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## **The Rome Statute as Evidence of Customary International Law**

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## 5 Indirect Co-Perpetration: Article 25(3)(a) of the Rome Statute and Custom

### 5.1 INTRODUCTORY REMARKS

Chapters 3 and 4 have examined articles 8 and 7 of the Rome Statute as evidence of customary law concerning war crimes and crimes against humanity. This Chapter moves on to criminal liability of individuals at the leadership level. The ICC has interpreted that the liability of indirect co-perpetration (jointly with another through another person) is subsumed in article 25(3)(a) of the Rome Statute.<sup>1</sup> The *Stakić* Appeals Chamber held that this liability lacked support under customary law.<sup>2</sup> However, some commentators claimed that indirect co-perpetration 'may well have support in customary international law'.<sup>3</sup> This Chapter explores the relationship between article 25(3)(a) of the Rome Statute and custom concerning the liability of indirect co-perpetration.

For this purpose, section 5.2 discusses the necessity and different approaches to attribute liability to leaders. Section 5.3 analyses the text of article 25(3)(a) and the controversial indirect co-perpetration liability in the *Katanga & Ngudjolo* case to see whether indirect co-perpetration is encompassed in article 25(3)(a) of the Rome Statute as a fourth category of perpetration or a form of co-perpetration. Section 5.3 concludes that this liability is a new creation by the ICC. Alternatively, since the ICC has frequently endorsed the idea of indirect co-perpetration as a mode of liability embedded in article 25(3)(a), it is necessary to examine the customary status of this liability. Section 5.4, therefore, touches upon the practice of post-World War II tribunals as well as the drafting history of article 25(3)(a) to examine whether this mode of liability was deemed a way to attribute liability. Conspiracy liability and commission through association are briefly commented on in this section. Section 5.5 analyses practice after the adoption of the Rome Statute to show whether indirect co-perpetration has generally been accepted at the present time. The focus will be on the jurisprudence of the UN *ad hoc* tribunals concerning the notion of joint criminal enterprise

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1 *Katanga & Ngudjolo* Decision on Confirmation of Charges, paras 506-08; *Ruto et al* Decision on Confirmation of Charges, para 289.

2 *Prosecutor v Milutinović et al* (Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction: Indirect Co-Perpetration) ICTY-05-87-PT (22 March 2006) [*Milutinović et al* Trial Chamber Decision on Indirect Co-perpetration 2006], para 40; *Prosecutor v Stakić* (Judgment) ICTY-97-24-A (22 March 2006) [*Stakić* Appeals Chamber Judgment], para 62.

3 Boas *et al*, *International Criminal Law Practitioner Library*: Vol 1, 121.

(JCE) as established in *Tadić*, indirect co-perpetration, and JCE as established in *Brdanin*. Other instruments for international crimes, national cases and implementation laws are also examined. It seems that rare evidence shows acceptance of indirect co-perpetration liability. This unique mode of liability has not generally been recognised as a customary rule. Chapter 5 concludes that article 25(3)(a) neither was nor is declaratory of a customary rule with regard to indirect co-perpetration.

## 5.2 THE ATTRIBUTION OF LIABILITY TO INDIVIDUALS AT THE LEADERSHIP LEVEL

The attribution of liability to high-level leaders is complicated in international criminal law. Different approaches are developed to hold the accused of non-physical perpetrators at the leadership level accountable for the crimes committed by others. This section first analyses the basis of attributing a crime to an accused at the leadership level and then qualifies the scope of the present chapter.

### 5.2.1 The rationale to attribute liability to high-level leaders

The notion of modes of liability assists to establish a link between the crime committed and the accused.<sup>4</sup> An individual is held liable for his/her physical acts or omissions if all elements of that crime have been satisfied. This is the basic mode of liability.<sup>5</sup> In practice, if a plurality of individuals are involved in multiple acts of an offence, this leads to the 'systematic criminality' nature of international crimes.<sup>6</sup> Apart from the physical acts or omissions, each person may contribute to a crime through different forms of perpetration and participation. International criminal tribunals and authorities have adopted different approaches to attribute liability to an accused (a non-physical perpetrator) for the crime where others (physical executors) performed the physical act.<sup>7</sup> Several modes of liability exist in international criminal law, such as command responsibility, aiding and abetting, planning, ordering and instigation as well as incitement.

4 For an analysis of individual (criminal) responsibility for violations of international humanitarian law, see Henckaerts and Doswald-beck (eds), *Customary International Humanitarian Law*, Vols I and II (New York: CUP 2005), Rules 102 (individual criminal responsibility), 151 (individual responsibility); ICRC, Customary IHL Database.

5 1998 Rome Statute, art 7(2). *Tadić* Opinion and Trial Judgment, paras 663-69, holding that art 7(1) of the ICTY Statute concerning individual criminal responsibility is part of customary international law.

6 *Tadić* Appeals Chamber Judgment, paras 191-92; Jann K. Kleffner, 'The Collective Accountability of Organised Armed Groups for System Crimes' in A. Nollkaemper and H. Van der Wilt (eds), *System Criminality in International Law* (New York: CUP 2009) 238-69.

7 The wording of 'executor' in this research covers both physical perpetrators who are held liable and physical executors who are not responsible for their acts.

Ringleaders, ‘masterminds’ or intellectual culprits, as non-physical perpetrators are usually physically distant from the execution of the crime. Post-World War II trials revealed that leaders were held responsible for the crimes executed by others.<sup>8</sup> Different grounds support prosecution of these non-physical perpetrators at the political or military leadership level. One viewpoint is that they are criminalised because of their contribution to the crimes committed. These intellectual leaders designed a common criminal plan, which was later executed through physical executors’ acts.<sup>9</sup> A Report of the UN Secretary-General stated that ‘all persons who participate in the planning, preparation or execution of serious violations of international humanitarian law in the former Yugoslavia contribute to the commission of the violation and are, therefore, individually responsible’.<sup>10</sup>

Another view claims that these masterminds are punishable for the moral gravity of their participation in systemic international crimes.<sup>11</sup> ‘The moral gravity of such participation in a JCE [joint criminal enterprise] is often no [...] different from that of those actually carrying out the acts in question.’<sup>12</sup> These leaders are deemed the ‘most responsible’ one, specifically for the crime of aggression.<sup>13</sup> In its commentary to the 1996 Draft Code of Crimes against the Peace and Security of Mankind (Draft Code of Crimes), the International Law Commission (ILC) stated that ‘[a] government official may [...] be considered to be even more culpable than the subordinate who actually commits the criminal act’.<sup>14</sup> In contrast to the first legal ground, the second ground is of a moral and supplementary basis. For example, the US representative at the London Conference, Robert Jackson, once stated:

We are prepared to show that as against the top men, not merely against the little soldiers who were out in the field and did these things, but against the top Nazis who ordered them. [...] [T]hey [the top Nazis] were guilty [...] because they personally knew and directed and planned these violations as their deliberate method of conducting war.<sup>15</sup>

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- 8 M. Cherif Bassiouni, *Introduction to International Criminal Law* (2<sup>nd</sup> edn, Leiden: Brill 2013) 263.
- 9 *Tadić Appeals Chamber Judgment*, para 191; *Attorney General v Eichmann* (Judgment, District Court of Jerusalem, Israel), 11 November 1961, (1968) 36 ILR 5, para 194; Stefano Manacorda and Chantal Meloni, ‘Indirect Perpetration versus Joint Criminal Enterprise: Concurring Approaches in the Practice of International Criminal Law?’ (2011) 9 *JICJ* 159.
- 10 UN Doc S/25704 (1993), para 54.
- 11 *Tadić Appeals Chamber Judgment*, para 191; *Prosecutor v Kvočka et al* (Judgement) ICTY-98-30/1-A (28 February 2005) [*Kvočka et al Appeals Chamber Judgment*], para 80; *Blagojević & Jokić Trial Judgment*, para 695.
- 12 *Tadić Appeals Chamber Judgment*, para 191; *Kvočka et al Appeals Chamber Judgment*, para 80; Nicola Piacente, ‘Importance of the Joint Criminal Enterprise Doctrine for the ICTY Prosecutorial Policy’ (2004) 2 *JICJ* 446-54.
- 13 1998 Rome Statute, arts 8*bis*(1) and 25(3)*bis*.
- 14 UN Doc A/51/10 (1996), p 26.
- 15 ‘Minutes of Conference Session of July 23, 1945’, in *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials* (Washington, DC: USGPO 1949) [*Report of Robert H. Jackson*] 332.

The practice of international tribunals has also developed prosecution of leaders mainly based on the first ground. This gives rise to the question of how to attribute liability to high-level leaders who are far from the crimes performed by physical executors.<sup>16</sup>

### 5.2.2 Approaches to attribute liability to high-level leaders

National criminal law might enlighten the establishment of a link between the crimes and a leader, such as co-perpetration, aiding and abetting liability.<sup>17</sup> With regard to the detailed approaches to attribute liability to the accused for crimes physically executed by others, more differences than similarities exist in various national criminal legal systems for various national legislative considerations and policies.<sup>18</sup> Recent Statutes and jurisprudence of international criminal tribunals progressively develop unique modes of liability in international criminal law.<sup>19</sup> For instance, article 25(3) (b) of the Rome Statute stipulates the liability for ordering the commission of crimes. Article 28 clearly provides 'responsibility of commanders and other superiors', which has been developed since the IMT and its subsequent trials. Another way to attribute liability is the idea of joint criminal enterprise established by the ICTY jurisprudence.<sup>20</sup> All these forms of liability in national and international systems merit attention but go beyond the focus of this research. This Chapter focuses on indirect co-perpetration as defined by the ICC.

In contrast to other provisions or drafts of individual liability for international crimes,<sup>21</sup> article 25 of the Rome Statute provides many explicit rules

16 Manacorda and Meloni, 'Indirect Perpetration versus Joint Criminal Enterprise Concurring Approaches in the Practice of International Criminal Law?'

17 Van Sliedregt, *Individual Criminal Responsibility in International Law* 65.

18 *ibid*; M. Cherif Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (New York: CUP 2011) 472.

19 1993 ICTY Statute, art 7(1); 1994 ICTR Statute, art 6(1); Statute of the SCSL, art 6(1); Law on the Establishment of the ECCC, art 29(1); Statute of the African Court of Justice and Human and People's Rights (not entered into force), art 28N; as well as 1998 Rome Statute, arts 25 and 28; *Tadić* Appeals Chamber Judgment, para 192; *Blagojević & Jokić* Trial Judgment, para 695. Elies van Sliedregt, 'Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide' (2006) 5 *JICJ* 184, 199 concluding that 'JCE in international law is a merger of common law and civil law, and it is a unique (*sui generis*) concept in that it combines and mixes two legal cultures and systems'.

20 *Tadić* Appeals Chamber Judgment, para 192; 1993 ICTY Statute, art 7(1).

21 Nuremberg Charter, art 6(2); Control Council Law No. 10, art 2(2); 1950 ILC Nuremberg Principles, Principles I, VI (a)(ii), and VII; 1948 Genocide Convention, art III; 1949 Geneva Conventions (GC: art 49 of GC I; art 50 of GC II; art 129 of GC III; and art 146 of GC IV); the 1977 Additional Protocol I, art 86; 1991 Draft Code of Crimes, arts 3(1)-(2); 1996 Draft Code of Crimes, art 2(3); 1993 ICTY Statute, art 7(1); 1994 ICTR Statute, art 6(1); Statute of the SCSL, art 6(1); Law on the Establishment of the ECCC, art 29(1); and Statute of the African Court of Justice and Human and People's Rights, art 28N.

of individual criminal responsibility.<sup>22</sup> Article 25(3)(a) provides the ways of committing a crime: ‘commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible’. Based on the phrases ‘jointly with another person’ and ‘through another person’, Chambers of the ICC interpreted that article 25(3)(a) covers a way of ‘commission jointly with another through another person’, or indirect co-perpetration.<sup>23</sup> The term ‘commission’ is said to be synonymous with ‘perpetration’.<sup>24</sup> The concept of indirect co-perpetration allows the Court to attach liability to leaders for crimes committed by physical executors, who were used by these leaders’ co-perpetrators.<sup>25</sup>

Chambers of the ICC in their recent decisions frequently employed indirect co-perpetration to impute liability to the accused.<sup>26</sup> Prosecutions and the ICTY’s Trial Chamber in *Stakić* have also relied on indirect co-perpetration to attach liability to defendants.<sup>27</sup> Some commentators even contended that indirect co-perpetration ‘may well have support in customary international law’.<sup>28</sup> By contrast, the *Stakić* Appeals Chamber rejected this liability for its lack of basis in customary international law.<sup>29</sup> This Chapter explores the relationship between article 25(3)(a) of the Rome Statute and the possible customary law concerning indirect co-perpetration. The first step is to clarify whether indirect co-perpetration is embedded in article 25(3)(a) as a way of perpetration.

22 See 1998 Rome Statute, arts 25, 25(3)(e) and 25(3)*bis*. Kai Ambos, ‘Article 25’ in O. Triffterer and K. Ambos (eds), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* 983-85; Albin Eser, ‘Individual Criminal Responsibility’ in A. Cassese *et al* (eds), *The Rome Statute of the International Criminal Court: A Commentary* 767; Schabas, *The International Criminal Court: A Commentary on the Rome Statute* 562; Elies van Sliedrecht, *Individual Criminal Responsibility in International Law* 61-65.

