*, ICC, Pre-Trial Chamber II, 08 March 2011 (hereinafter *Ruto, Kosgey and Sang*, Decision), § 53.

[54] Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Case No. *ICC-01/09-02/11*, ICC, Pre-Trial Chamber II, 23 January 2012 (hereinafter *Muthaura, Kenyatta and Ali*, Confirmation Decision), § 421; Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Case No. *ICC-01/09-01/11*, ICC, Pre-Trial Chamber II, 23 January 2012 (hereinafter *Ruto, Kosgey and Sang*, Confirmation Decision), § 354, because if both subparagraphs (c) and (d) require a "substantial" contribution, the hierarchical structure of the different modes of liability provided for in Article 25 (3) would make no sense. Olásolo, *Tratado*, *supra* note 46, at 683-686, 717 and 722.

[55] Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, Prosecutor v. *Germain Katanga and Mathieu Ngudjolo Chui*, Case No. *ICC-01/04-01/07*, ICC, Trial Chamber II, 21 November 2012 (hereinafter *Katanga*, Severing Decision), § 6-7, 23, 28-29 and 33.

[56] They differ from each other too in that the contribution is made to an individual crime or to a crime committed by a group. Furthermore, according to *Mbarushimana*, Confirmation Decision, *supra* note 46, § 286-287, *ex post facto* contributions to the crime fall under Article 25(3)(d) of the Rome Statute, so long as these contributions had been agreed upon by the group and the suspect prior to the perpetration of the crime; Olásolo, *Tratado*, *supra* note 46, at 686-687.

hierarchical interpretation of Article 25(3) RS – but he thinks that such hierarchical order is not damaged if the last level lacks a minimum threshold –[57].

Antonio Cassese believes that there is another difference between subparagraphs (c) and (d) of Article 25(3) RS, since Article 25(3)(d) RS is only applicable to those who, from outside the group, contribute to the commission of the crime agreed by the group[58]. However, as Pre-Trial Chamber I held in the *Mbarushimana* case, Article 25(3)(d) RS can also be applied to members of the group[59]. To do otherwise would mean that those who are part of the group and make significant – but not essential – contributions to the crime would be acquitted (only if their contribution is essential can they be considered co-perpetrators), since subparagraphs 3(b) and 3(c) of Article 25 RS are not applicable when members of the group make a significant contribution to the crime just with the knowledge that other members of the group intend to commit it (if they lack the intent to commit any crimes themselves, subparagraphs 3(b) and 3(c) cannot be applied)[60]. But they could be convicted under Article 25(3)(d) RS if they made identical contributions from outside the group[61].

IV.2.2. The subjective elements

Pre-Trial Chambers I and II agree on the subjective elements of Article 25(3)(d): 1) an intentional contribution (the person must mean to engage in the relevant conduct that allegedly contributes to the crime, so the contribution must be intentional with regard to its own conduct, not with regard to the impact of such conduct on the commission of the crime), and 2) that the contribution is made with the aim of furthering the criminal activity or criminal purpose of the group (Article 25(3)(d)(i) RS) or, at least, in the knowledge of the intention of the group to commit the crime (Article 25(3)(d)(ii) RS)[62].

As a consequence, as Olásolo contends, Article 25(3)(d) RS requires the accessory neither to share the criminal purpose of the group, nor to possess the subjective elements of the crime perpetrated by the group[63]. Furthermore, the members of the group do not have to know about the accessory's contribution[64]. The knowledge of the intention of the group to commit the crime – even if the contribution is not made with the aim of furthering the commission of the crime – constitutes the minimum threshold[65]. As a result of this not very demanding subjective threshold, it is clear that

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[57] A. Kiss, "La contribución en la comisión de un crimen por un grupo de personas en la jurisprudencia de la Corte Penal Internacional", 2 *InDret* (2013) 1-34, at 18. According to him, it is not a matter of grade of the contribution, but of its nature.

[58] Cassese, *International, supra* note 10, at 212-213.

