

Participation under International criminal law and the jurisprudence of International Tribunals

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Introduction

International criminal law deals with a different reality than national criminal law. While committing a crime through the contribution of a plurality of persons is *possible* under national law, it is almost a *must* under international law. The very nature of international crimes renders roughly impossible the hypothesis of having a single actor. Therefore, the question of how to punish all who participate in committing an international crime takes larger dimension in the theory of international criminal law.

A first question that should be clarified is the usage of terminology, as there might be a difference between different systems in using different terminology. In general, national systems distinguish between two main categories of involved individuals: perpetrators and accomplices or participants. However, the usage of these terms varies considerably depending on the national system concerned¹, something that might create confusion when we use the same terms in international law.

In this report we intend to use the term *participation* to refer to all forms of contribution to the commission of the crime other than the *physical perpetration*. Thus, defining who is a participant is closely related to the definition of who is a perpetrator. In other words, if we define the perpetrator as the person who commits the constitutive elements of the prohibited act, a participant may be defined as a person who contributes to the crime without being the perpetrator.

This definition of participation is, of course, a tautological one, it does not precise any course of action or determine the course of action that would satisfy the principle of legality that necessitate the clarity and precision of the penal norm. Therefore categories, or specific courses of conduct, have been provided for in the statutes of International Tribunals as well as in some international conventions of international criminal law in a way that tries to delimit the contour of participation. Finally, the term complicity will be used to refer to one form of participation namely aiding and abetting.

This report aims to show how international criminal law has treated the question of criminal participation. In the first section we will try to survey the treatment of criminal participation in some conventions treating international crimes (1). Then we will expose how international criminal tribunals have applied notions of criminal participation (2). Next section will present new forms of criminal responsibility as developed under the jurisprudence of international criminal jurisdictions (3). Finally we will conclude by some general remarks on the application of general concepts of participation to the complexity of international crimes.

¹ Lorenzo PICOTTI, Expanding forms of preparations and participation, General report, RIDP, Vol. 78, 2007, pp.418-419.

1. Participation under Conventional ICL: A case by case approach

Conventions are the main legislative tool on international level; therefore they constitute one of the basic components of ICL. Conventions on substantive ICL provide for numerous international crimes. In this section we will restrict our research to 4 categories of international crimes: genocide, war crimes, terrorism and organized crime to see how the concept of “participation” has been treated in each one of them.²

The choice of the first two categories is due to their imminent presence on the scene of international criminal jurisdictions. Beside crimes against humanity, which does not have till now a convention regrouping its categories in a thorough way, genocide and war crimes are the only crimes adjudicated currently on international level. As to the second two categories namely; terrorism and organized crime, their choice was due to the increasing interest that international law has dedicated to them in the last two decades.

On the one hand, terrorism has been the focus of a growing concern of the international community since 1990's; this concern has been aggravated after the wave of terrorist attacks that the world has witnessed in the new millennium. In part, this has led to the adoption of several legal instruments that incriminate different acts. The evolution of the treatment of participation in that regard is worth noting.

On the other hand, organized crime is the most recent category of international crimes to be recognized by an international convention. The international community has finally succeeded in 2000 to conclude an international convention on the transnational organized crime. The collective nature of commission of this crime carries a great resemblance to the paradigm of international crimes adjudicated before international tribunals, and thus a quick examination of the way the convention has dealt with the participation might be useful. In exposing these conventions we will follow their chronological order.

1.1 *The genocide convention of 1948: A strong beginning*

The genocide convention is the most developed convention in terms of treating different modes of incrimination of international crimes. This seems logic as genocide is the most serious international crime or as it has been called the crime of crimes. After defining the material acts which constitutes genocide in the second article of the convention, the third article addresses the question of different modes of liability in stating that “... [t]he following acts shall be punishable: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide.”

Even though the convention does not define any of these different terms, the idea of enumerating all these modes constitutes a huge advance in the degree of detailing incriminated modes. Moreover, the *travaux preparatoires* present a great help in understanding the extent of the different incriminated forms.³ Later on, this text will be adopted literally in the Statutes of the Ad hoc Tribunals and will be interpreted extensively by numerous decisions.

What matters to us for the purpose of this presentation is that the convention had a general text incriminating “complicity” without specifying certain category. In fact complicity is the only, technically speaking, mode of liability mentioned in the convention to the commission of the crime of genocide. The other acts, conspiracy, inciting and attempt, are inchoate crimes that do not depend on the actual

² Criminalizing complicity has been provided for also in other international conventions as the International Convention on the Suppression and punishment of the crime of Apartheid of 1973, Art. III and the Convention against Torture and other cruel, inhuman or degrading treatment or Punishment of 1984, article 4 (1).

³ For comprehensive scholar works on the Genocide convention, one can cite three essential volumes: Nehemiah ROBINSON, *The Genocide Convention*, Institute of Jewish Affairs, New York, 1960 ; William SCHABAS, *Genocide in International Law : The crime of crimes*, Cambridge University Press, 1st edition, 2nd edition 2009 and John QUIQGLEY, *The Genocide Convention : An international law analysis*, Ashgate publishing, 2006.

commission of genocide. Moreover, conspiracy and inciting are mere preparatory acts under the ordinary theory of the general part of criminal law.

It is true that in the absence of a definition of what constitutes “complicity”, it is not clear what exactly the ambit of the text is, but this is left to the judges who will apply the text depending on general notions of complicity in their respective legal orders.

1.2 The Geneva conventions of 1949: A step backward

War crimes are regulated in general by two groups of conventions; first, the Hague conventions of 1899 and 1907, and secondly the Geneva conventions of 1949 and its two additional protocols of 1977. The Hague conventions do not provide for individual criminal responsibility, the violation of its provisions entailed State responsibility within the limits of International law. The question of punishing individuals committing the violations depends solely on the will of States and the way they will apply the convention in their national orders.⁴ It follows that the question of criminal participation is not addressed. This situation has changed under Geneva conventions.

The four Geneva conventions have a penal section where the question of individual responsibility for violating their provisions is addressed. In identical terms Article 49 of the 1st convention, Article 50 of the 2nd convention, article 129 of the 3rd convention and article 146 of the 4th convention stipulates that “the High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.”

This provision clearly indicates that States shall punish individuals who commit any of the grave breaches enumerated in each convention, and therefore establishes the individual criminal responsibility for violations of the provisions of the conventions.

There is no general provision that incriminates participation in committing the crime. The only incriminated form of participation provided for is to “order” the commission of such a crime. This reflects the concern of the drafters to confirm the responsibility of the superiors for giving orders in violation of laws of war. Yet, the silence on the other forms of possible participation in committing war crimes seems little justified, specially considering the fact that the genocide convention has been already adopted just few months beforehand. Therefore, in terms of general part questions, Geneva conventions might be considered a step backward.

Yet, the commentary on the 1st additional protocol to the Geneva conventions adopted in 1977 states that a person will be individually responsible not only when he takes part as a direct or principal actor in physically committing the crime amounting to a grave breach, but also if he helps the offender in preparing or perpetrating the crime.⁵ However, this is a matter of interpretation and it is not clear whether it is obligatory or not under the convention.

1.3 Terrorism Conventions: A gradual approach

It is regrettable that until now there is no one convention that deals with terrorism thoroughly. This is due to the political problems in reaching a consensus on the definition of this crime. To overstep this difficulty the international community has followed a piece-meal approach where multiple conventions have been adopted, each one of them is incriminating a specific act that States agree on its “terrorist” nature.

⁴ Commentary on the Geneva conventions of 12 August 1949, Vol. IV, 1958, p. 548.

⁵ C. PILLOUD et al., Commentary on the Additional Protocols of 8 June 1977 to the Geneva conventions of 12 August 1949, Geneva, 1987, p. 979.

Up to 13 conventions that incriminate acts classified as terrorist acts have been adopted from 1963 till 2005.⁶ Neither one of them has provided a definition of *terrorism*, rather more than one definition for *terrorist acts*. Under the current situation of international conventions terrorism is a label that we attach to certain acts or a category that include various acts rather than a proper crime on its own that that one can define exactly its contents. Various questions concerning terrorism have been dealt with extensively in the doctrine, questions like the definition, the victim's rights, the procedures to combat terrorism, the jurisdiction competent to try accused of that crime and the possibility of admitting terrorism as a core international crime beside war crimes, crimes against humanity and genocide. Yet, our concern is different, we will survey the international legal instruments in regard to a specific point of general criminal law; participation.

In fact the way in which participation has been dealt with, as a matter of general criminal law, has varied considerably. In a very quick survey of the conventions we can classify their position in three categories.

1st Category: early period 1963/ 1970/1971/ 1973

Conventions in this period are focusing almost only on defining the acts to be prohibited. Very little attention is granted to the question of participation; some conventions do not mention it or incriminate the acts of participation at all, while others do incriminate it in very general terms without any precision.

At least three instruments could be cited as examples of conventions that do not contain any reference to the question of participation or the criminal responsibility of the participant: The Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft of 1963 is a first example; second is the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation of 1988, supplementing the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 1971 and finally the Convention on the Marking of Plastic Explosives for the Purpose of Identification of 1991. The last convention does not include in fact any texts on individual criminal responsibility, all its provisions address the State authorities inciting them to prohibit and punish acts related to manufacturing of explosives.

Other conventions do incriminate participation but in a very general manner that does not explain the contents of the concept. So for example, article 1(b) of the Convention for the Suppression of Unlawful Seizure of Aircraft of 1970 states, after defining the prohibited act in the first paragraph, that "any person who on board an aircraft in flight... (b) is an accomplice of a person who performs or attempts to perform any such act commits an offence."