23 *Katanga & Ngudjolo* Decision on the Confirmation of Charges, paras 491-92; *The Prosecutor v Lubanga* (Judgment on the Appeal of Thomas Lubanga Dyilo against his Conviction, A Ch) ICC-01/04-01/06-3121-Red (1 December 2014) [*Lubanga* Conviction Appeals Chamber Judgment], paras 458, 460.

24 Ambos, ‘Article 25’, 984-85.

25 *Katanga & Ngudjolo* Decision on the Confirmation of Charges, para 492.

26 *ibid*, paras 491-92; *Katanga* Trial Judgment, para 1416; *The Prosecutor v Ntaganda* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Bosco Ntaganda, PTC II) ICC-01/04-02/06-309 (9 June 2014), paras 104, 121; *Laurent Gbagbo* Decision on Confirmation of Charges, para 241; *Lubanga* Conviction Appeals Chamber Judgment, paras 458, 460; *The Prosecutor v Blé Goudé* (Decision on the Confirmation of Charges against Charles Blé Goudé, PTC I) ICC-02/11-02/11-186 (11 December 2014) [*Blé Goudé* Decision on Confirmation of Charges], paras 136-37; *Ongwen* Decision on Confirmation of Charges, para 41.

27 *Prosecutor v Stakić* (Judgment) ICTY-97-24-T (31 July 2003) [*Stakić* Trial Judgment], paras 438-42.

28 Boas *et al*, *International Criminal Law Practitioner Library*: Vol 1, 121.

29 *Milutinović et al* Trial Chamber Decision on Indirect Co-perpetration 2006, para 40; *Stakić* Appeals Chamber Judgment, para 62.

### 5.3 IS INDIRECT CO-PERPETRATION ENCOMPASSED IN ARTICLE 25(3)(A) OF THE ROME STATUTE?

As quoted above, article 25(3)(a) of the Rome Statute stipulates that an individual will be responsible if s/he commits a crime, whether 'jointly with another or through another person, regardless of whether that other person is criminally responsible'. This section first analyses article 25(3)(a) and then jurisprudence of the ICC to seek whether indirect co-perpetration is encompassed in article 25(3)(a) as a way of perpetration.

#### 5.3.1 The text of article 25(3)(a): three forms of perpetration

It is generally commented that article 25(3)(a) depicts three alternatives of committing a crime: direct perpetration, co-perpetration and indirect perpetration.<sup>30</sup>

##### 5.3.1.1 *Direct perpetration and co-perpetration*

Direct perpetration means that the accused herself/himself physically executed all acts of the crime. If the individual fulfilled all the mental and material elements of the crime, s/he is held liable as a direct perpetrator. Co-perpetration means that individuals jointly committed a crime, in which all offenders exercise control over their own offences. Co-perpetration requires that all offenders act together in a common plan and their essential functional divisions in the accomplishment of that crime.<sup>31</sup> Co-perpetrators, those individuals who did not carry out all objective elements of the crime, can be held liable as principals for that crime, due to the mutual attribution between them.<sup>32</sup> The co-perpetrators can only realise their plan insofar as they act together, but each can ruin the whole plan if s/he does not carry out her/his part. To this extent, the individual is in control of the act.<sup>33</sup> Apart from the two liabilities, article 25(3)(a) also contains the liability of indirect perpetration, which is the result of a struggled compromise of common law and civil law at the Rome Conference.<sup>34</sup>

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30 Darryl Robinson, 'Crimes against Humanity' in R. Cryer *et al* (eds), *An Introduction to International Criminal Law and Procedure* 302; Schabas, *The International Criminal Court: A Commentary on the Rome Statute* 568-69; *Katanga & Ngudjolo* Decision on the Confirmation of Charges, para 488; *Katanga* Trial Judgment, para 1396.

31 Schabas, *ibid*.

32 Eser, 'Individual Criminal Responsibility', 789-95; *Katanga & Ngudjolo* Decision on the Confirmation of Charges, para 492.

33 *Stakić* Trial Judgment, paras 440-41. For comments on the joint control approach to interpreting co-perpetration, see Lachezar D. Yanev and Tijs Kooijmans, 'Divided Minds in the Lubanga Trial Judgment: A Case against the Joint Control Theory' (2013) 13 *ICLR* 789.

34 Bassiouni, *Introduction to International Criminal Law* 286.

### 5.3.1.2 Indirect perpetration

In international criminal law, indirect perpetration had not been considered as a mode of liability in previous international instruments until the Rome Statute. Indirect perpetration (commission through another person, regardless of whether that other person is criminally responsible) means that the accused committed a crime through another by exerting their will over that person to complete the crime, in which that person is deemed as a/an tool/instrument.<sup>35</sup> Two points deserve attention with regard to indirect perpetration.

The first issue is how to interpret the phrase 'regardless of whether that other person is criminally responsible'. It is generally agreed that this phrase is irrelevant to co-perpetration but was inserted to restrict the wording 'committing [...] through a person'. The drafting history of this provision confirms this view.<sup>36</sup> A plain reading of this phrase indicates that the accused's liability as an indirect perpetrator does not depend on the responsibility of physical executors. The person used is not limited to innocent agents but includes a responsible person. However, it is unclear to what extent the person is 'responsible'. Can that person be fully responsible for the crimes committed? The text of the Rome Statute and the drafting history of article 25(3)(a) were silent on this issue. ICTY Judge Schomburg, who advocates indirect perpetration, held that direct and physical perpetrators were used as a mere 'instrument'. He added that 'a particular "defect" on the part of the direct and physical perpetrators' is required because the will or the act is controlled, although the phrase 'perpetrators behind perpetrator' seems to include an entirely responsible perpetrator.<sup>37</sup> The accused are considered as indirect perpetrators, if they used the physical executors, for example, children and persons acting under duress who are held innocent or partly responsible for any deficiency, to commit crimes.

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35 *Lubanga* Decision on Confirmation of Charges, para 332; *Katanga & Ngudjolo* Decision on the Confirmation of Charges, paras 495, 499 and fn 660.

36 'Informal Group on General Principles of Criminal Law, Proposed new Part [III bis] for the Statute of an International Criminal Court General principles of Criminal Law' (26 August 1996), UN Doc A/AC.249/CRP.13, pp 4-8; 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', UN Doc A/51/22 (1996), Vol II, pp 80-85; 'Working paper submitted by Canada, Germany, the Netherlands and the United Kingdom' (14 February 1997), UN Doc A/AC.249/1997/WG.2/DP.1; 'Chairman's Text, Article B b., c. and d.1, Individual criminal responsibility' (19 February 1997), UN Doc A/AC.249/1997/WG.2/CRP.2/Add.2; 'Report of the Preparatory Committee on the Establishment of an International Criminal Court' (14 April 1998), UN Doc A/CONF.183/2, pp 30-31, art 23(7)(a).

37 *Gacumbitsi* Appeals Chamber Judgment (Separate Opinion of Judge Schomburg), para 20; *Simić et al* Appeals Chamber Judgment (Dissenting Opinion of Judge Schomburg) ICTY-95-9-A (28 November 2006), para 19. See also *The Prosecutor v Seromba* (Dissenting Opinion of Judge Liu) ICTR-01-66-A (12 March 2008), para 8 and fn 17.

In addition, academic writing and the ICC seem to support a formulation of 'fully' responsible executors. If a fully responsible person executed a crime, the crime is 'attributable to' the accused on the basis of complicity, rather indirectly 'committed' by that accused on the commission basis. Article 25(3)(a) is different from national constructions on the point of indirect perpetration alternative. This argumentation implicitly endorsed the view that the person used may be a 'fully' physical executor. Accordingly, an indirect perpetrator may indirectly 'commit' the crime through a 'fully' criminal responsible perpetrator. The ICC also supported that an accused would be deemed an indirect perpetrator when the crime was committed through 'fully responsible' perpetrators. Relying on the term 'perpetration behind perpetration', the ICC held that 'a person who acts through another may be individually criminally responsible, regardless of whether the executor (the direct perpetrator) is also responsible'.<sup>38</sup> The Pre-Trial Chamber also referred to 'responsible, direct perpetration' and 'non-innocent individual'.<sup>39</sup> Accordingly, the person used may be innocent, partly responsible, or wholly responsible.

Evidence supporting fully responsible executors is most relevant to the doctrine of 'control over an organisation' proposed by German jurist Claus Roxin.<sup>40</sup> The second issue arises concerning the ICC's formulation of indirect perpetration 'by means of control over an organisation'.<sup>41</sup> Based on the doctrine of 'control over an organisation', the ICC held that indirect perpetration contains 'commission through another person by means of control over the organisation'.<sup>42</sup> This idea of perpetration by means of 'control over an organised apparatus of power' is that the accused in a leading position in an organised structure of power used the organisation as an instrument to commit the crime indirectly, and the accused is liable for all crimes committed by members of the organisation. Judge Schomburg also noted that there is a new trend of punishing organised crimes through the term 'indirect perpetration'.<sup>43</sup> For example, according to the Criminal Law of the

38 *Katanga & Ngudjolo* Decision on Confirmation of Charges, para 495.

39 *ibid*, paras 496-99.

40 *ibid*, para 498 and fn 659.

41 *ibid*, paras 499-500.

42 *The Prosecutor v Al Bashir* (Public Redacted Version of the Prosecution's Application under Article 58, OTP) ICC-02/05-157-AnxA (12 September 2008), para 248; *Katanga & Ngudjolo* Decision on Confirmation of Charges, para 525; *First Warrant of Arrest* Decision for *Al Bashir*, para 223; *Bemba* Decision on Confirmation of Charges 2009, paras 350-51; *The Prosecutor v Abu Garda* (Decision on the Confirmation of Charges, PTC I) ICC-02/05-02/09-243-Red (8 February 2010) [*Abu Garda* Decision on Confirmation of Charges], paras 162, 216; *Katanga* Trial Judgment, para 1404; *Lubanga* Conviction Appeals Chamber Judgment, para 465; *Blé Goudé* Decision on Confirmation of Charges, para 136. For comments on indirect perpetration in the *Katanga* Trial Judgment, see Carsten Stahn, 'Justice Delivered or Justice Denied? The Legacy of the *Katanga* Judgment' (2014) 12 *JICJ* 809, 823-25.

43 *Prosecutor v Simić et al* (Dissenting Opinion of Judge Schomburg) ICTY-95-9-A (28 November 2006), fn 32.

People's Republic of China (PRC), organisational leaders are criminally liable for all crimes committed by fully responsible members of the organisation.<sup>44</sup> The idea of by means of 'control over organisation' is reminiscent of leaders' liability for their formulation of the common plan and the criminal organisation issues embedded in the Nuremberg Charter.<sup>45</sup> The ICC's construction of indirect perpetration by 'control over an organisation' appears to disregard the fact that the Rome Statute bears no provision similar to that in national criminal provisions or in the Nuremberg Charter to impose liability on organisations' leaders.<sup>46</sup> As Judge Van den Wyngaert pointed out:

Article 25(3)(a) only speaks of commission 'through another person'. It is hard to see how this could be read to mean that this form of criminal responsibility also attaches when an accused commits crimes through an organisation. [...] In this instance, there is no indication that the States Parties meant the word 'person' to mean 'organisation'. [...] [T]he type of control over an organisation that is envisaged by the Pre-Trial Chamber could be an important evidentiary factor to demonstrate that an accused did in fact dominate the will of certain individuals who were part of this organisation. However, in such cases, the level of discipline within an organisation and the accused's role in maintaining it are elements of proof and not legal criteria. [...] The words 'commission through another person' in Article 25(3)(a) [...] should be given their ordinary meaning.<sup>47</sup>

### 5.3.2 Indirect co-perpetration at the ICC

Apart from the three alternatives, the ICC interprets that indirect co-perpetration is also subsumed in article 25(3)(a). At the ICC, the concept of indirect co-perpetration (or joint indirect perpetration) was introduced in the *Katanga & Ngudjolo* case in 2008.<sup>48</sup> The following paragraphs first analyse this case as to the interpretation of article 25(3)(a) and then briefly evaluate indirect co-perpetration.

#### 5.3.2.1 A 'literal' reading of article 25(3)(a) in *Katanga & Ngudjolo*

In *Katanga & Ngudjolo*, both accused were rebel military leaders in the Democratic Republic of Congo (DRC). Katanga and Ngudjolo were alleged to have designed a plan to 'wipe out' the village of Bogoro in the Ituri district, DRC. The prosecutor charged both of the accused with crimes committed by members of their two troops in implementing that plan, during and after the attack on civilians.<sup>49</sup>

44 China, Criminal Law of the People's Republic of China 1979, amended 2017, art 26(3). Chinese commentators have considered this special form of liability embedded in article 26 as a type of joint commission rather than a form of indirect perpetration.

45 Nuremberg Charter, arts 9 and 10.

46 Argentina, Code of Military Justice, art 514; Argentina, Penal Code, art 45.

47 *Ngudjolo* Trial Judgment (Concurring Opinion of Judge Christine Van den Wyngaert), paras 52, 55, 57.

48 *Katanga & Ngudjolo* Decision on Confirmation of Charges, para 492.

49 *ibid*, para 33.