[59] *Mbarushimana*, Confirmation Decision, *supra* note 46, § 272-275; Olásolo, *Tratado*, *supra* note 46, at 680-681; Ohlin, "Three Conceptual", *supra* note 10, at 80-81.

[60] *Mbarushimana*, Confirmation Decision, *supra* note 46, § 273-274; Olásolo, *Tratado*, *supra* note 46, at 681.

[61] *Mbarushimana*, Confirmation Decision, *supra* note 46, § 273-274; Olásolo, *Tratado*, *supra* note 46, at 681. Even if he relies on a different reason, Kiss, "La contribución", *supra* note 58, at 27-31, also thinks that the interpretation suggested by Cassese is not correct.

[62] *Mbarushimana*, Confirmation Decision, *supra* note 46, § 288; *Muthaura, Kenyatta and Ali*, Decision, *supra* note 54, § 47; *Ruto, Kosgey and Sang*, Decision, supra note 54, § 51; *Katanga*, Severing Decision, *supra* note 56, § 26 and 33; Olásolo, *Tratado*, *supra* note 46, at 687 and 731.

[63] Olásolo, *Tratado*, *supra* note 46, at 731-732.

[64] *Ibid*., at 731-732.

[65] Ambos, "Article 25", *supra* note 3, at marginal note 26 and 29-39; G. P. Fletcher and J. D. Ohlin, "The Commission", *supra* note 44, at 548-550; *Katanga*, Severing Decision, *supra* note 56, § 30.

it is necessary to require that the contributions reach certain objective relevance to give rise to liability under Article 25(3)(d) RS[66]. Therefore, it should be required that the contributions are, at least, "significant", as Pre-Trial Chamber I and Trial Chamber II have stated.

Concerning subparagraph 3(c), it demands that the person who assists in the commission of the crime acts "for the purpose of facilitating the commission of such a crime". Since subparagraph 3(d)(ii) considers it sufficient that contributions to the crime are made without the aim of furthering it, but with the knowledge that they are furthering it[67], the difference with regard to subparagraph 3(c) is obvious. Several scholars – as well as relevant case law – have pointed out this difference[68].

On the contrary, the difference between the subjective elements of subparagraphs 3(c) and 3(d)(i) is not so obvious[69], and therefore, it is useful to take into account the aforementioned differences in terms of objective elements. Nevertheless, Kiss suggests the following explanation of the difference regarding the subjective elements of those Articles: whereas subparagraph 3(c) refers to the purpose of facilitating the commission of a crime, which requires a direct causal relationship between the contribution and the crime, subparagraph 3(d)(i) only requires that the contribution is made with the aim of furthering the criminal activity or criminal purpose of the group, and thus, contributions which do not have a direct causal relationship with the crime can give rise to liability under Article 25(3)(d) RS[70].

V. THE EXCLUSION OF THE THREE CATEGORIES OF JCE FROM THE ROME STATUTE´S ARTICLE 25(3)(D)

The decision on the confirmation of charges in the *Mbarushimana* case sets forth the differences between the JCE doctrine and the mode of criminal liability envisaged in Article 25(3)(d) RS[71]. Focusing on JCE I, it is the only category of JCE that can be considered, without difficulty, as an expression of co-perpetration. This means that, had it been accepted in the Rome Statute, it should have been included in the concept of co-perpetration under Article 25(3)(a) 2nd alternative.

Nevertheless, the ICC has adopted another concept of co-perpetration based on the functional control of the act by the individuals who, due to the importance of their functions, can ruin the

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[66] Moreover, as Olásolo, *Tratado*, *supra* note 46, at 717, 722 and 730, contends, the interpretation suggested by Pre-Trial Chamber II is not only less demanding, but also less defined.

[67] Olásolo, "El Desarrollo", *supra* note 4, at 84.