In the same manner, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 1971 stipulates in its first article paragraph (2) that "any person also commits an offence if ... he

⁶ Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on 14 September 1963; Convention for the Suppression of Unlawful Seizure of Aircraft, signed at the Hague on 16 December 1970; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973; International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979; Convention on the Physical Protection of Nuclear Material, signed at Vienna on 3 March 1980; Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 24 February 1988; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on 10 March 1988; Convention on the Marking of Plastic Explosives for the Purpose of Detection, signed at Montreal on 1 March 1991; International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997; International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on 9 December 1999; International Convention for the Suppression of Acts of Nuclear Terrorism, New York, 13 April 2005.

is an accomplice of a person who commits or attempts to commit any such offence.” Almost the same formula is used in the International Convention Against the Taking of Hostages of 1979 in article 1-2 (b).

No definition whatsoever to what constitutes *complicity* is discussed. Yet, some other instruments provide for a relatively more detailed approach of participation.

2nd category: Middle period 1980-1997

A more strict formula of incriminating participation in a brief manner can be found in the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons of 1973. Article 2 (1) (e) dispose that “an act constituting participation as an accomplice in any such attack shall be made by each State Party a crime under its internal law.” Even though the obligation to incriminate participatory acts are framed in a more direct phrasing, yet there is no definition of what could constitute a participatory act. We find the exact formulation in the Convention on the Physical protection of Nuclear Material of 1980, where Article 7 (1) (g) incriminate complicity in the exact same terms.

In two other conventions adopted in Rome in 1988, another formulation of incriminating participation is endorsed. Both articles 2(2) (b) of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation and article 3 (2) (b) of the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf stipulate, in a similar language, that “any person also commit an offense if that person ...abets the commission of any such offences perpetrated by any person or is otherwise an accomplice of a person who commits such an offence.” We remark a slightly more detailed treatment of the question of participation. The texts mention for the first time “abetting” as a specific form of participation, in addition to complicity.

It is worth noting that these documents consider the “threat” to commit the offence as an inchoate crime in itself. While the first two documents only mention the “threat” as a form of committing the offence, the latter, in addition, incriminate the “threat” that aims at compelling another to commit the offence.⁷

3rd category: The late conventions

Three conventions adopted in the last 15 years have marked another advance in the treatment of participation in international instruments on terrorism. The international convention on the suppression of Terrorist bombings adopted in 1997 has been a marking point with a much more detailed approach to the criminalisation of participation. The Convention enumerates new forms of participation that have been introduced in the text concerning individual criminal responsibility.

Thus article 2(3) (a) states that a person is considered to have committed the offence if “that person participates as an accomplice” in the offence. The article does not define what constitutes complicity, however the next phrase adds that a person commits a crime if he “organizes or directs others to commit” the offence under question 2(3)(b). Finally, the same paragraph introduces a new form of participation which apparently will be a followed example in other conventions and even before international Tribunals. Article 2(3)(c) states that a person will be criminally responsible if he “in other way contributes to the commission of one or more offences as set forth in paragraph 1 or 2 of the present article by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned”.

⁷ Articles 2 (2) (c) and 3 (2) (c) of the two conventions adopted in Rome in 1988 stipulates respectively that the person is also responsible when he “threatens, with or without a condition, as is provided for under national law, aimed at compelling a physical or juridical person to do or refrain from doing any act, to commit any of the offences set forth in paragraph 1, subparagraphs (b) and (c), if that threat is likely to endanger the safety of the fixed platform.”

The whole part on participation will be adopted without any change in 1999 in the International Convention for the Suppression of the Financing of Terrorism of 1999 and later in the International Convention for the Suppression of Acts of Nuclear Terrorism of 2005. Also, it is worth noting that a similar text will be adopted in 1998 by the international criminal court in article 25 (3) (d).

1.4 Organised Crime: a thorough approach

In 2000 in Palermo the United Nations has adopted a Convention and two Protocols on the Transnational organised crime. This has been the culmination of a long course of efforts since decades to counter this phenomenon.⁸

The convention was concerned in the first place with fighting the phenomenon of organised groups established to commit serious crimes. Due to the highly complex nature of relationships between the perpetrators of such a crime, one possible solution to the phenomenon was to incriminate the “membership” of the criminal organisation, yet the convention did not opt for this solution. The convention adopted a position that passes the incrimination on active participation rather than on mere membership. Thus, article 5 is entitled “criminalization of participation in an organised criminal group”.⁹ In so doing the convention draws a large scope of criminal participation that deals with all possible form of implication in an organised criminal group.

Article 5 (1) (a) deals with two forms of involvement in the organised group that the convention asks the member States to incriminate as criminal offences either both or at least one of them. First is the agreement to commit a crime, within certain conditions, if there was an act in furtherance of this agreement or it was in relation of an organized criminal group [5(1)(a)(i)]. Second is taking an active part in the criminal activities or any other activities that contribute to the criminal activities of an organised group. It is clear that both incriminated acts are taking as a point of departure a concept that originates from the theory of criminal participation: conspiracy for the first and complicity for the second.¹⁰

The next paragraph, 5 (1) (b), enumerates classic modes of participation by incriminating “organising, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organised criminal group”. This paragraph provides for a full range of concepts that aims at capturing any possible form of involvement in the criminal activities whatever the categories of participation provided for in different legal system. It could be considered one of the broadest texts on incriminating participation in international conventions. Yet, it is hard to imagine the scope of application of this paragraph in the light of the very

⁸ For a historical record of the fight against this phenomenon and the UN documents in that concern, See *Organised Crime: A compilation of UN documents 1975-1998*, M. Cherif BASSIOUNI and Eduardo VETERE (eds), Transnational Publishers, Ardsley, New York, 1998

⁹ The article reads as follows: “1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) Either or both of the following as criminal offences distinct from those involving the attempt or completion of the criminal activity:

(i) Agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group;

(ii) Conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in:

a. Criminal activities of the organized criminal group;

b. Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim;

(b) Organizing, directing, aiding, abetting, facilitating or counseling the commission of serious crimes involving an organized criminal group.

¹⁰ David, McCLEAN, *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols*, Oxford University Press, 2007, pp. 50-67.

broad incrimination in paragraph (a) that incriminated “taking active part”, something that might encompass all the forms of participation in paragraph (b)

It is also worth noting that the convention has incriminated specifically three substantive offences; laundering of proceeds of a crime; corruption and obstructing justice. Both articles 6 and 8 speaking respectively about the first two offenses include a paragraph on incriminating participatory acts.¹¹

Conclusion

We can say that there is a constant interest of punishing participants to the commission of international crimes. In almost all the documents surveyed, incriminating the acts of participation was an objective whatever the offence treated. In addition, we can remark a trend of enlarging the concept of complicity in late documents by precise texts that enumerate more detailed courses of conduct that constitute certain forms of participation.

Yet, we also remark that there is no detailed treatment of the elements of complicity or any other form of participation provided for in these conventions. This is explained by the fact that conventions of International criminal law are enforced, in the absence for an International criminal court competent for the trial of all international crimes, through an *indirect model*, that's to say the application of its provisions before national jurisdictions. In the light of this consideration, it is normal that questions of general part of criminal law are left to the respective national legal order that is going to apply the various incriminations. An international treaty can not intervene to change or impose a certain vision of a delicate question of the general part of criminal law such as criminal participation. The convention can just set the principle of punishing the participants/accomplices and let each system enforce it within its acceptable limits.

With the advent of international criminal tribunals, ad hoc or permanent, the situation is different and the questions of general criminal law had to be answered in a way or another in order to punish the individuals accused of committing the crimes within the jurisdiction of the each tribunal. Questions relating to criminal participation are essential in that concern. That is the next part of our discussion.

2. Participation under the jurisprudence of International Criminal Tribunals

Nuremberg was the first international trial for individuals accused of committing international crimes. The legacy of the International Military Tribunals either in Nuremberg or shortly after in Tokyo presents the real foundation of the doctrine of individual criminal responsibility in international law. Thus the importance of the judgments of both Tribunals is evident in any discussion concerning the evolution of the theory of international law and the role of the individual thereof, yet they are of much less interest from a criminal law perspective.

As to the question of participation, article 6 of the Nuremberg Charter stipulates in the final paragraph that “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.”

The text enumerates four modalities of participation namely; leaders, organizers, instigators and accomplices, yet with no more clarification as to the definition of each category or the elements of responsibility under each of them. Similarly, the Nuremberg judgment did not pay attention to precise the

¹¹ Article 6 (1) (b) demands States to incriminate, subject to the basic concepts of their legal system, “ (ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counseling the commission of any of the offences established in accordance with this article”. While article 8 (3) provide that “Each State Party shall also adopt such measures as may be necessary to establish as a criminal offence participation as an accomplice in an offence established in accordance with this article.”

elements of each form of responsibility and sometimes it did not even state under which category it convicts the defendant.

In fact, the Tribunal was satisfied by ascertaining the facts attributed to the accused to conclude on his culpability without précising under which category or what was the legal requirements of each specific mode of liability. In a very brief manner, the Tribunal would state the facts attributed to the defendant and then decide that he is guilty or not. In doing so, the Tribunal adopted a rather pragmatic approach to the question of individual criminal liability and its modalities. The focus was more on confirming the principle that individuals are responsible before international law, questions of technical criminal law was almost not dealt with at all as the attention was more drawn to the facts than to legal techniques.

This was acknowledged by the ICTY in one of the first judgments of the ad hoc Tribunals. In Tadic, the Trial Chamber remarked that “the post-Second World War judgments, generally failed to discuss in detail the criteria upon which guilt was determined” as to different forms of responsibility; planning, instigating, ordering or aiding and abetting.¹²

Detailing the concept of different modes of participation under international criminal law was achieved principally by the ICTY and the ICTR jurisprudence. Article 7/6 (1) of their respective statutes provide that “A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 5 of the present Statute, shall be *individually responsible* for the crime.” The jurisprudence of these two Tribunals elaborated on the definitions and elements of each of the mentioned categories as we will see in this section.

The Rome Statute is definitely the most developed in that regard. Article 25 (3) enumerates forms of engaging individual criminal responsibility and devote three paragraphs b, c and d to treat criminal participation. The relevant paragraphs provide that a person shall be individually responsible if he:

“(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.”