Pre-Trial Chamber I confirmed the charges based on indirect co-perpetration.<sup>50</sup> The Pre-Trial Chamber first stated that the accused jointly controlled the organised troops based on the hierarchical relations between the accused and their subordinates. The accused, as perpetrators behind perpetrators (their subordinates), both mobilised their power within troops to secure automatic compliance with their orders to achieve the plan.<sup>51</sup> The Chamber further claimed that the crime committed by the accused with an agreement is mutually attributed to both of them. In its wording, ‘if he acts jointly with another individual – one who controls the person used as an instrument – these crimes can be attributed to him on the basis of mutual attribution.’<sup>52</sup> Accordingly, through a combination of joint perpetration at the senior level and perpetration ‘through other persons by means of control over an organisation’, the Chamber introduced the notion of indirect co-perpetration. The accused at the leadership level were held liable for committing a crime through other persons (subordinates) at the executive level, by means of joint control over the troops. In other words, the accused was liable for the crime indirectly committed by his co-perpetrator, who used a third person to execute that crime.<sup>53</sup>

Defences have constantly challenged that the liability of indirect co-perpetration neither exists in the Rome Statute nor is supported by customary law.<sup>54</sup> The ICC rejected this argument. Pre-Trial Chamber I in *Katanga & Ngudjolo* interpreted the wording ‘or’ in article 25(3)(a) by addressing:

[...] article 25(3)(a) uses the connective ‘or’, a disjunction (or alternation). Two meanings can be attributed to the word ‘or’-one known as weak or *inclusive* and the other strong or *exclusive*. An inclusive disjunction has the sense of ‘either one or the other, and possibly both’ whereas an exclusive disjunction has the sense of ‘either one or the other but not both’. Therefore, to interpret the disjunction in article 25(3)(a) of the Statute as either ‘inclusive’ or ‘exclusive’ is possible from a strict textualist interpretation. In the view of the Chamber, basing a person’s criminal responsibility upon the joint commission of a crime through one or more persons is therefore a mode of liability ‘in accordance with the Statute’.<sup>55</sup>

The Chamber in a footnote referred to the element of ‘widespread or systematic’ attack in article 7 of the Rome Statute to support its inclusive disjunctive interpretation.<sup>56</sup> The Chamber concluded that indirect co-perpetration

50 *ibid*, para 466.

51 *ibid*, paras 513-14.

52 *ibid*, para 492.

53 *ibid*, paras 492-93.

54 *The Prosecutor v Katanga & Ngudjolo* (Defence Written Observations Addressing Matters that Were Discussed at the Confirmation Hearing, Defence) ICC-01/04-01/07-698 (28 July 2008), paras 13-32; *Katanga & Ngudjolo* Decision on Confirmation of Charges, para 474; *The Prosecutor v Katanga & Ngudjolo* (Defence for Germain Katanga’s Pre-Trial Brief on the Interpretation of Article 25(3)(a) of the Rome Statute, Defence) ICC-01/04-01/07-1578-Corr (30 October 2009), paras 2, 7, 9-26; *Katanga* Trial Judgment, paras 1373-76.

55 *Katanga & Ngudjolo* Decision on Confirmation of Charges, para 491 (emphasis in original and citations omitted).

56 *ibid*, para 491 and fn 652.

is encompassed in article 25(3)(a) through the wording ‘jointly through another person’.<sup>57</sup> Trial Chambers in the *Katanga* and *Ngudjolo* cases both confirmed this finding.<sup>58</sup>

However, a ‘textual’ reading of article 25(3)(a) does not lead to such a construction. The reasoning behind the interpretation of the wording ‘or’ is misguided. In the *Ngudjolo* case, Judge Van den Wyngaert in her concurring opinion noted that the ‘inclusive disjunction’ is not an ordinary language interpretation but a concept of formal logic. The term in this Statute should be interpreted ‘in accordance with the ordinary meaning’ rather than through its formal logic formulation.<sup>59</sup> In her view, ‘[t]his combined reading leads to a radical expansion of Article 25(3)(a) of the Statute, and indeed is a totally new mode of liability’.<sup>60</sup> With regard to the element of ‘widespread or systematic’ attack, the Pre-Trial Chamber of the ICC held that ‘the attack can be widespread, or systematic, or both’. This Chamber conflated legal element of ‘widespread or systematic’ with the factual coincidence of ‘widespread and systematic’ attack. This factual situation does not introduce a legal requirement of ‘widespread and systematic’ for the crimes against humanity.<sup>61</sup> Likewise, two persons may jointly commit crimes through another person. This factual situation, however, does not lead to a conclusion that a form of indirect co-perpetration exists.<sup>62</sup> The ‘textual’ interpretation of the term ‘or’ in article 25(3)(a) is not persuasive. The ordinary meaning of article 25(3)(a) is that three alternatives of perpetrations are listed.

The drafting history also appears to show that the drafters did not intend to give the term ‘or’ a special meaning to include indirect co-perpetration. In the *Ad Hoc* Committee, a special working group summarily listed some general principles for discussion.<sup>63</sup> In the early two sessions of the Preparatory Committee, some States submitted several proposals.<sup>64</sup> These proposals contained direct perpetration and co-perpetration categories but did not contain commission through another person as a form of perpetration. Later on, the informal group re-organised States’ submissions and provided possible

57 *ibid*, para 493.

58 *Katanga* Trial Judgment, para 1381; *Ngudjolo* Trial Judgment, paras 58-64.

59 *Ngudjolo* Trial Judgment (Concurring Opinion of Judge Christine Van den Wyngaert), para 60 and fn 76.

60 *ibid*, paras 60-61.

61 *ibid*, para 60 and fn 76.

62 *Contra* Thomas Weigend, ‘Perpetration through an Organisation: The Unexpected Career of a German Legal Concept’ (2011) 9 *JICJ* 91, 110-11, arguing that ‘joint indirect perpetration is a factual coincidence of two recognised forms of perpetration. There is no doctrinal obstacle to applying Article 25(3)(a) ICC Statute to this situation’.

63 ‘Guidelines for consideration of the question of general principles of criminal law’, annexed in ‘Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court’, UN Doc A/50/22 (1995), p 58.

64 ‘Report of the Preparatory Committee on the Establishment of an International Criminal Court’, UN Doc A/51/22 (1996), Vol I, paras 191-92, 202-03; Canada, ‘Applicable Law: non-paper’ (27 March 1996); ‘General Rules of Criminal Law: Non-Paper, submitted by Sweden’ (4 April 1996).

proposals for further discussion,<sup>65</sup> with an additional paragraph inserted. This additional paragraph introduced indirect perpetration by addressing that a person 'shall be deemed to be a principal where that person commits the crime through an innocent agent who is not aware of the criminal nature of the act committed'. In addition, a proposal suggested combining responsibility of principal liability and responsibility of participation/complicity, which stated that '(b) those who commit such crimes; (c) those who jointly commit such crimes; (d) those who commit such crimes by means of a third person' are perpetrators of the crime.<sup>66</sup> This combinatory proposal detours the original shape of article 25(3)(a) of the Rome Statute.

In the Preparatory Committee's third session, a text, which supported the combining proposal and refined its wording, emerged.<sup>67</sup> Canada, Germany, the Netherlands and the UK submitted that: 'a person is criminally responsible and liable for punishment for a crime defined [...] if that person: (a) commits such a crime, whether as an individual, jointly with another, or through a person who is not criminally responsible'. This text was widely supported by the Preparatory Committee after revising the third category of the commission to 'through another person regardless of whether that person is criminally responsible'.<sup>68</sup> The final adopted text of the Preparatory Committee is that 'commits such a crime, whether as an individual, jointly with another, or through another person regardless of whether that person is criminally responsible'.<sup>69</sup> This text is nearly identical to the final version of article 25(3)(a) except for minor changes. This text was neither discussed at the Rome Conference nor amended by the working group on General Principles of Criminal Law.<sup>70</sup> Nevertheless, this text was slightly refined by the Drafting Committee. The Drafting Committee removed the comma between the phrase 'jointly with another' and the phrase 'or through another' and added a comma before 'regardless'.<sup>71</sup> The Drafting Committee's refined text

65 'Informal Group on General Principles of Criminal Law, Proposed new Part [III bis] for the Statute of an International Criminal Court General principles of Criminal Law' (26 August 1996), UN Doc A/AC.249/CRP.13, pp 4-8; 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', UN Doc A/51/22 (1996), Vol II, pp 80-85.

66 UN Doc A/51/22 (1996), Vol II, pp 80-85.

67 'Working paper submitted by Canada, Germany, the Netherlands and the United Kingdom' (14 February 1997), UN Doc A/AC.249/1997/WG.2/DP.1.

68 'Chairman's Text, Article B b., c. and d., Individual criminal responsibility' (19 February 1997), UN Doc A/AC.249/1997/WG.2/CRP.2/Add.2; 'Decision taken by the Preparatory Committee at its Session held from 11 to 21 February 1997' (12 March 1997), UN Doc A/AC.249/1997/L.5.

69 'Report of the Preparatory Committee on the Establishment of an International Criminal Court' (14 April 1998), UN Doc A/CONF.183/2, pp 30-31, art 23(7)(a).

70 UN Doc A/CONF.183/C.1/SR.1, A/CONF.183/C.1/SR.8, A/CONF.183/C1/SR.23, A/CONF.183/C1/SR.24, A/CONF.183/C1/SR.26; 'Report of the Working Group on General Principles of Criminal Law' (18 June 1998), UN Doc A/CONF.183/C.1/WGGP/L.4 and Corr.1, p 254.

71 'Report of the Drafting Committee, Draft Statute for the International Criminal Court' (14 July 1998), UN Doc A/CONF.183/C.1/L.65/Rev.1.

was wholly adopted and incorporated in the Draft Statute of the Committee of the Whole, which was transmitted to the final plenary meeting of the Rome Conference for voting.<sup>72</sup>

The examination of the drafting history first indicates that the liability for commission 'jointly with another person' and the liability for commission 'through another person' were designed separately. The idea of indirect co-perpetration as a form of perpetration was neither in the mind of civil law lawyers nor consistent with the knowledge of common law representatives at the Rome Conference. Alternatively, the removal of the comma by the Drafting Committee did not aim to include an alternative of commission 'jointly through another person' as defined by the ICC. The above observation reveals that indirect co-perpetration is not encompassed in article 25(3)(a) as a form of perpetration.

### 5.3.2.2 Observations and assessment of indirect co-perpetration

Other issues merit further discussions to understand the notion of indirect co-perpetration. The first issue is the way to establish a link between the accused and the crime committed by subordinates. In the *Katanga & Ngudjolo* case, Katanga was a top commander of Ngiti ethnicity armed forces, while Ngudjolo was the military leader of Lendu ethnicity fighters. Based on 'indirect perpetration of commission through control over the organisation', the accused as the armed group's leader may be held liable for the commission of crimes through subordinates by means of control over their own troops. It should be emphasised that the question how to prove a crime was executed by an individual is closely related to evidence. In practice, it is sometimes difficult to ascertain which member of which troop executed a specific crime because the two troops implemented plans together. One may suggest attributing all offences committed by members of both troops to the accused if a link exists between the accused and the other troop. Nevertheless, the fact, in this case, is that despite a shared common plan between the two accused, subordinates of each troop belonging to different ethnic origins are 'unlikely to comply with orders of a leader not of their own ethnicity'. In this circumstance, based on indirect perpetration, both accused would not be held liable for crimes executed by the other troop due to their lack of control over that other troop. It seems that if there is any doubt about the membership of the executor, both accused might not be liable for that offence committed. The difficulty in locating physical perpetrators in each troop seems to be a motivation for the prosecutor to introduce indirect co-perpetration to attribute liability to the accused. In this way, each indirect co-perpetrator is liable for all crimes.

According to the Pre-Trial Chamber, the accused and his co-perpetrators contributed to the crime through their joint control of the fulfilment of the

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72 'Report of the Committee of the Whole, Draft Statute for the International Criminal Court' (17 July 1998), UN Doc A/CONF.183/8.

material elements of a crime. It means that on the one hand, Ngudjolo had control over the Lendu troop and is liable for the crimes committed by the Lendu troop's subordinates; on the other hand, the accused Katanga would be liable for the crime 'attached' to his co-perpetrator Ngudjolo based on mutual attribution. Accordingly, Katanga is liable for the crimes committed by the Lendu troop's subordinates, despite no direct link between him and the Lendu troop. The creation of indirect co-perpetration liability establishes a link between the crime committed by a lower level perpetrator of other group and the accused at the higher leadership level.<sup>73</sup>

Secondly, apart from interpreting indirect co-perpetration as the fourth way of perpetration, a different construction of it was illustrated by the *Lubanga* Appeals Chamber. Bearing in mind Judge Van den Wyngaert's different view,<sup>74</sup> the *Lubanga* Appeals Chamber pointed out that divergent views exist at the ICC and held that there are only three rather than four forms of perpetration embedded in article 25(3)(a). Meanwhile, in interpreting co-perpetration liability, the Appeals Chamber implicitly endorsed 'joint commission through another person' as a form of co-perpetration instead of using the label of indirect co-perpetration. The *Lubanga* Appeals Chamber found that 'co-perpetrators need [not] to carry out the crime personally and directly'.<sup>75</sup> Subsequent cases subscribed to this interpretation of co-perpetration.<sup>76</sup> After the *Katanga & Ngudjolo* confirmation of charges decision, indirect co-perpetration was confirmed in the *Al Bashir, Bemba, Abu Garda, Ruto et al, Gaddafi et al, Muthaura et al, Lubanga, Laurent Gbagbo* and *Blé Goudé* as well as *Ntaganda* and most recently the *Ongwen* cases.<sup>77</sup>

73 *The Prosecutor v Muthaura & Kenyatta* (Prosecutions Submissions on the Law of Indirect co-perpetration under Article 25(3)(a) of the Statute and Application for Notice to be Given under Regulation 55 (2) with respect to the Individual's Individual Criminal Responsibility, OTP) ICC-01/09-01/11-433 (3 July 2012), paras 5-6, 8-35.