[68] *Katanga*, Confirmation Decision, *supra* note 3, § 483; *Lubanga*, Confirmation Decision, *supra* note 3, § 337; *Mbarushimana*, Confirmation Decision, *supra* note 46, § 289; Decision on the Prosecutor's Application under Article 58(7) of the Statute, *Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Al Abd-Al-Rahman ("Ali Kushayb")*, Case No. *ICC-02/05-01/07*, ICC, Pre-Trial Chamber I, 27 April 2007, § 88-89 and 106-107; Olásolo, "El Desarrollo", *supra* note 4, at 82-83; Ambos, "Article 25", *supra* note 3, at marginal note 45; Ambos, *La Parte*, *supra* note 22, at 269-272.

[69] The difference could come from the interpretation of the "common plan or purpose" suggested by Pre-Trial Chamber I, according to which, in the context of Article 25(3)(d) of the Statute, the common plan does not need to be specifically directed at the commission of a crime, but only include an element of criminality. In other words, it suffices that the co-perpetrators are aware of the risk that implementing the common plan will result in the commission of the crime, and accept such an outcome. *Mbarushimana*, Confirmation Decision, *supra* note 46, § 271; *Lubanga*, Confirmation Decision, *supra* note 3, § 344; Olásolo, *Tratado*, *supra* note 46, at 679-680, 709 and 731-732.

[70] Kiss, "La contribución", *supra* note 58, at 14-17.

[71] *Mbarushimana*, Confirmation Decision, *supra* note 46, § 282; Kiss, "La contribución", *supra* note 58, at 5, 9 and 18.

commission of the crime if they refuse to fulfil their functions[72]. This means that if the accused played a role which was not essential in the commission of the crime, he or she can only be liable under some form of accessorial liability[73], while the same contributions would give rise to responsibility as co-perpetrator under JCE I. Therefore, JCE I cannot be included in Article 25(3)(a) RS. And as a subtype of JCE I, the same applies to JCE II. Furthermore, as a form of co-perpetration, JCE I – and thus, JCE II too – cannot be included in the mode of accessorial liability referred to in Article 25(3)(d).

As to JCE III, it is neither included in subparagraph (a) nor in subparagraph (d) of Article 25(3) RS. Despite ICTY case law, JCE III cannot be considered as a form of co-perpetration, and thus, it cannot be included in Article 25(3)(a) RS. Concerning the possibility of including it in Article 25(3)(d) RS, it is worth pointing out that the said provision requires that the contribution is made "with the aim of furthering *the criminal activity or criminal purpose of the group*" or, at least, "in the knowledge of *the intention of the group to commit the crime*". It therefore excludes the criminal liability for the crimes which are not intended by the group, because they are just a possible consequence of the implementation of the common plan[74], where the awareness and acceptance of the risk of the commission of the crime is not shared with the rest of the members. On the contrary, under JCE III, members of a JCE can be held liable for the crimes of other members not explicitly agreed upon beforehand, provided that the crimes were a natural and foreseeable consequence of the plan and they consciously took that risk[75]. This is precisely why JCE III does not fall into Article 25(3)(d) RS either.

VI. CONCLUSION

The ICC adopts the theory of control of the act to distinguish between principals and accessories, and thus, it detaches itself from the JCE doctrine which was developed by the *ad hoc* tribunals and which is based on a subjective criterion approach. As a consequence, the ICC interprets Article 25(3)(d) RS – the Article which apparently most resembles the JCE doctrine – as a residual form of participation instead of a form of co-perpetration.

However, Article 25(3)(d) RS also entails interpretation problems, such as its problematic delimitation with regard to subparagraph 3(c), or the possibility that it may include any of the three categories of JCE. As far as the first issue is concerned, although some scholars consider it superfluous (because they think it refers to conducts which are already envisaged in subparagraph 3(c)), ICC case law shows that there are significant differences which justify the separate codification of the conducts referred to in subparagraph 3(d). With regard to the second issue, it seems clear that none of the three categories of the JCE doctrine is included neither in subparagraph 3(d) of Article 25 RS, nor in subparagraph 3(a) of the same Article.

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[73] Olásolo, "El Desarrollo", *supra* note 4, at 87-88.
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