In the following section we will try to survey briefly the evolution of concepts of participation in the jurisprudence of the ad hoc Tribunals, in comparing them with corresponding texts of the Rome Statute.¹³

¹² *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Opinion and Judgement, 7 May 1997, para. 674. In the same paragraph however, the Chamber noted that there is some kind of general pattern that is common to all forms of responsibility that reposes on mainly two elements; intent and some kind of causality

¹³ In doing so we do not pretend to present an exhaustive study of the Tribunals' jurisprudence on the issues presented. The enormous quantity of judgements and decisions rendered obliged us to limit our choices to only the main ones from our perspective. The following decisions will be cited from the ICTY: *Prosecutor v. Milan Babić*, Case No. IT-03-72-S, Sentencing Judgement, 29 June 2004 (“*Babić Sentencing Judgement*”); *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-06-T, Judgement, 17 January 2005 (“*Blagojević and Jokić, TJ*”); *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-06-A, Judgement, 9 May 2007 (“*Blagojević and Jokić, AJ*”); *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, Judgement, 3 March 2000 (“*Blaškić TJ*”); *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004 (“*Blaškić AJ*”); *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Judgement, 1 September 2004 (“*Brđanin, TJ*”); *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Judgement, 3 April 2007 (“*Brđanin, AJ*”); *Prosecutor v. Zejnil Delalić*, Case No. IT-96-21-T, Judgement, 16 November 1998 (“*Čelebići, TJ*”); *Prosecutor v. Zejnil Delalić*, Case No. IT-96-21-A, Judgement, 20 February 2001 (“*Čelebići, AJ*”); *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgement, 10 December 1998 (“*Furundžija, TJ*”);

2.1 Planning

Planning is the first form of participation incriminated under articles 7/6 (1) of the Ad hoc Tribunals Statutes. It normally takes place by those who are on the top of a hierarchy, and it is usually an early stage of the commission of the crime. It is likely to be applied to “leaders” in a governmental or a military structure.

The material element of planning is composed of three elements; an act of planning, the commission of a crime, a causal link between the act and the crime.

First material element is an act of planning. This “envisions one or more persons formulating a method of design or action, procedure, or arrangement for the accomplishment of a particular crime.”¹⁴ In *Akayesu*, the trial chamber considered that planning “implies one or more person contemplate the commission of a crime at both its preparatory and execution phase.”¹⁵ The Chamber also noted that this form of criminal participation is similar to the notion of “complicity” in civil law or to “conspiracy” in common law but it differed in that “planning” as understood in the statute can be an act committed by one person.¹⁶

In what could be an expansion to the definition, some chambers considered that the definition of a plan includes in addition to formulating a criminal plan, *endorsing a plan proposed by another*.¹⁷ However, in this case the limits between planning and conspiracy are not very clear. The existence of such a “plan” may be established by direct or circumstantial evidence but in any case it has to be the only reasonable inference drawn from the evidence.¹⁸ In the meanwhile, there is no need for a direct link between the “planner” and the “perpetrator”, in fact the link between them is probably quite distant. It is normal that there are several mid level positions in the hierarchical structure, whether military or governmental, between the planning and the execution level.

Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-A, Judgement, 21 July 2000 (“*Furundžija*, AJ”); *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Judgement and Opinion, 5 December 2003 (“*Galić*, TJ”); *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Judgement, 30 November 2006 (“*Galić*, AJ”); *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T, Judgement, 26 February 2001 (“*Kordić and Čerkez*, TJ”); *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Judgement, 17 December 2004 (“*Kordić and Čerkez*, AJ”); *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-T, Judgement, 15 March 2002 (“*Krnojelac*, TJ”); *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-A, Judgement, 17 September 2003 (“*Krnojelac*, AJ”); *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T, Judgement, 2 August 2001 (“*Krstić*, TJ”); *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Judgement, 19 April 2004 (“*Krstić*, AJ”); *Prosecutor v. Dragoljub Kunarac*, Case No. IT-96-23-T and IT-96-23/1-T, Judgement, 22 February 2001 (“*Kunarac*, TJ”); *Prosecutor v. Dragoljub Kunarac*, Case No. IT-96-23&IT-96-23/1-A, Judgement, 12 June 2002 (“*Kunarac*, AJ”); *Prosecutor v. Zoran Kupreškić*, Case No. IT-95-16-T, Judgement, 14 January 2000 (“*Kupreškić*, TJ”); *Prosecutor v. Zoran Kupreškić*, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001 (“*Kupreškić*, AJ”); *Prosecutor v. Miroslav Kvočka*, Case No. IT-98-30/1-A, Judgement, 28 February 2005 (“*Kvočka*, AJ”); *Prosecutor v. Naser Orić*, Case No. IT-03-68-T, Judgement, 30 June 2006 (“*Orić*, TJ”); *Prosecutor v. Blagoje Simić, Miroslav Tadić and Simo Zarić*, Case No. IT-95-9-T, Judgement, 17 October 2003 (“*Simić*, TJ”); *Prosecutor v. Blagoje Simić*, Case No. IT-95-9-A, Judgement, 28 November 2006 (“*Simić*, AJ”); *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-A, Judgement, 22 March 2006 (“*Stakić*, AJ”); *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Judgement, 31 January 2005 (“*Strugar*, TJ”); *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Opinion and Judgement, 7 May 1997 (“*Tadić*, TJ”); *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgement, 15 July 1999 (“*Tadić*, AJ”); *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-A, Judgement, 25 February 2004 (“*Vasiljević*, AJ”).

The ICTR case law include: *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgement, 2 September 1998 (“*Akayesu*, TJ”); *Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-T, Judgement, 7 June 2001 (“*Bagilishema*, TJ”); *Jean de Dieu Kamuhanda v. Prosecutor*, Case No. ICTR-99-54A-A, Judgement, 19 September 2005 (“*Kamuhanda*, AJ”); *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, Judgement, 21 May 1999 (“*Kayishema and Ruzindana*, TJ”); *Prosecutor v. Seromba*, Case No. ICTR-2001-66-A, Judgement, 12 March 2008, (“*Seromba*, AJ”).

¹⁴ *Semanza*, TJ, para. 380

¹⁵ *Akayesu*, TJ, para. 480; *Musema*, TJ, para.119, *Blaskic*, TJ, 279

¹⁶ *Akayesu*, TJ, para. 480

¹⁷ *Bagilishema*, TJ, para. 30; *Mpambara*, TJ, para. 20, *Semanza*, TJ, para. 380.

¹⁸ *Blaskic*, TJ, para. 279; *Kajelijeli*, TJ, para. 761; *Kordic and Cerkez*, TJ, para. 386

Second material element is the commission of a crime. In fact, the question is whether “planning” could be incriminated per se as an inchoate crime or not; in other words whether a person could be convicted for planning even if the crime itself was not committed. At least one Trial Chamber has answered in the affirmative. In *Kordic and Cerkez*, the Trial Chamber considered that planning constitutes a discrete form of responsibility under Article 7(1) of the Statute, and thus it agreed “that an accused may be held criminally responsible for planning alone”.¹⁹ The chamber conditioned this announcement by stating that this is valid only when (1) the person has not been convicted for commission of the same crime; and (2) when he intended directly or indirectly the crime be committed.²⁰ However, this judgment is an isolated precedent.

In fact, planning is not an inchoate crime under the current law of international Tribunals. In order for planning to be punishable, the crime that has been planned must have been committed or at least attempted.²¹ The *Blaskic* Trial Chamber held that “a person other than the person who planned... must have acted in furtherance of a plan”²², therefore a criminal act has to be executed in application of such a plan. Later on the Appeals Chamber in *Kordic and Cerkez* considered implicitly that the perpetration of a crime is necessary to punish “planning” as it stated that “the *actus reus* of planning requires that one or more persons design the criminal conduct constituting one or more statutory crimes *that are later perpetrated*.”²³ Also the Trial Chamber in *Brdjanin* considered that “proof is required that the crime in question has actually been committed by the principal offender”.²⁴

One can argue that the text of the statute is not clear on this point and it could have been logically interpreted that planning is an inchoate crime in itself. Yet the *Akayesu* Trial Chamber in excluding this possibility decided that only attempting a crime is punished as inchoate crime under the statute in the case of Genocide²⁵, and therefore *a contrario* no other mode of liability could be incriminated as inchoate. As pointed out by several commentators, this was not the only logical inference, planning could have been criminalized per se and without any link to whether the planned crime has been committed later or not.²⁶

In fact the position adopted by the Tribunals is supported by the 1996 International Law Commission Draft code of crimes against peace. Article 2(3) (e) incriminate the person who “directly participates in planning or conspiring to commit...a crime, *which in fact occurs*”. The commentary of the ILC on this article states clearly that this paragraph “sets forth a principle of individual responsibility with respect to a particular form of participation in a crime *rather than creating a separate and distinct offence or crime*”.²⁷

In any case, if the person has planned and in the same time has participated at the execution of the crime that he had planned, he could not be punished for both; he could only be punished for commission.²⁸ However, the fact that he participated in the commission could be an aggravating circumstance.²⁹

¹⁹ *Kordic and Cerkez*, TJ, para. 386

²⁰ *Kordic and Cerkez*, TJ, para. 386

²¹ *Akayesu*, TJ para. 473

²² *Blaskic*, TJ, para. 278.

²³ *Kordic and Cerkez*, para AJ, 26, italic added.

²⁴ *Brdjanin*, TJ, para. 267

²⁵ *Akayesu*, TJ, para. 473

²⁶ Guanael METTRAUX seems to support the idea that planning should be incriminated per se under ICL, Guanael METTRAUX, *International Crimes and the Ad hoc Tribunals*, Oxford University Press, 2005, p. 280. While CASSESE argues that ICL shall recognize only planning of serious international crimes as a crime of itself, and keep the derivative nature of the incrimination of planning for the less serious international crimes. Antonio CASSESE, *International Criminal Law*, Oxford University Press, 2nd edition, 2008, p. 226. Even though one can understand the logic behind such a desire to incriminate planning, neither author has provided any support for his proposition from customary or conventional international criminal law. In addition, the distinction proposed by Cassese between serious and less serious international crimes is arbitrary and might lead to extra confusion.