74 *Ngudjolo* Trial Judgment (Concurring Opinion of Judge Christine Van den Wyngaert), paras 63-64; *The Prosecutor v Katanga* (Minority Opinion of Judge Christine Van den Wyngaert) ICC-01/04-01/07-3436-AnxI (7 March 2014), para 278.

75 *Lubanga* Conviction Appeals Chamber Judgment, paras 458, 460, 465.

76 See also *Bemba* Decision on Confirmation of Charges 2009, para 348; *Ruto et al* Decision on Confirmation of Charges, para 292; *Ongwen* Decision on Confirmation of Charges, paras 38-41.

77 *First Warrant of Arrest* Decision for *Al Bashir*, paras 209-13; *Bemba* Decision on Confirmation of Charges 2009, paras 350-51; *Abu Garda* Decision on Confirmation of Charges, para 169; *The Prosecutor v Gaddafi et al* (Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abuminyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al Senussi", PTC I) ICC-01/11-01/11-1 (30 June 2011), para 69; *Ruto et al* Decision on Confirmation of Charges, paras 280-90, 299, 349; *Muthaura et al* Decision on Confirmation of Charges, paras 298-99; *The Prosecutor v Ngudjolo* (Judgment pursuant to Article 74 of the Statute, TC II) ICC-01/04-02/12-3-tENG (20 December 2012) [*Ngudjolo* Trial Judgment], paras 7, 58-64; *Katanga* Trial Judgment, paras 1381, 1416; *The Prosecutor v Ntaganda* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, PTC II) ICC-01/04-02/06-309 (9 June 2014), paras 104, 121; *Laurent Gbagbo* Decision on Confirmation of Charges, para 241; *Lubanga* Conviction Appeals Chamber Judgment, paras 458, 460; *Blé Goudé* Decision on Confirmation of Charges, paras 136-37; *Ongwen* Decision on Confirmation of Charges, para 41.

Thirdly, the Pre-Trial Chamber of the ICC even applies this liability to a crime committed outside the common plan. In *Katanga & Ngudjolo*, aside from the charge against the offence of attack on civilians, the prosecution also charged both of the accused with sexual offences committed by soldiers after the attack on Bogoro. The Chamber relied on indirect co-perpetration liability and held that although the sexual offences were not a part of the common plan, as a consequence of the plan, the accused knew that these sexual offences 'would occur in the ordinary course of the events'.<sup>78</sup> The ICC further clarified the subjective and objective elements of indirect co-perpetration. The Trial Chambers in the *Katanga* and *Ngudjolo* cases combined the two elements of indirect perpetration and co-perpetration to flesh out the elements of indirect co-perpetration. The objective (material) elements are:

- (i) the suspect must be part of a common plan or an agreement with one or more persons;
- (ii) the suspect and the other co-perpetrators must carry out essential contributions in a coordinated manner which result in the fulfilment of the material elements of the crime;
- (iii) the suspect must have control over the organisation; and
- (iv) the suspect and the other co-perpetrators' joint control is actually possible.<sup>79</sup>

The subjective (mental) elements are:

- (i) the suspect must carry out the subjective elements of the crimes;
- (ii) the suspect must be aware of the factual circumstances enabling him to exercise joint control over the commission of the crime through another person(s); and
- (iii) the suspect and the other co-perpetrators must be mutually aware and accept that implementing the common plan will result in the fulfilment of the objective elements of the crime.<sup>80</sup>

Lastly, the ICC's construction of indirect co-perpetration deserves a comment. Criminal proceedings against high-ranked individuals would be highly desirable from a moral perspective; nonetheless, moral arguments should not be the primary reason for introducing such a new mode of liability. We cannot say that prosecution of them based on other modes of liability is not an effort to prevent and narrow the impunity gap. Jens Ohlin remarks that indirect co-perpetration liability is a form of 'double vicarious liability', a by-product of co-perpetration and indirect perpetration liabilities.<sup>81</sup> In the ICC's view, 'there are no legal grounds for limiting the joint commission of the crime solely to cases in which the perpetrators execute a portion of the crime

78 *Katanga & Ngudjolo* Decision on Confirmation of Charges, paras 565, 567.

79 It requires that (i) the organisation must consist of an organised and hierarchal apparatus of power; and that (ii) the execution of the crimes must be secured by almost automatic compliance with the orders issued by the suspect.

80 *Katanga & Ngudjolo* Decision on Confirmation of Charges, paras 495-537; *Ruto et al* Decision on Confirmation of Charges, para 292; *Al Bashir* Warrant of Arrest Decision, paras 209-231; *Bemba* Decision on Confirmation of Charges, paras 350-51.

81 Jens D. Ohlin, 'Second-Order Linking Principles: Combining Vertical and Horizontal Modes of Liability' (2012) 25 *Leiden J Intl L* 771.

by exercising direct control over it'.<sup>82</sup> It is true that two suspects may commit a crime through a third person by having joint control over the latter's will. This situation, however, is distinct from the cases covered by indirect co-perpetration as defined by the ICC. As shown above, it is not relevant whether the accused shared intent with the physical perpetrators or exercised any direct authority over the latter.<sup>83</sup>

Relying on the construction of indirect perpetration 'by control over an organisation', indirect co-perpetration not only covers commission jointly 'through another person' but also includes commission 'by means of joint control over an organisation'. This construction of indirect co-perpetration serves to attribute liability to a leader of an organisation for the crimes performed by physical executors belonging to another organisation, regardless of whether offences were a part of the common plan shared between the accused and their co-perpetrators. The ICC created indirect co-perpetration in a way either by combining co-perpetration and indirect perpetration 'by control over an organisation' as the fourth way of perpetration or by expansively interpreting co-perpetration to cover a new form of co-perpetration 'through another person by control over the organisation'. Consequently, relying on indirect co-perpetration, the accused might be held liable for all crimes committed 'indirectly' by their co-perpetrators who used physical executors to perform crimes, regardless of whether the crime is a part of the common plan.

### 5.3.3 Assessment and conclusions

The above analysis reveals that three categories of perpetration are encompassed in article 25(3)(a). Although indirect co-perpetration is called a form of co-perpetration or a fourth alternative of perpetration, it is in nature a creation by combining co-perpetration and indirect perpetration. This interpretation is not consistent with a textual reading, nor was it especially defined by the drafters. Indirect co-perpetration was introduced through an expansive interpretation by the ICC to deal with the liability of the accused at the leadership level for the crime executed by a person belonging to another group.

In this research, the analysis of the relationship between a treaty provision and custom requires a treaty rule covering a same subject. It seems that this precondition is not satisfied because indirect co-perpetration is not subsumed in the text of article 25(3)(a). Therefore, a preliminary analysis of the form and the structure of the text, as well as the preparatory works of article 25(3)(a) does not assist in assessing whether article 25(3)(a) was declaratory of custom on indirect co-perpetration. In fact, subsequent jurisprudence of the ICC has subscribed to indirect co-perpetration. Its subsequent application of article 25(3)(a) may establish indirect co-perpetration, which might

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82 *Katanga & Ngudjolo* Decision on Confirmation of Charges, para 492.

83 *Lubanga* Decision on Confirmation of Charges, paras 349-67.

be binding on all States Parties to the Statute. A further examination of its customary status is required. Based on the arguable presumption that the interpretation of indirect co-perpetration subsumed in article 25(3)(a) is well accepted, the following sections evaluate whether article 25(3)(a) was or is declaratory of customary law concerning indirect co-perpetration.

#### 5.4 INDIRECT CO-PERPETRATION: WAS ARTICLE 25(3)(A) DECLARATORY OF CUSTOM?

This section analyses whether article 25(3)(a) was declaratory of customary law on indirect co-perpetration. For this purpose, this section looks into instruments and case law before the adoption of the Rome Statute to survey whether indirect co-perpetration existed or was emerging under customary law before 1998.

##### 5.4.1 Post-World War II instruments

Previous provisions or drafts of individual criminal responsibility for international crimes did not use wording similar to that in article 25(3)(a).<sup>84</sup> The concluding paragraph of article 6 of the Nuremberg Charter focused on the liability of leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit crimes for the acts performed by any person in the execution of the crime.<sup>85</sup> Article 5 of the Tokyo Charter contained a provision similar to that in the Nuremberg Charter.<sup>86</sup> Article 7(1) of the ICTY Statute provides that a person 'who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime' is responsible. Article 6(1) of the ICTR Statute provides a similar construction. The 1994 ILC Draft Statute of the court did not contain a provision about individual criminal responsibility.<sup>87</sup> Article 2(3) of the 1996 ILC Draft Code of Crimes addressed various forms of perpetration and participation,<sup>88</sup> including intentionally committing, ordering, aiding and abetting, direct participa-

84 Control Council Law No. 10, art 2(2); 1950 ILC Nuremberg Principles, Principles I, VI (a) (ii), and VII; 1948 Genocide Convention, art III; 1949 Geneva Conventions (GC: art 49 of GC I; art 50 of GC II; art 129 of GC III; and art 146 of GC IV); the 1977 Additional Protocol I, art 86; the 1991 Draft Code of Crimes, arts 3(1)-(2); 1996 Draft Code of Crimes, art 2(3); 1993 ICTY Statute, art 7(1); 1994 ICTR Statute, art 6(1); Statute of the SCSL, art 6(1); Law on the Establishment of the ECCC, art 29(1); and the Statute of the African Court of Justice and Human and People's Rights (not entered into force), art 28N.

85 Nuremberg Charter, art 6(2); Bassiouni, *Crimes against Humanity* 382-83.

86 Tokyo Charter, art 5.

87 'Report of the International Law Commission on the Work of its Forty-sixth Session, Note by the Secretary-General', UN Doc A/49/355 (1994), pp 3-31.

88 1996 Draft Code of Crimes, art 2(3).

tion in planning or conspiring, incitement and attempts.<sup>89</sup> Article 25(3)(a) seems to contain no trace of this Draft Code of Crimes. In short, no precedent in international treaties has explicitly set out indirect co-perpetration. The absence of the term 'indirect co-perpetration' is not conclusive evidence of its lack of customary basis. A mode of liability in a different label or terminology may serve the same function of indirect co-perpetration. The next subsection explores whether indirect co-perpetration can trace its roots to post-World War II cases in international law.

#### 5.4.2 Post-World War II trials

Supporters of indirect co-perpetration under customary law have referred to post-World War II trials to justify their claims.<sup>90</sup> Their references at least indicate that some post-World War II trials may be relevant for the examination of the customary state of indirect co-perpetration. This subsection surveys post-World War II trials relating to conspiracy, complicity through the organisation and concerted actions to show whether these trials evidence the practice of indirect co-perpetration as emerging customary law.

##### 5.4.2.1 *Liability for the offence of conspiracy, conspiracy liability, and complicity through association*

The IMT judgment and the Nuremberg Subsequent Proceedings concerning the conspiracy issue may be relevant for the identification of customary law. A clarification is first necessary due to the distinction between conspiracy as an inchoate crime and liability for participation in a conspiracy as a form of complicity (conspiracy liability). Commentators have closely examined proposals about conspiracy debated in the drafting of the Nuremberg Charter and in following World War II cases.<sup>91</sup> The wording 'common plan or conspiracy' was contained in two paragraphs of the Nuremberg Charter, article 6(a) and the concluding paragraph of article 6. The IMT differentiated between the meaning of conspiracy in these two paragraphs.

Article 6(a) criminalised aggressive wars (planning, preparation, initiation and waging) and participation in a conspiracy to prepare and wage aggressive war.<sup>92</sup> The drafters of the Nuremberg Charter defined the notion

89 'Fourth report on the draft Code of Offences against the Peace and Security of Mankind, by Mr Doudou Thiam, Special Rapporteur', UN Doc A/CN.4/398 and Corr.1-3 (1986), paras 89-145; 'Report of the International Law Commission', GAOR 42<sup>nd</sup> Session Supp No 10, UN Doc A/42/10 (1987), pp 14-15.

90 *Prosecutor v Simić et al* (Dissenting Opinion of Judge Schomburg) ICTY-95-9-A (28 November 2006), para 14.

91 Lachezar D. Yanev, 'A Janus-Faced Concept: Nuremberg's Law on Conspiracy vis-à-vis the Notion of Joint Criminal Enterprise' (2015) 26 *CLF* 419, 456.