²⁷ Commentary 1996 ILC Draft Code, Article 2, para. 13.

²⁸ *Bagilishema*, TJ, para. 30; *Kordic and Cerkez*, TJ, para. 386

The third material element is the causal link between the act of planning and the crime committed. Chambers have differed in expressing which standard to adopt, so for example Kayishema and Ruzindana Trial Chamber held that “the accused’s conduct must have contributed to, or...had an effect on, the commission of the crime”.³⁰ A higher standard has been adopted by the *Bagilishema* Trial Chamber that held that “the accused’s level of participation must be *substantial*”³¹. To the same effect, the Appeal Chamber ruled in *Kordic and Cerkez* that “it is sufficient to demonstrate that the planning was a factor substantially contributing to such a criminal conduct”.³² Therefore secondary or minor involvement might not be sufficient to render the accused guilty. Of course the question of judging what is “substantial” and what is “minor” is a matter of fact that is left to the judges to decide. In any case, it is clear that planning does not have to be a *sine qua non* condition to the commission of the crime.

Planning as a form of participation is not mentioned in the Statute of the Rome Statute of the ICC, however this does not mean that it will go unpunished. It is almost certain that that it will be covered under the broad categories of participation mentioned in article 25 (3). It is going to be a matter of legal qualification to consider planning either as a form of “inducing” under paragraph (b) or “aiding and abetting” under paragraph (c) or a “contribution to the commission of the crime” under paragraph (d).

2.2 *Instigating, Solicitation and inducement*

Article 7/6 (1) of the ICTY/ICTR statute holds that a person who instigated a crime shall be individually responsible. Also 25 (3) (b) of the Rome Statute holds that a person who “solicits or induces” the commission of a crime is individually responsible for this crime. Despite the difference in terminology, both articles intend to cover the same course of conduct. In general terms, all the three verbs: instigate, solicit and induce in addition to incite mean almost the same thing.

The material element of instigation could be divided into three components: an act of instigation, the commission of a crime and a causal link between both.

First of all, an act of instigation has to be committed. The ICT have used different synonyms in defining the term “instigation”; thus it might involve the act of urging, encouraging, prompting, inducing, soliciting or inciting a person to commit an offense.³³ The essence is that a person is influencing the will of another person to push him to behave in a certain manner. Yet, this does not demand, to the contrary of ordering, any position of authority between the instigator and the executor. Moreover, there is no certain form to instigate someone; it could be verbally or by another means of communication³⁴. The *Blaskic* Trial chamber held that instigation could be committed not only by a positive action but also by a culpable omission, as “the wording of Article 7/6 (1) is sufficiently broad to allow for the inference that both acts and omissions may constitute instigation and that the notion covers both express and implicit conduct”.³⁵ Finally, instigation might pass through different persons that could be involved before the commission of the crime.³⁶

Secondly, a crime has to be committed as a result of the instigation. As ordering and planning, instigation is not an inchoate crime. In fact, this specific condition is the main difference between instigation and incitement to commit genocide that is punished exceptionally as a separate crime and under certain conditions as the essence of the act in both forms is the same namely, the desire to influence the will of another to commit a crime.

²⁹ *Stakic*, T.J, para. 443, *Brdjanin*, T.J, para. 268

³⁰ *Kayishema and Ruzindana*, T.J, para. 198

³¹ *Bagilishema*, T.J, para. 30.

³² *Kordic and Cerkez*, A.J, para. 26

³³ *Akayesu*, T.J, para. 482; *Blaškic* T.J, para. 280; *Kordic and Cerkez* T.J, para. 387, *Bagilishema*, T.J, para. 30; *Oric*, T.J, para. 271

³⁴ *Mpambara*, T.J, para. 18

³⁵ *Blaskic*, T.J, para. 280, and also *Kordic and Cerkez*, T.J, para. 387.

³⁶ *Brdjanin*, T.J, para. 359.

Thirdly, there has to be a certain link of causality between the instigation and the commission of the crime.³⁷ Therefore the prosecutor has to present proof of a causal connection between the acts of the instigator and the *actus reus* of the crime in cause.³⁸ However the causal requirement is not so strict to require a *sine qua non* test, in other words the prosecutor does not have to prove that “but for” the acts of the accused the crime would not have been committed.³⁹ It is sufficient that the instigation had “a clear contributing factor” or “substantially contributed” to the commission of the crime.⁴⁰

It is interesting to note that the degree of the influence of the acts of the instigator on the principal perpetrator is essential in determining whether he would be convicted for “instigation” or for “aiding and abetting”. The *Oric* Trial Chamber held that if the acts of encouragement had helped the physical perpetrator to take the decision to commit the criminal act, in other terms had an influence on the decision making process of the perpetrator, then the encouragement is considered as instigation. While if the physical perpetrator had already made his mind independent of the accused's conduct then the accused's acts might qualify as aiding and abetting through encouragement or moral support.⁴¹

Instigation and Incitement to commit genocide

Both Statutes of the Ad hoc Tribunals and the Rome Statute provide for a separate incrimination to incitement to commit genocide.⁴² Even though on a linguistic level instigation and incitement are synonyms, there are several differences as to the treatment of each one of them in international criminal law.

First of all, incitement is an inchoate crime in itself; therefore it does not need the proof of the commission of the incited crime, while instigation needs the actual commission of the crime of genocide. This difference engendered another one in case of actual commission of the genocide. The instigator will not be punished unless proved that his acts had a causal link to the committed genocide, to the contrary a public and direct inciter would be punished without the need to prove any causal link to the actions committed, as his acts are incriminated *per se*. In other words, the Prosecutor is relieved from the burden of proof that the incitement has led to any results whatsoever, once the elements of public and direct incitement are established. This is always an easier option for the prosecutor.⁴³

Second, incitement as a crime in itself requires more conditions than instigation. It has to be direct and public, while instigation does not have to be neither direct nor public, it could be personal and takes place in private.⁴⁴

A third difference lies in the scope of incrimination. Instigation is incriminated for all the crimes under the jurisdiction of the court; either under the ICT or under the “solicits or induced” formula of the ICC. Yet, public and direct incitement is only incriminated when it concerns genocide.

2.3 Ordering

Ordering is another mode of participation that engages the personal responsibility of the person who issues the order to commit a crime. As opposed to planning and instigation, that are not mentioned literally in the Rome Statute, ordering appears in both Statutes of the International Criminal Tribunals in article 7/6 (1) and in the Rome Statute of the International Criminal Court in article 25 (3)(b).

³⁷ *Brdjanin*, TJ, para. 359

³⁸ *Baglishima*, TJ, para. 30, *Semanza*, TJ, para. 120

³⁹ *Kordic and Cerkez*, TJ, para. 387.

⁴⁰ *Kvočka*, TJ, para. 252; *Kordic and Cerkez*, TJ, para.387.

⁴¹ *Oric*, TJ, para. 271.

⁴² Article 4(e) (c) of the ICTY Statute, Article 2(e) (c) of the ICTR Statute and Article 25 (3)(e) of the ICC Statute.

⁴³ In that sense we might understand the conviction of *Bikindi* in a recent judgment by the ICTR, 03 december 2008.

⁴⁴ *Akayesu*, AJ, para. 478-482; *Semanza*, TJ, para. 381.

Ordering can be simply defined as an instruction to commit a crime from one person to another. It has been defined by the ICT chambers as entailing “a person in a position of authority using that position to convince another to commit an offence”⁴⁵

One can resume the material element of ordering into four components: a position of authority of the accused over another person, an instruction to commit a statutory crime, the commission of a crime and a causal link between the order and the crime.

First, there has to be a specific relationship of authority between the person who gives the order and the person who executes it. The *Akayesu* Trial Chamber ruled that “ordering implies a superior-subordinate relationship between the one giving the order and the one executing it”⁴⁶. However, the Appeals Chamber of the ICTR in *Semanza* clarified that “no formal superior-subordinate relationship between the accused and the perpetrator is required. It is sufficient that there is some position of authority on the part of the accused that would compel another to commit a crime in following the accused’s order”.⁴⁷

In the same line, the Appeals Chamber ruled in *Kamuhanda* that in contrast to superior responsibility under article 6 (3) of the ICTR Statute, ordering does not require the accused to have *effective control* over the person ordered, but merely that he has authority⁴⁸, in addition, this authority might be informal or even temporary.⁴⁹ Actually, the position of authority is a question of fact⁵⁰ that could be proved by all kind evidence, sometimes it could be inferred simply from the fact that the order was obeyed.⁵¹

Secondly, the accused has to issue an order. He has to be proven to have given the instruction that a certain criminal conduct is to be executed. The order itself does not have to be written or in any particular form, its existence is a matter of fact that could be proven by all the circumstantial evidence.⁵² In any case, it has to be a positive act as we can not speak of ordering by omission.⁵³

Otherwise, the act of issuing the order does not have to be direct from the person origin of the order to the executor; it could pass by a chain of command that involves several levels and persons. The persons who receive the order and pass it to the lower level could also be condemned for ordering an illegal act depending upon the circumstances.⁵⁴

As to its content, as a matter of principle the content of the order has to involve a statutory crime. However, a person in a position of authority might issue an order that is legal in itself and finds himself responsible for the criminal actions that were committed in the course of executing his order if there was a substantial likelihood that the criminal results will occur and the accused was aware of that likelihood.⁵⁵

Third, a crime has to be committed or at least attempted in execution of the order.⁵⁶ This is in line with the position taken by the Rome Statute of the ICC in article 25 (3)(b) that holds a person criminally responsible if he “orders the commission of ... a crime which in fact occurs or is attempted”. Almost in identical

⁴⁵ *Akayesu* Judgement, para. 483; *Blaškić* Judgement, para. 281; *Kordić and Cerkez* Judgement, para. 388

⁴⁶ *Akayesu*, para. 483; *Blaskić*, T.J, para. 281 and *Semanza*, T.J, para. 382.

⁴⁷ *Semanza*, A.J, para. 361

⁴⁸ *Kamuhanda*, A.J, para. 75.

⁴⁹ *Semanza*, A.J, para. 363

⁵⁰ *Akayesu*, T.J, para. 473

⁵¹ *Kamuhanda*, T.J, para. 594

⁵² *Blaskić*, T.J, para. 281; *Kordić and Cerkez*, T.J, para. 388

⁵³ *Galić*, A.J, para. 508.

⁵⁴ *Kuperskić*, T.J, 827 and 862

⁵⁵ *Blaskić*, A.J, para. 41, look *infra* for the common mental element.

⁵⁶ *Brdjanin*, T.J, para. 267; *Semanza*, T.J, para. 378.

language, the article 2 (3) (b) of the Draft code of crimes against peace of 1996 holds the same ruling. Therefore, ordering is not an inchoate crime, to the contrary of the opinion of some scholars.⁵⁷

Fourth, there must be a causal link between the order and the criminal act committed.⁵⁸ In fact the accused conduct must have had a “positive effect in bringing about the commission” of the crime.⁵⁹ The *Kamuhanda* Trial Chamber has ruled that the accused’s conduct “must have substantial effect on the completion of the crime.”⁶⁰

Categorising

It seems that there are divergent views in categorizing ordering; whether it is as a mode of participation or a form of commission. While the jurisprudence of the ad hoc Tribunals considers it as a form of participation, some scholars argue that it is a form of commission especially under the system of the International Criminal Court. Cassese considers that the person issuing the order is criminally responsible as a co-perpetrator of the crime committed by the subordinate in execution of the order he issued.⁶¹ Also, Ambos considers that a person who orders the commission of crime is “not a mere accomplice but a perpetrator by means, using the subordinate to commit his crime”.⁶²

He concludes that “ordering” in fact belongs to the forms of perpetration mentioned in subparagraph (a) of article 25 (3), and it should be considered as a form of commission “through another person”.⁶³ Even though this last argument is valid on its face, it is not supported by the text of article 25 of the Rome Statute that enumerates “ordering” in paragraph (b) after exhausting the forms of commission in paragraph (a). There is no clear case law of the ICC on the issue, yet it seems that the current jurisprudence will not be in favor of such an interpretation.⁶⁴

Common Mental element of Ordering, Planning, Instigating

It seems that the jurisprudence of the Ad hoc Tribunals has dealt in the same manner with the three forms of participation in regard to the required subjective element. However, this common position does not seem to be consistent all the time.

⁵⁷ Cassese defends the idea that it should be incriminated in itself. He cites cases law from an American martial court and a couple of Post- Nuremberg cases, CASSESE, *op. cit.*, pp. 230-232. Mettraux shares the same opinion in adding that existing State practice also supports that contention, METTRAUX, *op. cit.*, p. 283. CRYER also joins them in making a stronger argument based on the one side on attacking the position of the ILC draft code and the ICT jurisprudence that relied on it as not reflecting the status of international law on the subject, and on the other side on the literal interpretation of the statutes of the d hoc Tribunals that does not necessitate this conclusion. Robert CRYER, *General principles of liability in International Criminal Law*, in *The Permanent International Criminal Court: Legal and Policy Issues*, edited by Dominic McGOLDRICK, Peter ROWE and Eric DONNELLY, Hart Publishing, 2004, p. 243-245. In any case, the position for the actual jurisprudence seems well settled and under the current statute of the ICC it is not likely that it will change in the future.

⁵⁸ *Strugar*, TJ, para. 332.

⁵⁹ *Galic*, TJ, para. 169.

⁶⁰ *Kamuhanda*, TJ, para.590.

⁶¹ CASSESE, *op. cit.*, p. 230.

⁶² Kai AMBOS, Article 25, in Otto TRIFFERRER, *Commentary on the Rome Statute of the ICC*, 2nd edition, 2008, p. 755; in the same line Elies VAN SLEIDREGT, *The Criminal responsibility for individuals for violations of international humanitarian law*, TMC Asser Press, The Hague, 2003, p. 78.

⁶³ Kai AMBOS, *op. cit.*, p. 756

⁶⁴ The ICC has issued till now only two decisions concerning the confirmation of charges against Lubanga issued on the 29 January 2007, No: ICC-01/04-01/06, and the decision against Katanga issued on 30 September 2008, No: ICC-01/04-01/07. In the two decisions the Chamber did not discuss accessory liability under article 25(3)(b,c,d) after finding a base to charge under 25 (3)(a) which involves the different forms of perpetration. One can argue that the Prosecutor has referred specifically to “ordering” as an alternative mode of liability and the Chamber decided not to discuss any form of accessory liability, thus implying that it considers ordering simply as an accessory mode of liability and not as a form of commission. This point of view is also supported by the text of the ICC that simply includes “ordering” among *other* forms of participation in the crimes than “committing”. In any case, it is not conclusive and the issue has to be clarified by later jurisprudence.

Akayesu set the first framework for discussing the mental element for all the three forms of responsibility, the chamber has ruled that “the forms of participation referred to in article 6(1) of the ICTR cannot render their perpetrator criminally liable where he did not act knowingly, and even where he should have had such knowledge.”⁶⁵ This seems to adopt a double standard: Knowledge as a first criteria and then negligence as second criteria when the perpetrator “should have had” the necessary knowledge but he failed.

Later, the Trial Chamber in *Blaskic* proposed another standard for the subjective element that is different that the one in *Akayesu*, the Chamber ruled that “proof is required that whoever planned, instigated or ordered the commission of a crime possessed the criminal intent, that is, that he directly or indirectly intended that the crime in question be committed.”⁶⁶ The same formulation has been reiterated in several judgements.⁶⁷ The chamber did not explain what it meant by indirect intent, but we can assume that in any case it concerns a lower standard than intent.

The Appeals Chamber in *Blaskic* provided what is meant by “indirect intent” in ruling that “a person who “orders” an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite *mens rea* for establishing liability under article 7(1) pursuant to ordering.”

The Appeals Chamber similarly holds that in relation to “planning”, a person who plans an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that plan, has the requisite *mens rea* for establishing responsibility under Article 7(1) of the Statute pursuant to planning. Planning with such awareness has to be regarded as accepting that crime.⁶⁸

Therefore, it seems that the definition of the indirect intention is so close to the *recklessness* concept in common law system or the *dolus eventualis* in the civil law one. An issue that has not been resolved is what would be the case if the crime in question is a *specific intent* crime, as genocide or persecution. Could an accused be condemned for planning genocide based only on his awareness that his own plan, that did not include the commission of genocide, had a substantial likelihood to result in committing genocide? It seems that the answer is yes.

The position of the ICC towards the mental element of the three forms is to be determined. If the judges abide by the general rule of having both intention and knowledge as provided for in article 30 of the Statute then they might not accept the *dolus eventualis* or the recklessness standard advanced by the ad hoc Tribunals’ jurisprudence. Yet, if they will decide to follow that jurisprudence, they might consider that the subjective element of these modes is permitted under the exception of article 30 of “otherwise provided”.

2.4 Aiding and Abetting

Articles 7/6 (1) of the Ad hoc Tribunals Statutes provide that “a person who...aided and abetted in the planning, preparation or execution of a crime...shall be individually responsible”. In a more detailed manner article 25 (3) (c) of the Rome Statute provides that a person is individually responsible if “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.”

Aiding and abetting or assisting the commission of the crime is a weaker form of participation than the previous forms mentioned in the Statutes and discussed above. It is meant to be a generic category that can encompass all kinds of contributions that are not covered by the specific forms of actions mentioned above. Up to this moment there is no case law of the ICC on the elements or the definition if such a mode of liability. Yet, it has been dealt with extensively in the jurisprudence of the Ad Hoc Tribunals.

⁶⁵ *Akayesu*, TJ, para. 479

⁶⁶ *Blaskic*, Trial Judgement, para. 278

⁶⁷ *Kordic and Cerkez*, TJ, para. 386; *Bagilishima*, TJ, para.31

⁶⁸ *Kordic and Cerkez*, AJ, para. 31

Four main conditions are required to engage the responsibility under this form of participation: the commission of a certain crime; a contribution of the accused in the commission of that crime; a causal effect to the commission of the crime and finally a certain state of mind.

First of all, a crime within the jurisdiction of the Statutes has to occur. Aiding and abetting is not an inchoate crime, therefore we can not punish the acts committed by the accused if a crime is not perpetrated.⁶⁹ The criminal conduct for which the accused is charged with aiding and abetting must be established.⁷⁰

Second, the accused has to contribute in a certain way to the commission of the crime. The term “aiding” is defined as giving assistance to someone, while the term “abetting” is defined as facilitating the commission of an act by being sympathetic thereto.⁷¹ Yet, this is not a constraining definition; rather it has been understood as any act of practical assistance, encouragement or of a moral support to the perpetrator.⁷² The contribution of the accused might even be an act or an omission. Thus, it is ruled that if the accused enjoy a kind of authority over the perpetrators, his mere presence-an omission- might be sufficient to be considered as moral support or encouragement.⁷³ Also, the contribution of the aider and abettor may take place at any stage of the criminal activity; before, during or after the act is committed.⁷⁴ Moreover, liability for aiding and abetting does not require the existence of an arrangement or plan between the aider and abettor and the principal, in fact the principal might not be aware of the accused’s contribution.⁷⁵

This relaxed approach as to the contribution of the accused is conditioned by the requirement of a clear causal effect to the commission of the crime. The assistance has to have a *substantial* effect on the commission of the crime, however it is not required that it constitutes a condition sine qua non for the acts of the principal.⁷⁶ In the same line, it was held that “presence alone at the scene of the crime is not conclusive of aiding and abetting unless it is shown to have a *significant* legitimizing or encouraging effect on the principal.”⁷⁷ It is likely that the jurisprudence of the ICC will follow the same criteria.