92 Nuremberg Charter, art 6(a): 'Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing'.

of 'conspiracy' here as a punishable inchoate crime.<sup>93</sup> The IMT confirmed this interpretation and considered 'conspiracy to wage aggressive war' as a separate crime. In addition, the concluding paragraph of article 6 of the Nuremberg Charter provides: 'Leaders, organisers, 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.'<sup>94</sup> By referring to this concluding paragraph, the prosecution brought charges of participation in a conspiracy to commit crimes against humanity and war crimes as independent crimes.<sup>95</sup>

The IMT rejected the two charges. The IMT interpreted this concluding paragraph as a provision stipulating individual responsibility for any crimes listed in articles 6(a)-(c). In its view: 'the words [...] [in the concluding paragraph] are designed to establish the responsibility of persons participating in a common plan.'<sup>96</sup> The wording 'common plan or conspiracy' in the concluding paragraph serves as an element of the complicity liability rather than a distinct crime in a technical sense.<sup>97</sup> The responsibility of leaders and organisers does not lie in their actions of conspiracy or common plan as a separate crime. Leaders are individually responsible for the acts committed by others in the execution of a common plan because they contributed to the offences committed through their participation in the formulation or execution of that plan.<sup>98</sup> This interpretation is similar to complicity liability embedded in the civil law system, in which the underlying offences are required to be perpetrated. Based on this liability, leaders and organisers who were involved in the formulation of a plan to commit war crimes and crimes against humanity would also be punished. In short, the wording 'conspiracy' in the Nuremberg Charter was interpreted in two ways: as an inchoate crime and as a form of complicity.

Article 5(a) of the Tokyo Charter also referred to participation in a common plan or conspiracy as crimes against peace. The sentence that is stated in the concluding paragraph of article 6 is incorporated in the definition of crimes against humanity in article 5(c) of the Tokyo Charter. The IMTFE also held that conspiracy, as a stated crime, is restricted to crimes against

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93 Yanev, 'A Janus-Faced Concept: Nuremberg's Law on Conspiracy vis-à-vis the Notion of Joint Criminal Enterprise', 419.

94 Nuremberg Charter, art 6.

95 *France et al v Göring et al*, (1948) 1 TMWC 171, p 229.

96 *ibid*, p 226.

97 'The Charter and Judgment of the Nuremberg Tribunal – History and Analysis: Memorandum submitted by the Secretary-General', UN Doc A/CN.4/5 (1949), pp 73-74.

98 *France et al v Göring et al*, (1948) 1 TMWC 171, pp 109, 123. This provision is not limited to conspiracy liability, but also includes complicity in general. This paragraph covers participation in a conspiracy, participation in the formulation of the conspiracy, and participation in the execution of the conspiracy.

peace,<sup>99</sup> and rejected the charge of participation in a conspiracy to commit conventional war crimes or murder by waging war.<sup>100</sup> Nevertheless, the IMTFE did not differentiate between the meaning of the two words ‘conspiracy’ in article 5 of the Tokyo Charter.

On the other hand, in the Subsequent Proceedings, tribunals endorsed the distinction between conspiracy as a separate crime and conspiracy as a form of complicity.<sup>101</sup> Control Council Law No. 10 did not contain a provision similar to the concluding paragraph of article 6 in the Nuremberg Charter. Its article II (2)(d) stipulated criminal responsibility of individuals ‘connected with plans or enterprises’ involving the commission of a crime. The prosecution and defences differed on the understanding of article II (2) (d). The prosecution relied on this provision to charge the defendants with conspiring to commit war crimes and crimes against humanity, as well as crimes against peace. The defences argued that conspiracy to commit war crimes and crimes against humanity were not crimes, and that article II (2) (d) deemed ‘enterprise liability’ a mode of liability. As Kevin Heller has noted, the tribunals in the *Medical*, *Justice* and *Pohl* cases simply dismissed the charge of conspiracy as a crime for lack of jurisdiction. In the *Krupp*, *Farben*, *Ministries* and *High Command* cases, indictments of conspiracy for war crimes and crimes against humanity also failed.<sup>102</sup> The tribunals seemed to have supported the view of the defences and interpreted the phrase ‘connected with plans or enterprises’ in article II (2)(d) as a form of liability.

Therefore, the function of conspiracy in the post-World War II trials is twofold. The first is to define a separate crime for a concrete plan to crimes against peace. The second function is as a mode of liability to attribute liability to defendants for their contribution to offences of crimes against peace, war crimes and crimes against humanity committed by others.<sup>103</sup> Conspiracy has been retained as a mode of liability for genocide in the 1990s, but it was excluded totally from the framework of the 1998 Rome Statute either as a distinct crime or as a liability because the influence of civil law lawyers.<sup>104</sup>

99 *US et al v Araki et al*, Judgment, p 34 stating that ‘the context of this provision clearly relates it exclusively to subparagraph (a), crimes against peace, as that is the only category in which a “common or conspiracy” is stated to be a crime.’ See also *US et al v Araki et al*, Indictment (English), in Annexe No A-6, pp 57-58, count 53; UN Doc A/CN.4/5 (1949).

100 *US et al v Araki et al*, Judgment, pp 27-71. See *US et al v Araki et al*, Indictment (English), Counts 37, 38, 44, 53.

101 *US v. Brandt* [*Medical case*], (1948) 1TWC 1, p 10; *US v. Altstötter* [*Justice case*], (1948) 3 TWC 3, p 17; *US v. Pohl* [*Pohl case*], (1948) 5 TWC 195, p 201.

102 Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* 276-80.

103 Allison Danner and Jenny Martinez, ‘Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law’ (2005) 93 *California L R* 75, 119, arguing that ‘international judges fail to acknowledge that conspiracy is not only a substantive crime but also constitutes a liability theory in its own right’. Jens D. Ohlin, ‘Joint Intentions to Commit International Crimes’ (2011) 11 *Chicago J Intl L* 693, 702-703, arguing that ‘substantial historical support for the idea that common purpose liability [i.e. JCE] and conspiracy liability are one and the same’. See also Harmen van Der Wilt, ‘Joint Criminal Enterprise: Possibilities and Limitations’ (2007) 5 (1) *JICJ* 91, 96.

104 Jens D. Ohlin, ‘The One or the Many’ (2015) 9 *Crim Law and Philos* 285.

Conspiracy as an inchoate crime is familiar to common law lawyers, whereas conspiracy liability is more familiar to civil law lawyers.

The IMT provided little opportunity for discussion on the elements of conspiracy liability for participation in a common plan. According to the text of the concluding paragraph of article 6, conspiracy (complicity) liability requires offences committed by any persons in the execution of a common plan. Secondly, although article 6 includes no explicit reference to a shared common plan between the physical perpetrator and leaders, the drafting history of the Nuremberg Charter indicates such a requirement.<sup>105</sup> Thirdly, simply participation in a conspiracy initiated by others is not enough. States at the London Conference did not agree that the mere existence of an agreement/common plan is sufficient to attribute liability.<sup>106</sup> The IMT also did not adopt that mere agreement to a conspiracy suffices to charge the leaders.<sup>107</sup> In the IMT's view, when statesmen, military leaders, diplomats, and businessmen, with knowledge of the common plan, willingly co-operate and facilitate the plan initiated by original conspirators, they make themselves parties to the common plan. Therefore, conspiracy liability at the IMT requires the knowledge of the common plan and the accused's actual acts of furthering the common plan.

As shown above, case law concerning conspiracy as a distinct offence is not related to liability. At the IMT, conspiracy liability was originally designed to attribute liability to leaders and planners at the planning level. The above clarification of the conspiracy liability for the common plan at the IMT reveals that conspiracy liability is distinct from modern indirect co-perpetration liability in several aspects. First, participation in the conspiracy to commit crimes at the IMT is regarded as a form of complicity. The current idea of indirect co-perpetration liability is considered as a form of commission; therefore, these accused are deemed principals instead of accessories. This difference is a choice of the way to solve a similar issue. Second, at the IMT, defendants' contribution at the preparatory stage sufficed to attribute liability for conspiracy. However, whether indirect co-perpetration requires the accused's essential contribution to crimes at the execution stage or the preparatory stage is controversial.<sup>108</sup> The third and main difference is that conspiracy liability requires a shared plan between the leaders and physical executors at a vertical level, whereas indirect co-perpetration requires no such shared common purpose. In short, these cases about conspiracy liability do not assist in analysing indirect co-perpetration.

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105 Yanev, 'A Janus-Faced Concept: Nuremberg's Law on Conspiracy *vis-à-vis* the Notion of Joint Criminal Enterprise', 437-42.

106 *ibid.*, 434-36.

107 *ibid.*

108 Alicia Gil Gil and Elena Maculan, 'Current Trends in the Definition of "Perpetrator" by the International Criminal Court: From the Decision on the Confirmation of Charges in the *Lubanga* Case to the *Katanga* Judgment' (2015) 28 *Leiden J Intl L* 349; *Lubanga* Decision on Confirmation of Charges, para 367; *Ongwen* Decision on Confirmation of Charges, para 44; *The Prosecutor v Al Mahdi* (Decision on the confirmation of charges against Ahmad Al Faqi Al Mahdi, PTC I) ICC-01/12-01/15-84-Red (24 March 2016), para 27.

Apart from the introduction of conspiracy liability, articles 9 and 10 of the Nuremberg Charter deal with membership in a criminal organisation. The American Chief Prosecutor explained that both articles aimed to make subsequent trials of minor war criminals more expeditious.<sup>109</sup> The IMT clarified the characteristics of criminal organisation:

A criminal organisation is analogous to a criminal conspiracy in that the essence of both is cooperation for criminal purposes. There must be a group bound together and organised for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the Charter. Since the declaration with respect to the organisations and groups will [...] fix the criminality of its members, that definition should exclude persons who had no knowledge of the criminal purposes or acts of the organisation and those who were drafted by the State for membership, unless they were personally implicated in the commission of acts declared criminal by Article 6 of the Charter as members of the organisation. Membership alone is not enough to come within the scope of these declarations.<sup>110</sup>

This explanation indicates that the declaration of a criminal organisation is not collective punishment.<sup>111</sup> As Heller noted, the membership in a criminal organisation is a combination of conspiracy and criminal association liability.<sup>112</sup> In connection with conspiracy liability, the declaration of an organisation as a criminal opens the door to hold leaders of an organisation responsible for crimes committed by members of that organisation. However, such a combined reading should not go too far. This idea does not give any hint that liability would be imposed on the leader for the crime committed by an individual who is a member of the criminal organisation but lacks the knowledge of the common purpose. A shared intention, for the common design of the organisation, is required.

In the Subsequent Proceedings, tribunals considered both small and large criminal enterprises. In the *Ministries* case, the enterprise was limited to the campaign of persecution of the Catholic Church; however, in the *Justice* case, the enterprise was a nationwide government-organised system of cruelty and injustice.<sup>113</sup> The case law did not emphasise the membership of the executors but rather the shared common plan between the accused and the physical executor.<sup>114</sup> Indeed, if the size of a group was extended, the executors who were not in the same group as the accused would be included as a member of the large group. For crimes committed in the scope of the com-

109 *Trial of the Major War criminals*, published at Nuremberg, 1947, Vol I, p 144. Reich Cabinet; Leadership Corps of the Nazi Party; SS; SD; Gestapo; SA; the General Staff and High Command of the German Armed Forces.

110 *France et al v Göring et al*, (1948) 1 TMWC 171, p 256.

111 Yanev, 'A Janus-Faced Concept: Nuremberg's Law on Conspiracy *vis-à-vis* the Notion of Joint Criminal Enterprise', 427-28.

112 Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* 275.

113 *Ministries* case, (1948) 14 TWC 1, p 520; *Justice* case, (1948) 3 TWC 3, p 985.

114 For a detailed analysis, see Yanev, *Theories of Co-perpetration in International Criminal Law* 385-91, arguing that these cases include *Justice*, *RuSHA*, *Stalag Lufe III* as well as *Borkum Island* cases.

mon design of a large group, these post-World War II cases about complicity through association are a good start for ascertaining the contours of indirect co-perpetration at the leadership level. However, if the crimes committed were outside the common plan, these cases are irrelevant to the assessment of the emergence of indirect co-perpetration under customary law. Thus, it is inconclusive to argue that these cases evidence a pre-existing customary law of indirect co-perpetration with the required mental and material elements.

Much more recently, the interpretation by the IMT has been followed by national courts.<sup>115</sup> In 1994, the Canadian Federal Court, in *Sivakumar*, held:

[...] the starting point for complicity in an international crime was ‘personal and knowing participation’. This is essentially a factual question that can be answered only on a case-by-case basis, but certain general principles are accepted.<sup>116</sup>

In its view, one type of complicity is complicity through association. It means that leaders may be rendered responsible for the acts of others because of their close association with the principal actors. The court held that ‘[t]his view of leadership within organisation constituting a possible basis for complicity in international crimes committed by the organisation is supported by Article 6 of the Charter of the International Military Tribunal’.<sup>117</sup>

Article 2(3)(e) the 1996 Draft Code of Crimes also confirmed this liability, which provided for liability of an individual who ‘directly participates in planning or conspiring to commit such a crime which in fact occurs’.<sup>118</sup> This complicity liability through association might be the origin of ‘indirect perpetration through an organisation’, instead of ‘indirect co-perpetration through jointly control over an organisation’.<sup>119</sup>

#### 5.4.2.2 ‘Concerted actions’ in Hong Kong and Australia’s war crimes trials

Regulation 8(ii) of the Regulation Annexed to the British *Royal Warrant* provided that:

115 *Naredo and Arduengo v Canada* (Minister of Employment and Immigration), (1990) 37 FTR 161; *Rudolph v Canada* (Minister of Employment and Immigration), [1992] 2 FC 653; *Moreno v Canada* (Minister of Employment and Immigration), [1994] 1 FC 298; *Ramirez v Canada* (Minister of Employment and Immigration), [1992] 2 FC 306, pp 317-18.