The fourth element to be proven is the mental element or the *mens rea* of the accused. It is well settled in the jurisprudence of the Ad hoc Tribunals that a “knowledge” standard is sufficient.⁷⁸ The accused need not “intend” to facilitate the commission of the crime that he assists, but only he has to intend to present his contribution in the knowledge or the awareness that it will help the perpetrator in committing his crime.⁷⁹

Also, the accused need not know he exact crime that is going to be committed if he knows that one of a number of crimes will probably be committed.⁸⁰ Therefore the accused need not share the intent of the principal perpetrator but he has to be aware of it.

The knowledge standard is upheld also in specific intent crimes. Thus the ICTY held in *Kristic* that a conviction for aiding and abetting genocide is possible when the accused knew about the perpetrators

⁶⁹ *Akayesu*, TJ, para. 473

⁷⁰ *Aleksovski*, AJ, para. 165 ; *Brdjanin*, TJ, para. 271.

⁷¹ *Akayesu*, TJ, para. 484 ; *Semanza*, TJ, para. 384.

⁷² *Furundzija*, TJ, para. 235 ; *Kamahunda*, TJ, para. 597 ; *Tadic*, AJ, para. 89 ; *Simic*, AJ, para. 85; *Brdjanin*, TJ, para. 271.

⁷³ *Blaskic*, TJ, para. 284

⁷⁴ *Aleksovski*, AJ, para. 62.

⁷⁵ *Tadic*, AJ, para. 229.

⁷⁶ *Furundzija*, TJ, para. 209. It was held before that judgment, in *Tadic* Trial judgment, that the contribution need to be “direct and substantial”, suggesting a *sine qua non* approach. Yet the *Furundzija* Trial Chamber considered that the term direct is misleading and not necessary, and maintained only the “substantial” criteria. *Furundzija*, TJ, para. 232. In holding only the “substantial” criterion see also, *Celebici*, AJ, para. 352; *Kristic*, TJ, para. 601; *Aleksovski*, AJ, para. 162-164.

⁷⁷ *Kunarac*, TJ, para. 393 ; *Furundzija*, TJ, para. 232 ; *Tadic*, TJ, para. 689.

⁷⁸ *Furundzija*, TJ, para. 255 ; *Tadic*, AJ, para. 229 ; *Brdjanin*, TJ, para. 272

⁷⁹ *Furundzija*, TJ, para. 245, 249.

⁸⁰ *Furundzija*, TJ, para. 246.

genocidal intent, so it is not necessary that he shared that intent with the principal.⁸¹ A similar conclusion was reached concerning the crime of persecution, a specific intent crime, in other judgments.⁸²

It is worth noting that this “knowledge” standard might not be followed under the jurisprudence of the ICC. The first sentence of article 25 (3) (c) set forward the condition that the contribution should be “for the purpose of facilitating” the commission of the crime. This language sets a clear indication of an “intent” requirement as to the mental element of aiding and abetting. This is, of course, a higher standard than that of the ad hoc Tribunals. It is to be seen how the judges of the ICC will apply this text and whether they will depart considerably from the jurisprudence of previous Tribunals.

3. New modes of liability: the Joint criminal enterprise

The fact that more than one person is involved in the commission of a crime raises the question of the distribution of responsibility between these persons. However, the complexity of international crimes has left the judges of international tribunals with difficulties as to the appropriate mode of attribution individual responsibility. The highly collective nature posed the problem of weighing the degree of involvement of each participant and correctly labeling it.

Despite the various modes of participation provided for in the statutes, and the extended interpretation of most of them by the jurisprudence in a way that covers a wide array of actions, yet there was a gap. These modes were modeled on traditional concepts of participation that addressed different realities in national context. Even though these forms are broad enough to cover any kind of implication in the crime, specially the flexible notion of aiding and abetting, still the conviction under any of those forms is considered to be accessory or derivative responsibility that depends on a vision that the actual perpetrator is still the main criminal.

This was not satisfactory to the judges who felt the need to find/invent new concepts that better correspond to the complications of the international reality. The solution was to enlarge the concept of “perpetration” or “commission to encompass serious acts of implication in the crime that would have fallen under the heading of “participation”. In that way, the traditional concept of perpetrator has to be reviewed to include more than the physical perpetrator.

The jurisprudence of the ad hoc Tribunals has favored an “extended” definition of commission that encompassed what is called the “joint criminal enterprise” doctrine. Briefly we can define joint criminal enterprise as a mode of liability by which all individuals cooperating in the execution of a criminal plan will answer as “perpetrators” to the crimes committed in the course of its execution, even for results that fall outside the original criminal plan, as long as these results were natural and foreseeable.

The concept has been referred to at the beginning by a variety of terms, such as common criminal plan, common criminal purpose, common design or purpose, common criminal design, common purpose, common concerted design and common criminal enterprise.⁸³ However, the term “joint criminal enterprise” has settled down and became the prevalent in the jurisprudence of the Tribunals.⁸⁴ Later on the judges found it sufficient to refer to the concept in its abbreviated form “JCE”,⁸⁵ so we intend to do.

The doctrine had an immediate positive reaction in the Tribunals work and very soon it became one of the main tools of the prosecution and one of the favorite theories of liability for the Judges. In fact, it is surprising how could a doctrine that appeared six years after the beginning of the functioning of the

⁸¹ *Kristic*, AJ, para. 140.

⁸² *Krnjelac*, AJ, para. 252 ; *Vasiljevic*, AJ, para. 142.

⁸³ *Prosecutor vs. Brdjanin and Talic*, IT-99-36, Decision on form of further amended indictment and prosecution to application to amend, 26 June 2001, para. 24.

⁸⁴ *Milutinovic et al.*, JCE Appeal decision, IT-99-AR72., 21 may 2003

⁸⁵ *Babic Sentencing Judgment*, para. 4, 6, 7.

Tribunal, become such important in its work. Moreover, its application expanded to occupy almost a similar important place in the work of other Tribunals; specifically the ICTR and at least two of the other hybrid international tribunals especially in Sierra Leone and East Timor. In the meanwhile, the doctrine was and still the objective of various critics either inside⁸⁶ or outside the tribunals.⁸⁷

We will try to sketch the main features of this new mode of liability under the law of the ICT and the main questions that have been at issue recently in the jurisprudence of this Tribunal.

3.1 *Introducing the concept*

In *Tadic*, the Appeals Chamber has interpreted the term “committed” in an innovative way to introduce a new mode of liability that it coined as “joint criminal enterprise.”⁸⁸

The Appeals Chamber held that criminal responsibility for participating in a common purpose falls within the ambit of article 7 (1). In addition to the physical perpetration of a crime by the offender himself, “the commission of one of the crimes envisaged in the Statute might also occur through participation in the realization of a common design or purpose.”⁸⁹

After a long discussion of various sources of international criminal law, the Appeals Chamber held that “the notion of common design as a form of accomplice liability is firmly established in customary international law and in addition is upheld, albeit implicitly, in the statute of the International Tribunal.”⁹⁰

The Chamber held that there are three categories of this concept that have similarities and differences. The first category; called basic JCE, “is represented by cases where all co-defendants, acting pursuant to a common design, possess the same criminal intention”.⁹¹

The second category, called systemic JCE, concerns personnel in prison camps or detention center, it is also called the concentration camp cases.⁹² The third category, called the extended JCE, concerns cases involving a common plan to pursue one course of conduct where one of the perpetrators commits a crime outside the common design, but was nevertheless a natural and foreseeable consequence of that common purpose.⁹³

In expounding the elements of each category, the Chamber concluded that the three categories have common objective elements; while their respective subjective element varies depending on the category at issue. In doing so, the *Tadic* Appeals Chamber has set a general framework that has been followed

⁸⁶ Judge Schomburg has been criticizing JCE constantly in several dissenting opinions. For a thorough account of his critiques see his dissenting opinions in the Appeals judgements of *Simic*, *Gacumbitsi*, and most recently in *Martic*. Also Judge Per-Johan Lindholm in his dissenting opinion in the *Simic* Trial judgment criticized the JCE.

⁸⁷ For critical views on the JCE among scholars, see Allison M. DANNER and Jenny S. MARTINEZ, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law*, California law journal, 2005, p. 74; Elies VAN SLIEDREGT, *Criminal responsibility in International law: Liability shaped by policy goals and moral outrage*, European Journal of Crime, Criminal law and Criminal Justice, 2006, p. 81; et *Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide*, JICJ, 2007, p. 184; Atilla BOGDAN, *Individual Criminal Responsibility in the Execution of a “Joint Criminal Enterprise” in the Jurisprudence of the ad hoc International Tribunal for the Former Yugoslavia*, ICLR, 2006, p. 67; Mohamed ELEWA BADAR, “Just convict everyone” joint perpetration: From *Tadic* to *Stakic* and back again, ICLR, 2006, p. 293; Shane DARCY, *Imputed Criminal Liability and the Goals of International Justice*, Leiden Journal of International law, 2007, p. 377; Jens David OHLIN, *Three conceptual problems with the doctrine of joint criminal enterprise*, JICJ, 2007, p. 69; Kai AMBOS, *Joint criminal enterprise and command responsibility*, JICJ, 2007, p. 159.

⁸⁸ The term has appeared at least once before the *Tadic* judgement in *Furundzija* judgement in 1998, but it was not elaborated upon by the Chamber. Thus the *Tadic* Appeal judgement is the real birth certificate for this mode of liability.

⁸⁹ *Tadic*, AJ, para. 188.