116 *Sivakumar v Canada* (Minister of Citizenship and Immigration), [1994] 1 FC 433.

117 *ibid.*

118 UN Doc A/51/10 (1996), para 50, p 21, commentary to art 2(3), § (14).

119 ‘Memorandum of Proposals for the Prosecution and Punishment of Certain War Criminals and Other Offenders, April 30, 1945’, in *Report of Robert H. Jackson* 31, referring to ‘joint participation in a broad criminal enterprise’. For an analysis of these proposals, see Yanev, ‘A Janus-Faced Concept: Nuremberg’s Law on Conspiracy *vis-à-vis* the Notion of Joint Criminal Enterprise’, 432-33.

Where there is evidence that a war crime has been the result of concerted action upon the part of a unit or group of them, then evidence given upon any charge relating to that crime against any member of such unit or group may be received as *prima facie* evidence of the responsibility of each member of that unit or group for that crime.

In any such case all or any members of any such unit or group may be charged and tried jointly in respect of any such war crime and no application by any of them to be tried separately shall be allowed by the Court.<sup>120</sup>

Writing on the Hong Kong war crimes trials and British Military trials, Nina Jørgensen found that by referring to Regulation 8(ii) prosecutors considered ‘concerted action’ as an evidentiary rule, rather than the notion of common plan/common intent.<sup>121</sup> The *British Royal Warrant* was the model for Australia’s war crimes legislation. The two paragraphs in Regulation 8(ii) were repeated in Australia’s 1945 *Regulations for the Trial of War Criminals*.<sup>122</sup> Section 9(2) of Australia’s 1945 *War Crimes Act* was also similar to the first paragraph of Regulation 8(ii) with the phrase ‘*prima facie*’ deleted. In Australia’s war crimes trials, section 9(2) in some cases was interpreted to support a charge of criminal responsibility for joint participation; however, this section in other cases was interpreted as an evidentiary provision for crimes committed by a group of people.<sup>123</sup> At the very least, the Hong Kong war crimes trials, British Military trials and Australia’s war crimes trials do not make the contemporary indirect co-perpetration more rooted and accessible.

#### 5.4.3 Assessment and conclusions

This idea of complicity liability for participation in a conspiracy or through association is not as expansive as indirect co-perpetration whereby leaders can be held liable for crimes committed by others, who neither are members of the enterprise nor share a common purpose. In addition, cases concerning concerted actions do not support an expansive interpretation of co-perpetration to include the form of indirect co-perpetration. Post-World War II cases do not evince the emergence of indirect co-perpetration in general. In short,

120 ‘Regulations for the Trial of War Criminals, Royal Warrant 0160/2498, Army Order 81/1845 (War Office, 18 June 1945)’ in Telford Taylor, *Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials under Control Council Law No. 10* (Washington, DC: USGPO 1949) 254-56.

121 Nina Jørgensen, ‘On Being “Concerned” in a Crime: Embryonic Joint Criminal Enterprise?’ in S. Linton (ed), *Hong Kong’s War Crimes Trials* (Oxford: OUP 2013) 137-67. But see Allison Danner and Jenny Martinez, ‘Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law’ (2005) 93 *California L Rev* 75, 108; Suzannah Linton, ‘Rediscovering the War Crimes Trials in Hong Kong, 1946-48’ (2012) 13 *Melbourne J Intl L* 284.

122 See Appendices I and II in G. Fitzpatrick, T. McCormack and N. Morris (eds), *Australia’s War Crimes Trials 1945-51* (Leiden: Brill 2016) 810-23.

123 Gideon Boas and Lisa Lee, ‘Command Responsibility and Other Grounds of Criminal Responsibility’ in G. Fitzpatrick *et al* (eds), *Australia’s War Crimes Trials 1945-51*, 160; Jørgensen, ‘On Being “Concerned” in a Crime: Embryonic Joint Criminal Enterprise?’, 137-67.

indirect co-perpetration has not generally been accepted as a customary rule before the adoption of the Rome Statute. For lack of a pre-existing customary rule, article 25(3)(a) of the Rome Statute was not declaratory of customary law concerning indirect co-perpetration.

#### 5.5 INDIRECT CO-PERPETRATION: IS ARTICLE 25(3)(A) DECLARATORY OF CUSTOM?

This section examines whether indirect co-perpetration liability is now well accepted under customary law in contrast to its non-acceptance before the adoption of the Rome Statute. For this purpose, the consecutive subsections 5.5.1-5.5.2 first look into the jurisprudence of the two UN *ad hoc* tribunals concerning indirect co-perpetration and JCE. Subsection 5.5.1 mainly comments on the state of indirect co-perpetration under customary law through the lens of JCE liability, in particular, the formulation of *Brđanin* JCE. Case law of the two tribunals concerning indirect co-perpetration is discussed in subsection 5.5.2. Subsections 5.5.4-5.5.5 observe and evaluate case law of other international and national criminal tribunals, as well as national legislation relating to co-perpetration.

A clarification of the importance of the jurisprudence of the two *ad hoc* tribunals is necessary. The jurisprudence of the ICTY and ICTR had less influence on the substantive content of article 25(3)(a), since the ICTY's remarkable *Tadić* Appeals Chamber judgment dealing with the issue of joint criminal enterprise (JCE) liability was delivered in 1999, i.e. one year after the adoption of the 1998 Rome Statute. Yet, as shown above, the *Katanga* Appeals Chamber deemed indirect co-perpetration a form of co-perpetration. Also, some Chambers of the ICTY upheld JCE as 'a form of co-perpetration' designed to attribute liability.<sup>124</sup> It appears that JCE and indirect co-perpetration overlap each other in a certain context. As Elies van Sliedregt has noted, the practice of the ICTY seems to reintroduce indirect co-perpetration liability under the label of JCE.<sup>125</sup> Thus, the jurisprudence of the two *ad hoc* tribunals concerning JCE is important for the analysis of customary law after the adoption of the Rome Statute. These cases are analysed chronologically.

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124 *Stakić* Trial Judgment, para 441; *Milutinović et al* Appeals Chamber Decision on Jurisdiction 2003 (Separate Opinion of Judge David Hunt on Challenge by Ojdanić to Jurisdiction Joint Criminal Enterprise), para 13; *Kuprešić et al* Trial Judgment, paras 772, 782; *Prosecutor v Simić et al* (Judgement, Separate and Partly Opinion of Judge Per-Johan Lindholm) ICTY-95-9-T (17 October 2003), para 2.

125 Van Sliedregt, *Individual Criminal Responsibility in International Law* 162-63.

### 5.5.1 *Tadić* joint criminal enterprise: 1999 Appeals Chamber Judgment

This subsection clarifies and discusses the *Tadić* formulation of JCE liability. Case law of the two UN *ad hoc* tribunals has established the JCE liability.<sup>126</sup> In the ICTY, the *Furundžija* Trial Chamber firstly referred to JCE/common purpose liability with respect to the liability of co-perpetrators who participate in a JCE of torture.<sup>127</sup> The *Tadić* Appeals Chamber judgment is widely known for confirming the customary status of JCE liability applicable in the Yugoslavia tribunal. In the famous *Tadić* case, the accused Dusko Tadić was a reserve police officer who had participated in the collection and forced transfer of civilians after the control of Bosnian Serb forces in 1992. In one count, five men were killed in the execution of the removal plan. Evidence showed that members of the armed group to which Tadić belonged committed the killing, but no evidence proved that Tadić had personally killed any of them.<sup>128</sup>

The Appeals Chamber analysed whether the killing could give rise to criminal culpability of Tadić who participated in the execution of that common plan, and what the requirements of the accused's mental and material elements were. The Appeals Chamber held that the commission of a crime might occur through different forms of participation aiming to achieve a common design/purpose,<sup>129</sup> which is encompassed in the ICTY Statute.<sup>130</sup> The Appeals Chamber then turned to customary law to clarify the mental and material elements of JCE liability.<sup>131</sup> In its view, JCE liability includes three forms: the basic form (JCE I), the systematic form (JCE II), and the extended form (JCE III).<sup>132</sup>

The facts in the *Almelo* trial after World War II present a good example

126 *Prosecutor v Tadić* (Judgement) ICTY-94-1-A (15 July 1999) [*Tadić* Appeals Chamber Judgment], paras 185-229; *Furundžija* Appeals Chamber Judgment, paras 118-20; *Mucić et al* Appeals Chamber Judgment, paras 365-66; *Prosecutor v Brđanin & Talin* (Decision on Form of Further Amended Indictment and Prosecution Application to Amend) ICTY-99-36-PT (26 June 2001) [*Brđanin & Talin* Decision on Amended Indictment 2001]; *Prosecutor v Krstić* (Judgement) ICTY-98-33-T (2 August 2001) [*Krstić* Trial Judgment], para 601; *Prosecutor v Šainović et al* (Decision on *Dragoljub Ojdanić's* Preliminary Motion to Dismiss for Lack of Jurisdiction: Joint Criminal Enterprise) ICTY-99-37-PT (13 February 2003) [*Šainović et al* Trial Chamber Decision 2003]; *Milutinović et al* Appeals Chamber Decision on Jurisdiction 2003, para 20; *Prosecutor v Prlić et al* (Judgement) ICTY-04-74-A (29 November 2017) [*Prlić et al* Appeals Chamber Judgment] Vol II, para 591. The *Tadić* Appeals Chamber Judgment interchangeably used the term 'common purpose', 'criminal enterprise', and joint criminal enterprise to indicate the same form of participation. Later on, the term 'joint criminal enterprise' was used throughout the *Krstić* Trial Judgment.

127 *Furundžija* Trial Judgment, para 216.

128 *Tadić* Appeals Chamber Judgment, paras 178-84.

129 *ibid*, para 188.

130 *ibid*, paras 189-93. Article 7(1) of 1993 ICTY Statute provides 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'.

131 *ibid*, para 194.

132 *ibid*, paras 196-203; *Kvočka et al* Appeals Chamber Judgment, para 198.

of JCE I.<sup>133</sup> In this case, three people each played a role in the killings: one fired the actual shots, another gave the order, and a third waited near the car to prevent people from coming near. All three knew what they were doing. In this scenario, except for the one who fired the shots, the other two did not fulfil all the elements of the killings for lack of physical acts. Relying on JCE I liability, the other two were also convicted of committing the killings.

A good illustration of JCE II is the cases of 'concentration camp' crimes committed by groups of persons acting pursuant to a concerted plan.<sup>134</sup> In the British *Belsen* case, members of military or administrative systems, such as concentration camps, physically mistreated prisoners.<sup>135</sup> The accused were held liable for the crimes committed by others who mistreated prisoners and detainees because the accused had intended to contribute to the crime through active participation in the enforcement of that system. The accused held a 'position of authority' in the system when the crimes were committed. JCE II in nature is a variant of JCE I.<sup>136</sup>

The scenario in *Tadić* illustrates JCE III. *Tadić* with other members participated in the execution of the removal plan, but five men were killed by other members during the execution of that plan. Based on JCE III, *Tadić* was also found guilty for the killing of the five men. Another example is provided by a situation where a group with a common plan shared the intention to forcibly remove members of one ethnicity from a town with the consequence that many members were shot and killed in the course of the execution of that plan.<sup>137</sup> The acts of killing were not envisaged in the ethnic cleansing plan. The accused as a non-physical perpetrator was also responsible for the acts of killing committed by other members of the group because the accused who participated in the group had foreseen the killing in carrying out the plan of ethnic cleaning. Other cases have also been frequently cited to illustrate JCE III.<sup>138</sup>

133 *UK v Otto Sandrock and Three Others [Almelo case]*, (1947) 1 LRTWC 35. In this case, Schweinberger gave the actual shots, while Sandrock gave the orders to kill a British prisoner and a Dutch civilian. Hegemann and Weigner played the same role to prevent people coming near. JCE I is usually called co-perpetration.

134 *Tadić Appeals Chamber Judgment*, para 202.

135 *UK v Josef Kramer et al [Belsen case]*, (1947) 2 LRTWC 1.

136 *Tadić Appeals Chamber Judgment*, paras 203, 228.

137 *Brđanin & Talin Decision on Amended Indictment 2001*, para 25.

138 For example, the *Essen Lynching* and *Borkum Island* cases. *UK v Erich Heyer and Six Others [Essen Lynching case]*, (1945) 1UNWCC 88 89. In the *Essen Lynching* case before British Military Court, three British pilots as prisoners of war were lynched by German civilians in the Essen-West town in 1944. A German Captain Heyer placed the three pilots under the escort of a German soldier and ordered that the soldier should not interfere if German civilians harass the airmen. He also added that these prisoners ought to be shot. The order was spoken in so loud a voice that the crowd could hear and would know what was going to occur. During the escort, the crowd hit the three pilots. One pilot was killed by a shot, another was killed by throwing over the parapet of a bridge, and the third one was beat and kicked to death. Accompanying with other civilians and servicemen, Heyer was charged with a war crime and convicted. A similar situation as in *Essen Lynching* occurred in the *Borkum Island* case. Seven pilots as prisoners were killed during the march through the streets of Borkum in 1944. The prosecutor in this case developed the doctrine of common purpose, which presumed that all participants in the common purpose shared the same criminal intent to murder, whereas the defence counsel did not deny this doctrine.

As for JCE liability, two requirements have to be fulfilled: a mental element and a material element, both of which are said to be found in customary international law.<sup>139</sup> Three forms of JCE liability share the same material element, which requires the existence of a joint criminal enterprise consisting of a plurality of persons with a common criminal plan (design or purpose) and the participation of the accused in that enterprise.<sup>140</sup> As to the mental element of JCE I, the accused has to share the intent to commit the crime. JCE II requires that the accused had knowledge of the criminal nature of the system and had intended to further the common design of the system. The mental element of JCE III is that:

[...] the *intention* to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*.<sup>141</sup>

After analysing post-World War II cases and some customary indicators, the *Tadić* Appeals Chamber concluded that JCE liability was ‘firmly established in customary international law’.<sup>142</sup>

The defences in some subsequent cases challenged the customary status of JCE liability. Appeals Chambers of the ICTY, however, declined to revisit the *Tadić* findings in this regard for lack of a cogent reason.<sup>143</sup> The ICTY also convicted the accused for JCE III liability in other cases: *Krstić*,<sup>144</sup>

139 *Tadić* Appeals Chamber Judgment, para 194; *Šainović et al* Trial Chamber Decision 2003.

140 *Tadić* Appeals Chamber Judgment, para 227.

141 *ibid*, para 228 (emphasis in original).

142 *ibid*, para 220.

143 *Milutinović et al* Appeals Chamber Decision on Jurisdiction 2003, para 18; *Karemera et al v The Prosecutor* (Decision on Jurisdictional Appeals: Joint Criminal Enterprise) ICTR-98-44-AR72.5, ICTR-98-44-AR72.6 (12 April 2006), para 13; *Prlić et al* Trial Judgment, Vol 1, para 220; *Dorđević* Appeals Chamber Judgment, paras 48-53. For commentators’ criticisms, see Machteld Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Antwerp: Intersentia 2008) 597; Alexander Zahar and Göran Sluiter, *International Criminal Law: A Critical Introduction* (Oxford: OUP 2008) 221-57; Jens D. Ohlin, ‘Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise’ (2007) 5 *JICJ* 69; Kai Ambos, ‘Joint Criminal Enterprise and Command Responsibility Symposium: Guilty by Association: Joint Criminal Enterprise on Trial’ (2007) 5 *JICJ* 159; Elies van Sliedregt, ‘Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide’ (2007) 5 *JICJ* 184; Antonio Cassese, ‘The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise’ (2007) 5 *JICJ* 109; Attila 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’ (2006) 6 *ICLR* 63, 119; Steven Powles, ‘Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?’ (2004) 2 *JICJ* 606, 615-18. For a summary of critics before 2008, see Boas *et al*, *International Criminal Law Practitioner Library*: Vol 1.

144 *Krstić* Trial Judgment, para 616; *Krstić* Appeals Chamber Judgment, paras 144, 151. For an analysis of the *Krstić* case, see Harmen van der Wilt, ‘Joint Criminal Enterprise: Possibilities and Limitations’ (2007) 5 *JICJ* 91, 97-98.

*Babić, Stakić, Martić, Krajišnik, Šainović et al, Đorđević, Popović et al, Stanišić & Simatović*, and the recent *Stanišić & Župljanin* cases.<sup>145</sup> The customary status of JCE liability is confirmed, directly or indirectly, by subsequent ICTR cases.<sup>146</sup> Both the STL and the SCSL also supported JCE liability.<sup>147</sup> JCE liability

- 145 *Furundžija* Appeals Chamber Judgment, paras 118-20; *Brđanin & Talin* Decision on Amended Indictment 2001, paras 28-30; *Krstić* Trial Judgment, para 601; *Prosecutor v Kvočka et al* (Judgement) ICTY-98-30/1-T (2 November 2001) [*Kvočka et al* Trial Judgment], paras 265, 289; *Šainović et al* Trial Chamber Decision 2003, pp 6-7; *Milutinović et al* Appeals Chamber Decision on Jurisdiction 2003, paras 18-20, 41; *Krnojelac* Appeals Chamber Judgment, paras 28-32; *Prosecutor v Vasiljević* (Judgement) ICTY-98-32-A (25 February 2004), paras 99, 101; *Krstić* Appeals Chamber Judgment, para 151; *Prosecutor v Šešelj* (Decision on Motion by Vojislav Šešelj Challenging Jurisdiction and Form of Indictment) ICTY-03-67/PT (26 May 2004), paras 52; *Prosecutor v Babić* (Sentencing Judgement) ICYT-03-72-S (29 June 2004), para 33; *Brđanin* Trial Judgment, para 258; *Blagojević & Jokić* Trial Judgment, paras 695-703; *Kvočka et al* Appeals Chamber Judgment, para 83; *Prosecutor v Prlić et al* (Decision to Dismiss the Preliminary Objections Against the Tribunal's Jurisdiction) ICTY-04-74-PT (26 September 2005), paras 16-17; *Limaj et al* Trial Judgment, paras 511-12; *Stakić* Appeals Chamber Judgment, para 87; *Prosecutor v Brđanin* (Judgement) ICTY-99-36-A (1 April 2007) [*Brđanin* Appeals Chamber Judgment], para 405; *Prosecutor v Tolimir* (Decision on preliminary motions on the indictment pursuant to Rule 72 of the Rules) ICTY-05-88/2-PT (14 December 2007), para 53; *Prosecutor v Haradinaj et al* (Judgement) ICTY-04-84-T (3 April 2008), paras 135, 137-79; *Prosecutor v Milutinović et al* (Judgement) ICTY-05-87-T (26 February 2009) [*Milutinović et al* Trial Judgment], Vol 3, para 9; *Martić* Appeals Chamber Judgment, para 80; *Krajišnik* Appeals Chamber Judgment, paras 215-18; *Prosecutor v Karadžić* (Decision on prosecution's motion appealing trial chamber's decision on JCE III foreseeability) ICTY-95-5/18-AR72.4 (25 June 2009), para 19; *Prosecutor v Haradinaj et al* (Retrial Judgement) ICTY-04-84bis-T (29 November 2012) [*Haradinaj et al* Retrial Judgment], paras 618, 621; *Prlić et al* Trial Judgment, Vol 1, para 210; *Šainović et al* Appeals Chamber Judgment, para 1157; *Đorđević* Appeals Chamber Judgment, para 81; *Popović et al* Appeals Chamber Judgment, paras 1672, 1674; *Prosecutor v Tolimir* (Judgement) ICTY-05-88/2-A (8 April 2015), para 281; *Prosecutor v Stanišić & Simatović* (Judgement) ICTY-03-91-A (9 December 2015), para 77; *Stanišić & Župljanin* Appeals Chamber Judgment, para 599.
- 146 *The Prosecutor v Karemera et al* (Decision on the Preliminary Motions by the Defence of Edouard Karemera *et al*, Challenging Jurisdiction in Relation to Joint Criminal Enterprise) ICTR-98-44-T (11 May 2004), para 38; *Karemera et al v The Prosecutor* (Decision on Jurisdictional Appeals: Joint Criminal Enterprise) ICTR-98-44-AR72.5, ICTR-98-44-AR72.6 (12 April 2006), paras 14-17; *Karemera et al v The Prosecutor* (Decision on Interlocutory Appeal of Edouard Karemera *et al* against Oral Decision of 23 August 2010) ICTR-98-44-AR50 (24 September 2010), para 16; *Rwamakuba v The Prosecutor* (Decision on Interlocutory Appeal on Joint Criminal Enterprise to the Crimes of Genocide) ICTR-98-44-AR72.4 (22 October 2004), paras 10, 17; *The Prosecutor v Uwinkindi* (Decision on Defence Appeal against the Decision Denying Motion Alleging Defects in the Indictment) ICTR-01-75-AR72 (C) (16 November 2011), paras 11-12; *Mugenzi & Mugiraneza v The Prosecutor* (Judgement) ICTR-99-50-A (4 February 2013), fn 290; *Nizeyimana v The Prosecutor* (Judgement) ICTR-00-55C-A (29 September 2014), para 325; *Ngirabatware v The Prosecutor* (Judgement) MICT-12-29-A (18 December 2014) [*Ngirabatware* Appeals Chamber Judgment], para 249; *Karemera & Ngirumtse* Appeals Chamber Judgment, para 623.
- 147 Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, STL-11/01/1 (16 February 2011) [STL 2011 Decision], paras 237, 244-49; *Prosecutor v Brima et al* (Judgment, A Ch) SCSL-2004-16-A (22 February 2008), paras 66-87; *Prosecutor v Sesay et al* (Judgment, A Ch) SCSL-2004-15-A (26 October 2009), paras 98-110.

has been crystallised into an international liability theory and has frequently been endorsed as a firmly established norm under customary law,<sup>148</sup> despite controversy about the customary status of JCE III.<sup>149</sup>

Two points of JCE liability deserve attention. Firstly, cases of JCE I/II may also be illustrations of traditional civil law co-perpetration liability at the executive level. Judge Schomburg claimed that JCE I is similar to co-perpetration in article 25(3)(a) of the Rome Statute.<sup>150</sup> Judge Lindholm also said that JCE I was ‘nothing more than a new label affixed to a since long well-known concept or doctrine in most jurisdictions as well as in international criminal law, namely co-perpetration’.<sup>151</sup> Secondly, the expression of ‘joint criminal enterprise’ can also be found in the UK’s common law doctrine of joint enterprise (venture).<sup>152</sup> The UK joint enterprise doctrine requires the existence of a plurality of persons comprising the accused, regardless of whether they shared a common purpose.<sup>153</sup> In the context of an accused act with an implicit or explicit agreement, the *Tadić* JCE I is similar to two categories of the UK joint enterprise, in which the accused jointly with the executor commits a single crime or the accused assists or encourages the executor to commit a crime. *Tadić* JCE III is also similar to one derivation of the joint enterprise liability or parasitic accessory liability, in which the accused and the executor participated in one crime but the executor committed a second crime in carrying out the offence of the first crime.<sup>154</sup> The *Tadić* Appeals Chamber appears to have relied on the UK joint enterprise liability to depict JCE I (co-perpetration) and JCE II, as well as JCE III.<sup>155</sup>

148 Van Sliedregt, *Individual Criminal Responsibility in International Law* 9; *Furundžija* Trial Judgment, para 216; *Tadić* Appeals Chamber Judgment, paras 185-229.

149 Schabas, *The International Criminal Court: A Commentary on the Rome Statute* 566-67. More detailed will be seen below.

150 *Gacumbitsi v The Prosecutor* (Separate Opinion of Judge Schomburg on the Criminal Responsibility of the Appellant for Committing Genocide) ICTR-01-64-A (7 July 2006), para 25; *Prosecutor v Simić et al* (Judgement, Separate and Partly Opinion of Judge Per-Johan Lindholm) ICTY-95-9-T (17 October 2003), para 2; Cassese *et al* (eds), *Cassese’s International Criminal Law* 175.

151 *Simić et al* Trial Judgment (Separate and Partly Opinion of Judge Per-Johan Lindholm), para 2.

152 UK, House of Commons Justice Committee, ‘Report on Joint Enterprise, Eleventh Report of Session 2010-12’ (11 January 2012); UK, House of Commons Justice Committee, ‘Report on Joint Enterprise, Fourth Report of Session 2014-15’ (10 December 2014); *Gacumbitsi v The Prosecutor* (Separate Opinion of Judge Shahabuddeen) ICTR-01-64-A (7 July 2006), para 40; David Ormerod and Karl Laird, *Smith and Hogan’s Criminal Law* (14<sup>th</sup> edn, Oxford: OUP 2015) 239-61; Andrew Simester *et al*, *Simester and Sullivan’s Criminal Law: Theory and Doctrine* (5<sup>th</sup> edn, Hart 2013) 232-49.

153 UK, ‘CPS Guidance On: Joint Enterprise Charging Decisions’, December 2012, paras 4-11.

154 *R v Chan Wing-siu* [1985] 1 AC 168, [1984] UKPC 27 (21 June 1984), p 8; John Smith, ‘Criminal Liability of Accessories: Law and Law Reform’ (1997) 113 *LQR* 453.

155 *Tadić* Appeals Chamber Judgment, paras 201, 203.

The *Tadić* Appeals Chamber, however, was not confronted with a comparable situation as the ICC was in the *Katanga & Ngudjolo* case. As shown above, the *Tadić* formulation of JCE, as a description of civil law and common law liability regimes, provides that a member of an enterprise without physical involvement is held legally liable for a crime contemplated and physically committed by other members of the enterprise. Based on this formulation, if the individuals share the common design related to a crime and participate in the commission of that crime, members who participated in the enterprise would be liable for the offences committed by their co-perpetrators.<sup>156</sup> By contrast, indirect co-perpetration requires no shared agreement between the accused and the physical perpetrators, nor the same membership of the physical perpetrator as the accused. Therefore, cases based on the *Tadić* formulation of JCE are not relevant for the analysis of the customary status of indirect co-perpetration at the leadership level.