⁹⁰ *Tadic*, AJ, para. 220

⁹¹ *Tadic*, AJ, para.196

⁹² *Tadic*, AJ, para. 202

⁹³ *Tadic*, AJ, para.204

faithfully by all subsequent decisions. Even though later application of the doctrine has witnessed a constant broadening of its scope and elements, this has been done in a total loyalty to the *Tadic* framework.

3.2 Common Objective elements of JCE:

Three objective elements are common to the three categories of JCE: plurality of persons; a common criminal plan and the accused participation in the plan.

3.2.1 A plurality of persons

To incur liability for joint criminal enterprise, a plurality of persons must be involved. It is sufficient that two or more persons join the plan to satisfy the condition. The persons do not have to be organized into any sort of military, political or administrative structure.⁹⁴

In fact the JCE has developed as a theory that is valid for all levels of criminals. So in *Tadic*, where the Appeals Chamber applied the JCE for the first time, the case concerned a low ranked soldier who was in fact an actual perpetrator on the ground for other crimes that he did personally commit. The potential of the theory has been realized rapidly by the prosecutor that expanded its use to try persons at all the levels of the hierarchy. Thus, mid level persons responsible for the administration of a small detention camp were charged with JCE as well as high ranking military (Krstic, Mladic) and political officials (Brdjanin, Karadic) till the level of Heads of States (Milosovic).

The exact identities of each member of the pretended "plurality" do not have to be proved by the Prosecutor, yet at least reference to the groups or structures to which these individuals belong is necessary. A vague reference to a plurality consisting of the accused and "others" is not sufficient to consider persons or groups that are not specifically identified.⁹⁵

3.2.2 A common plan

Tadic held that a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute has to be proved.⁹⁶ The plan may "materialize extemporaneously" and it does not have to be previously arranged or formulated. If it had, the exact date when the plan was conceived is irrelevant.⁹⁷ The common plan or purpose may be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.

In fact this inference seems to be the common practice of different judgments, as very few of them concern themselves with the question whether the actual agreement had existed between the persons involved. Judges have relied upon several factors to infer the existence of a "common purpose"; so for example the systematic nature of the crimes indicates the existence of prior agreements to put these crimes into effect⁹⁸, or simply the coordinated action among several military and political groups show the existence of a certain policy that amounts to a common plan.⁹⁹

The common purpose or plan is the cornerstone of the JCE, as its limits define the contours of the involved persons. In that sense the Kvočka Trial Chamber held that a JCE "can range anywhere along a continuum from two persons conspiring to rob a bank to the systematic slaughter of millions during a vast regime comprising thousands of participants."¹⁰⁰

⁹⁴ *Tadic*, AJ, para. 227; *Stakic*, AJ, para. 64, Krnojelac, AJ, para. 31

⁹⁵ *Brdjanin*, TJ, para. 346

⁹⁶ *Tadic*, AJ, para. 227

⁹⁷ *Simic*, TJ, para. 879

⁹⁸ *Krstic*, TJ, para. 612

⁹⁹ *Stakic*, TJ, para. 478

¹⁰⁰ *Kvočka*, TJ, para. 307.

Yet, it is important to note that the “common plan” is not necessary in cases concerning the second category of JCE, called the systemic JCE. In that regard, the common plan is inferred from the existence of an institution that practices a system of ill-treatment. There is no requirement of formal or informal agreement among the participants to commit a crime.¹⁰¹

3.2.3 *Participation in furthering the plan*

The third common objective element of JCE is the “participation of the accused in the common design involving the perpetration of one of the crimes provided for in the Statute.”¹⁰² The *Stakic* Appeals Chamber has held that the “participation need not involve the commission of a specific crime under one of the provisions...but may take the form of assistance in, or contribution to, the execution of the common purpose.”¹⁰³ So, the act of participation need not be a crime in itself but might be any other act that facilitates or further the commission of the crime.

An even broader concept of participation has been advanced by the *Kvocka* Appeals Chamber that noted that “it is sufficient for the accused to have committed an act or an omission which contributes to the common criminal purpose.”¹⁰⁴ Moreover it has been ruled that “presence at the time of the crime is not necessary. A person can still be held liable for criminal acts carried out by others without being present.”¹⁰⁵

In *kvocka*, the Trial Chamber tried to limit the open ended requirement of participation by holding that the accused’s participation must be *significant* before liability can ensue under JCE.¹⁰⁶ The Chamber went on to enumerate several criteria by which a chamber may evaluate whether the level of the participation of the accused was sufficiently “significant”.¹⁰⁷ Yet, the Appeals Chamber has overturned this ruling stating that “there is no legal requirement that the accused make a substantial contribution to the JCE”.¹⁰⁸

In any case the accused’s participation has to have a causal effect on the execution of the JCE either directly or indirectly. *Tadic* Appeals’ judgment noted that “while the defendant’s involvement in the criminal acts must form a link in the chain of causation, it was not necessary that his participation be a *sine qua non*, or that the offence would not have occurred *but for* his participation.”¹⁰⁹

*Brdjanin and the unsuccessful trial of limiting the scope of the objective elements of JCE*¹¹⁰

The expansive interpretation of the objective elements of the JCE doctrine has raised concerns to some Trial Chambers. As we have seen, the *Kvocka* trial Chamber has tried unsuccessfully to render the participation element more precise. In the same vein, the *Brdjanin* Trial Chamber had similar concerns about the broad application of the JCE and its potential extension of individual criminal liability beyond its traditional limits.

The *Brdjanin* Trial Chamber has marked a turning point in dealing with JCE in the jurisprudence of the Ad hoc Tribunals. The Chamber considered that the accused was physically and structurally remote from the crimes committed and therefore there was not sufficient link between him and these crimes. Thus, the Chamber concluded that “JCE is not an appropriate mode of liability to describe the individual criminal

¹⁰¹ *Kvocka*, AJ, para. 118 ; *Krnjelac*, AJ, para. 97.

¹⁰² *Tadic*, AJ, 227.

¹⁰³ *Stakic*, AJ, para. 64.

¹⁰⁴ *Kvocka*, AJ, para. 187

¹⁰⁵ *Simic*, TJ, para. 158.

¹⁰⁶ *Kvocka*, TJ, para. 311.

¹⁰⁷ *Kvocka*, TJ, para. 309-311.

¹⁰⁸ *Kvocka*, AJ, para. 97.

¹⁰⁹ *Tadic*, AJ, para. 199.

¹¹⁰ This part of the report is based primarily on the contribution presented by Romana SCHWEIGER and Saklaine HEDARALY at the Young Penalist round Table at the first preparatory colloquium for the 18th International congress of penal law held at La Coruna, Spain, 3 -5 September 2007.

responsibility of the Accused”.¹¹¹ In reaching this conclusion, the Trial Chamber has set forward, what appeared to the Appeals Chamber later as, three contours concerning the objective elements of the JCE that aim to limit the application of the JCE doctrine.

The first issue is “whether the person who carried out the *actus reus* of a crime must be a member of the JCE for liability to attach to a member for this crime”.¹¹² The Appeals Chamber answered in the negative considering that it does not matter whether the person who committed the *actus reus* of the crime is a member of the JCE or not, but whether the crime committed formed part of the common purpose or not.

In that case, “this essential requirement may be inferred from various circumstances, including the fact that the accused or any other member of the JCE closely cooperated with the principal perpetrator in order to further the common criminal purpose.”¹¹³ Thus, a member of a JCE can be held responsible of crimes committed by non JCE members if these crimes can be imputed to one member of the JCE who acted in accordance with the common purpose in using the non JCE members.¹¹⁴

The second issue is “whether imposition of liability upon an accused for his participation to further a common criminal purpose requires an understanding or an agreement between the accused and the person who carried out the *actus reus* of that particular crime”.¹¹⁵ The Appeals Chamber answered also in the negative and held that it is not necessary for any category of JCE to prove an additional understanding or agreement to commit the crime between the accused and the principal perpetrator of the crime.¹¹⁶ In that regard, the Trial Chamber had erred in stating that “the Prosecution must, *inter alia*, establish that between the person physically committing a crime and the Accused, *there was an understanding or an agreement to commit that particular crime*”.¹¹⁷ The key issue remains that of ascertaining whether the crime committed forms part of the common criminal plan or not, and this is a matter of evidence.¹¹⁸

Finally, the third issue was to determine “whether JCE liability is a doctrine that applies, or should apply, only to relatively small-scale cases.”¹¹⁹ The Appeals chamber refused this allegation and cited the Appeals Chamber of the ICTR in its response to a similar challenge to the scope of application of the JCE where it held that “the *Justice Case* shows that liability for participation in a criminal plan is as wide as the plan itself, even if the plan amounts to a ‘nation wide government organized system of cruelty and injustice.”¹²⁰ Thus, the Appeals Chamber held that the Trial Chamber erred again in considering that JCE is not appropriate for large cases.¹²¹

Even though the Appeals Chamber has refused the three limits proposed by the Trial Chamber, the Chamber tried to address its concern about developing the JCE as a theory of liability without limits. Therefore the Appeals Chamber noted that the contribution of the accused needs to be “significant” in order to be found responsible as a JCE member, yet it need not be “necessary or substantial”.¹²² No explanation was given by the Chamber as to what could constitute a significant, substantial or necessary contribution.

¹¹¹ *Brdjanin*, TJ, para. 355

¹¹² *Brdjanin*, AJ, para.392

¹¹³ *Brdjanin*, AJ, para. 410

¹¹⁴ *Brdjanin*, AJ, para. 413

¹¹⁵ *Brdjanin*, AJ, para. 392.

¹¹⁶ *Brdjanin*, AJ, para. 418.

¹¹⁷ *Brdjanin*, AJ para. 419

¹¹⁸ *Brdjanin*, AJ, para. 418.

¹¹⁹ *Brdjanin*, AJ, para. 392.

¹²⁰ Decision on Interlocutory Appeal regarding application of Joint criminal enterprise to the crime of Genocide, *Rwamakuba*, ICTR-98-44-AR72.4, Appeals Chamber, 22 October, 2004, para. 25.

¹²¹ *Brdjanin*, AJ, para. 425.

¹²² *Brdjanin*, AJ, para. 450.

3.3 Subjective elements of JCE

The subjective or mental elements of JCE differ depending on which category of JCE is in question. Therefore every one of them has its own subjective elements.

3.3.1 Subjective element of the 1st category: Basic JCE

It was held in *Tadic* that in cases concerning the first category the accused must participate voluntarily in one aspect of the common purpose; he must act with intention to achieve the criminal result and that his intention is shared by other codefendants.¹²³

The first two components do not seem to create any ambiguities as they form the basic notion of “direct intent” as known in national systems. However, the third element concerning the “shared intent” seems to create a little confusion in the jurisprudence of the Tribunals. All the judgments after *Tadic* have abided by the requirement of shared intent while there seem to be a difference in the interpretation of with whom the intent has to be shared. While some Chambers considered that the “shared intent” is to be proven between the accused and the members of the JCE,¹²⁴ other chambers endorsed the position that it is sufficient that the prosecution demonstrates that the person charged shares the intent with the principal perpetrator of the crime.¹²⁵

In any case, it is noteworthy that the Chambers have almost never inquired about the intent of the principal perpetrators as in most cases they are not even presented before the Tribunals. The intention is systematically inferred by the chambers or not even referred to as taken for granted, in other instances the intention of the codefendants or the other members of the pretended JCE is what counts to prove the shared intent.¹²⁶

3.3.2 Subjective element of the 2nd category: Systemic JCE

The subjective elements of the systemic JCE are different than those of the basic one. The *Tadic* Chamber held that the requisite *mens rea* comprises knowledge of the nature of the system of ill treatment and the intent to further that system.¹²⁷ These two elements seem also to represent the components of direct intent as it was the case of the basic JCE, yet few differences, on theoretical and practical levels, could be pointed out.

On a theoretical level, the first difference to be noted is that the intent does not have to be proven vis-à-vis each specific crime charged, but only towards the system as a whole. Having this intent will suffice to condemn the accused of all the crimes that have been committed pursuant to the system.¹²⁸ However, if there are specific intent crimes charged, then the accused has himself to have the requisite *mens rea* for that crime.¹²⁹ The second difference is that there is no need to prove a shared intent with whomsoever as it is the case of the basic JCE.

On a practical level, it is worth noting that the Chambers have been more lenient in inferring both the knowledge and the intent as to this category. The position or the authority that the accused possess within the organizational structure of the institution is enough per se to infer both his knowledge of the nature of the system and his intent to further its criminal goals.¹³⁰

¹²³ *Tadic*, AJ, para. 196

¹²⁴ *Stakic*, AJ, para. 65.

¹²⁵ *Simic*, TJ, para. 160 ; Krnojelac, TJ, para. 183; *Kvocka*, AJ, para. 110.

¹²⁶ *Kristic*, TJ, para. 612

¹²⁷ *Tadic*, AJ, para. 202, 220, 228.

¹²⁸ Krnojelac, AJ, para. 120.

¹²⁹ Krnojelac, AJ, para. 111.

¹³⁰ *Tadic*, AJ, para. 220, 228 ; *Kvocka*, TJ, para. 324.

3.3.3 Subjective element of the 3rd category: Extended JCE

The subjective elements of this category have set a more lenient approach as to the required *mens rea*. The third category concerns the responsibility of the accused for crimes that fall *outside* the common plan agreed to between the members of the JCE. The *Tadic* Appeals Chamber held that to incur liability for such crimes the accused has to have the intention to further the criminal purpose of the enterprise; that the crimes committed outside the common plan were natural and foreseeable consequences of such plan and that the accused willingly took that risk.¹³¹

The first component of the subjective element is identical to that of the first category of JCE where the accused has to have the intent to further a criminal goal. Yet, the later two elements set the different standard of *mens rea* in a lower degree than the first two categories.

If the first two categories require direct intent applied variably depending on which category is concerned, the third category requires a *dolus eventualis* or an advertant recklessness approach with regard to the crimes committed outside the common plan.¹³² Therefore, it is sufficient that the accused was aware that the envisaged plan might lead to the commission of the other crimes by the other members of the group and that he willingly took that risk.¹³³

Later on the question of whether this lower standard of *mens rea* would be sufficient to charge crimes requiring specific intent was raised. The *Brdjanin* Trial Chamber has refused to apply this third category of JCE to the crime of genocide arguing that the accused in the case of extended JCE lacks the specific intent required for genocide. Therefore the Chamber dismissed the charge of genocide against the defendant under JCE 3.¹³⁴

However, the Appeals Chamber reversed this ruling holding that the Trial Chamber had “erred by conflating the *mens rea* requirement of the crime of genocide with the mental requirement of the mode of liability by which criminal responsibility is alleged to attach to the accused.”¹³⁵ Therefore, the 3rd or extended form of JCE is applicable to all crimes within the jurisdiction of the ad hoc Tribunals including specific intent crimes.

3.4 JCE and the International Criminal Court

The Statute of the ICC does not refer directly to joint criminal enterprise. As we have been discussing, this technical term referring to a specific mode of liability appeared in the jurisprudence of international tribunals in 1999, one year after the adoption of the Rome Statute. Therefore, it is normal that the term does not exist therein.

JCE has been based on the notion of commission under the statutes of the ad hoc Tribunals, therefore it is theoretically possible that judge of the ICC might rely on article 25 (3) (a) discussing forms of commission to integrate the doctrine in the Court’s arsenal. The article stipulates that a person is individually responsible if he “commits ... a crime, whether as an individual, jointly with another or through another person...”. Yet this possibility is very unlikely in the light of the two decisions issued by the court on the confirmation of charges where the court opted for a different concept to interpret the notion of commission or joint commission.¹³⁶

The other possibility to accept the JCE or a similar doctrine in the jurisprudence of the Court is to rely on article 25 (3) (d) that holds responsible the person who “in any other way contributes to the commission ...of such a crime by a group of persons acting with a common purpose.” This article takes as a starting point the assumption of an existing group of persons acting with a “common purpose”. This is almost the same

¹³¹ *Tadic*, AJ, para. 220.

¹³² *Tadic*, AJ, para. 220.

¹³³ *Tadic*, AJ, para.228

¹³⁴ Prosecutor vs *Brdjanin*, IT-99-36-T, Décision on Motion for Acquittal Pursuant to Rule 98 bis, 28 November 2003, para. 57

¹³⁵ Prosecutor vs. *Brdjanin*, IT-99-36-A, Décision on Interlocutory Appeal, 19 March 2004, para. 6.

¹³⁶ Lubanga and Katanga decisions, supra note 63.

essence of JCE where the common plan or design is the central notion that entails the mutual attribution of responsibility among the persons who shared the common purpose.

Yet two limitations might restrain the admission of the concept as it exists under the jurisprudence of the ad hoc Tribunals. First is the nature of the engaged responsibility. Under the ICTY and ICTR jurisprudence, JCE is a mode of “committing or perpetrating” the crime, this will not be the case under the Rome Statute if it was introduced through paragraph (d) that deals with a form of participation or accomplice liability that seems even less serious than other forms of participation following the logic of drafting the article. In that sense, JCE will lose all its attractive advantage as a doctrine of attributing liability.

Second, it is also unlikely that the third form of JCE will be accepted under the required mental element of article 25 (3)(d). The third or extended form attaches liability to members of the group for crimes falling outside the agreed plan if they were natural and foreseeable results. Therefore, it satisfies itself with a recklessness standard. While article 25 (3)(d) requires either the intent or at least knowledge on the part of the accused. Relevant parts of the paragraph stipulates that the contribution of the accused “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”. If the Court applies literally this text, the 3rd category of JCE will be eliminated as not satisfying the required mental element. It is still to be seen how the Court will apply this text and what will be its position of JCE.

General conclusion

Modes of participation have witnessed a considerable evolution in international criminal law. We can remark few trends on the course of this evolution.

First, more attention is devoted to enumerate and detail various types of participation in order to better fight the scope of criminality, this is true either in conventional international criminal law or in the statutes of international criminal tribunals and courts. The question of criminal participation has acquired a constant growing importance within the documents dealing with international criminal law whether they are international conventions or acts establishing international criminal jurisdictions.

Second, a clear trend of expanding the notions and definitions of each mode of participation is evident in the jurisprudence of international courts, especially in the jurisprudence of the ad hoc tribunals. The material element of modes of participation has been defined very openly and in a relaxed manner that aims at covering a wide array of actions. Similarly, the mental or subjective element has been interpreted in a relaxed way that shifted from “intention” that is traditionally required for serious crimes in national systems to “recklessness” or *dolus eventualis*.

Third, the advent of the doctrine of JCE has marked a turning point in understanding the notion of a perpetrator. In fact, expanding the definition of “commission” took place at the expense of the traditional concept of “participation”, more specifically aiding and abetting, in a way that blurred the lines between the two notions.¹³⁷

Fourth, the international tribunals have proven to be very conservative regarding the notion of inchoate crimes. We have seen that the ad hoc Tribunals refrained from developing positive ICL in the direction of expanding certain notions of “participation” to be incriminated per se as preparatory acts constituting inchoate crimes. This position is totally supported by the Rome Statute and it is not likely to be changed in

¹³⁷ This approach has been confirmed in a recent decision where the ICTR Appeals Chamber reversed a conviction on the basis of aiding and abetting genocide and condemned the accused for “committing” genocide. The Seromba Appeals Chamber held that, aside from the JCE, a person could be “principal perpetrator of the crime itself by approving and embracing as his own the decision to commit the crime and thus should be convicted for committing genocide”, thus it is not necessary that he intervenes with his own hands. Seromba, AJ, para. 161.

the near future as the ICC will be, most probably, in few years the only and if not the most authoritative international criminal institution.