### 5.5.2 Indirect (co-)perpetration in the UN *ad hoc* tribunals

Scenarios similar to that in the *Katanga & Ngudjolo* case occurred in subsequent ICTY and ICTR cases. This subsection surveys the practice of the two *ad hoc* tribunals with respect to indirect co-perpetration.

#### 5.5.2.1 *Co-perpetratorship in Stakić: 2003 Trial Chamber judgment and 2006 Appeals Chamber judgment*

The Trial Chamber of the ICTY in the *Stakić* case relied on 'co-perpetratorship' liability to convict the accused.<sup>157</sup> In this case, the accused *Stakić* was a civilian leader of the Prijedor Municipal Crisis Staff in Bosnia and Herzegovina. Murder, extermination and other atrocities were committed against non-Serbs in Prijedor by members of Crisis Staffs, the police and the army acting in coordination to achieve the goal of establishing a Serb controlled territory. The prosecution charged *Stakić* on the basis of participation in a joint criminal enterprise. The defence argued that participation in a JCE was limited to participating directly, or being present at the commission of the crime, or acting in furtherance of a system.<sup>158</sup>

The Trial Chamber first argued that 'joint criminal enterprise is only one of several possible interpretations of the term "commission"' and that other definitions of co-perpetration should be considered.<sup>159</sup> The Trial Chamber defined the term 'commission' as that 'the accused participated, physically or otherwise directly or indirectly, in the material elements of the crime

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156 *Milutinović et al* Appeals Chamber Decision on Jurisdiction 2003, paras 25-56.

157 *Stakić* Trial Judgment, para 468.

158 *ibid*, paras 429.

159 *ibid*, paras 438.

charged through positive acts or, based on a duty to act, omissions, whether individually or jointly with others',<sup>160</sup>

In addition, the Chamber shared the view that:

For co-perpetration it suffices that there was an explicit agreement or silent consent to reach a common goal by coordinated co-operation and joint control over the criminal conduct. [...] [T]he accused must also have acted in the awareness of the substantial likelihood that punishable conduct would occur as a consequence of coordinated co-operation based on the same degree of control over the execution of common acts. Furthermore, the accused must be aware that his own role is essential for the achievement of the common goal.<sup>161</sup>

The Trial Chamber found that Stakić shared joint control over these offences with his co-perpetrators (associates) who were in charge of the Crisis Staff, the police and the army. In its view, Stakić and his co-perpetrators acted with a mutual awareness that crimes would occur in the course of achieving the common goal. The accused Stakić, as a (co-)perpetrator behind the direct perpetrators was held liable for the crimes committed by his co-perpetrators.<sup>162</sup> According to Judge Schomburg, the presiding judge in this case, 'co-perpetratorship' was a part of customary law.<sup>163</sup>

Neither the accused nor the prosecutor appealed the decision on this liability issue. The *Stakić* Appeals Chamber, however, intervened in examining this liability to avoid uncertainty and to ensure respect for the consistency and coherence in the application of law. Based on the factual findings of the trial judgment, the Appeals Chamber relied on JCE liability to convict Stakić.<sup>164</sup> The Appeals Chamber expressly rejected indirect (co-)perpetration liability because it did not form part of customary law.<sup>165</sup>

Scholars differ on the understanding of *Stakić's* co-perpetratorship liability. Some commentators argued for a limited reading of the co-perpetratorship in *Stakić*.<sup>166</sup> In their view, the prosecutor and the Trial Chamber in this case did not aim to construe co-perpetratorship to impose liability on Stakić for crimes 'committed by/attribution to' his co-perpetrators, who used physical executors to commit the crimes. Due to this restrictive definition, *Stakić's* co-perpetratorship is different from indirect co-perpetration, in which the accused's co-perpetrators used these physical executors. The ICTY's rejection of the restricted customary status of co-perpetratorship liability in the *Stakić* Appeals Chamber judgment, therefore, does not affect further prosecution based on indirect co-perpetration.<sup>167</sup> Another view seems

160 *ibid*, para 439 (citations omitted).

161 *ibid*, paras 440, 442.

162 *ibid*, paras 468-98, 629.

163 *Simić et al* Appeals Chamber Judgment (Dissenting Opinion of Judge Schomburg), paras 9-23 and fn 20.

164 *Stakić* Appeals Chamber Judgment, paras 61-98, 104.

165 *ibid*, paras 59, 62.

166 Boas *et al*, *International Criminal Law Practitioner Library*: Vol 1,121-22.

167 *ibid*, arguing that indirect co-perpetration may be well supported under customary law.

to be more persuasive. This view claims that a broad reading of co-perpetratorship was confirmed in *Stakić*.<sup>168</sup> The *Stakić* Trial judgment and its factual analysis implicitly confirmed the finding that an accused might be held liable as ‘the perpetrator behind the perpetrator’ for the crimes attributable to his/her co-perpetrators.

This broad understanding is similar to the ICC’s idea of indirect co-perpetration. As shown above, the Trial Chamber in *Stakić* recognised a broad interpretation of co-perpetration to attribute liability to the accused for their ‘indirect’ perpetration ‘through acts jointly with others’, although the mental elements of this co-perpetratorship are different from that of indirect co-perpetration. In addition, in light of the *Stakić* Appeals Chamber judgment, the ICTY prosecution amended several indictments.<sup>169</sup> For instance, the prosecution amended its indictment in *Popović et al* by replacing ‘direct and/or indirect co-perpetration’ with JCE liability. The Trial Chamber allowed its amendment.<sup>170</sup> These amendments at least support the view that JCE, in effect, was used as a substitute for indirect co-perpetration for the crime committed by physical executors, who were outside the enterprise as the accused and were used by the accused’s fellow co-perpetrators. Indeed, in rejecting the customary status of co-perpetratorship, it is unclear whether the *Stakić* Appeals Chamber bore in mind a narrow or broad understanding of co-perpetratorship for lack of its reasoning on this point. At the very least, the *Stakić* Appeals Chamber did not recognise liability labelled ‘co-perpetratorship’ or ‘indirect co-perpetration’ but use the term ‘JCE’.

#### 5.5.2.2 Indirect co-perpetration: 2006 *Milutinović et al* Trial Chamber decision

The *Stakić* Appeals Chamber did not give any reasons for its finding on the customary status of indirect co-perpetration as the *Milutinović et al* Trial Chamber did. In the *Milutinović et al* case, those accused were either civilian or military commanders of FRY and Serbia. Deportations, murders and other offences were committed by members of the forces of FRY and Serbia in the course of the expulsion of the Kosovo Albanian populations. In the indictment, where the physical perpetrators were not participants in the JCE, the accused were charged based on indirect co-perpetration, as an alternative form of liability, for their ‘joint control over the criminal conduct of forces of the FRY and Serbia’. The mental element of indirect co-perpetration was

168 Cassese *et al* (eds), *Cassese’s International Criminal Law* 179.

169 *Prosecutor v Gotovina et al* (Decision on Prosecution’s Consolidated Motion to Amend the Indictment and Joinder) ICTY-03-73-PT, ICTY-01-45-PT (14 July 2006), paras 25-26; *Prosecutor v Prlić et al* (Decision on Petković’s Appeal on Jurisdiction) ICTY-04-74-AR72.3 (23 April 2008), para 21. For more analysis of these cases, see Boas *et al*, *International Criminal Law Practitioner Library*: Vol 1, 104-23.

170 *Prosecutor v Popović et al* (Decision on Motions Challenging the Indictment pursuant to Rule 72 of the Rules) ICTY-05-88-PT (31 May 2006) [*Popović et al* Trial Chamber Decision], paras 17, 22.

identical to that of co-perpetratorship in the *Stakić* trial judgment.<sup>171</sup> Indirect co-perpetration in this way allows the prosecution to attribute liability to the accused for indirect commission of crimes through persons who do not form part of the accused's group.

One of the accused, Ojdanić, challenged the 'indirect co-perpetration' form of responsibility for its lack of basis in the ICTY Statute or in customary international law. He argued that 'there is insufficient *opinio juris* in respect of indirect co-perpetration'.<sup>172</sup> Also, the accused submitted that indirect co-perpetration is not enshrined in article 25(3)(a) of the Rome Statute. State practice did not exist in 1992 to substantiate the existence of indirect co-perpetration under customary law.<sup>173</sup> The prosecution relied on the *Stakić* Trial judgment to support its indictment of indirect co-perpetration and claimed that 'indirect co-perpetration is part of customary international law or a general principle of law'.<sup>174</sup>

The Trial Chamber in the *Milutinović et al* case examined whether a customary rule of indirect co-perpetration defining individual responsibility existed at the relevant time.<sup>175</sup> The Chamber first narrowed down the question for examination. The Chamber said that

[It] will not perform an exhaustive investigation of all the available sources in order to ascertain what forms of responsibility exist in customary international law that might arguably be given the label 'indirect co-perpetration' [...]. Instead, the Chamber will limit its analysis to the more focused questions of whether a form of responsibility with the physical and mental elements alleged [...] existed under customary international law, [...].<sup>176</sup>

According to the Chamber, the 'awareness of the substantial likelihood that crimes would occur', which describes the mental element of indirect co-perpetration, is similar to the mental element for planning or ordering liability. In its view, the *Stakić* Trial judgment in defining this formulation of the mental element may have relied on the jurisprudence on planning liability rather than customary law.<sup>177</sup> In addition, although judicial authorities in several legal systems of the world have recognised indirect perpetration and co-perpetration, 'indirect co-perpetration' liability had not been established as part of customary law at the material times.<sup>178</sup> The Chamber dismissed that indirect co-perpetration with the specific mental element existed under customary law. As in *Stakić*, liability was imposed on the basis of JCE.

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171 *Prosecutor v Milutinović et al* (Prosecution's Notice of Filing Amended Joinder Indictment and Motion to Amend the Indictment with Annexes) ICTY-05-87-PT (16 August 2005), paras 18-23; *Milutinović et al* Trial Chamber Decision on Indirect Co-perpetration 2006, para 11.

172 *Milutinović et al* Trial Chamber Decision on Indirect Co-perpetration 2006, para 28.

173 *ibid*, para 29.

174 *ibid*, paras 30-31.

175 *ibid*, paras 25.

176 *ibid*, para 26.

177 *ibid*, para 38.

178 *ibid*, para 39.

### 5.5.2.3 Co-perpetratorship: 2006 *Gacumbitsi* Appeals Chamber judgment

In interpreting the term ‘commission’, the majority of the Appeals Chamber in two later cases of the ICTR, i.e., the *Gacumbitsi* and *Seromba* cases, accepted a broad interpretation of co-perpetration.<sup>179</sup> The accused in the two cases were described either as indirect perpetrators or as co-perpetrators.<sup>180</sup> In *Gacumbitsi*, the Appeals Chamber held that the accused supervised and directed refugees to carry out killings as an ‘integral part of the massacre plan’. The accused’s supervision and direction constituted ‘committing’ genocide for his ‘direct participation in the *actus reus* of the crime’ (co-perpetratorship).<sup>181</sup> The same reasoning was applied in *Seromba* to charge the commission of extermination.<sup>182</sup>

Judge Schomburg in his separate opinion in *Gacumbitsi* cited a series of national provisions, case law and scholarly works to argue that ‘international criminal law has accepted co-perpetratorship and indirect perpetratorship (perpetration by means) as a form of “committing”’.<sup>183</sup> Article 25(3) (a) of the Rome Statute was also cited to support a conviction based on both indirect perpetration and co-perpetration. Judge Schomburg in another case further expressed his position that co-perpetration and indirect perpetration are firmly entrenched in customary international law.<sup>184</sup> In *Gacumbitsi*, Judge Güney in his dissenting opinion argued that the majority of the Appeals Chamber departed from case law of JCE liability and adopted a novel approach of ‘direct participation in the material elements of the crime’ without providing an analysis of whether this form is recognised in customary international law.<sup>185</sup> Judge Shahabuddeen, however, contended that ‘[s]ince several states adhere to one theory [JCE] while several other states adhere to the other theory [co-perpetration], it is possible that the required State prac-

179 *Gacumbitsi* Appeals Chamber Judgment, paras 59-61; *Seromba* Appeals Chamber Judgment, paras 161, 171-172, rendering the decision by citing the *Gacumbitsi* judgment. For discussions on the two cases, see Robert C. Clarke, ‘Together Again? Customary Law and Control over the Crime’ (2015) 26 *CLF* 457, 490; Flavia Z. Giustiniani ‘Stretching the Boundaries of Commission Liability: The ICTR Appeal Judgment in *Seromba*’ (2008) 6 *JICJ* 783.

180 *Gacumbitsi* Appeals Chamber Judgment (Separate Opinion of Judge Schomburg), para 28.

181 *Gacumbitsi* Appeals Chamber Judgment, para 60.

182 *The Prosecutor v Seromba* (Judgement) ICTR-01-66-A (12 March 2008), paras 161-63, 171-72, 189-90.

183 *Gacumbitsi* Appeals Chamber Judgment (Separate Opinion of Judge Schomburg), paras 2-28.

184 *Simić et al* Appeals Chamber Judgment (Dissenting Opinion of Judge Schomburg), paras 9-23 and fn 20.

185 *Gacumbitsi* Appeals Chamber Judgment (Partially dissenting opinion of Judge Güney), paras 2-8; *Seromba* Appeals Chamber Judgment (Dissenting Opinion of Judge Liu), paras 7, 9, 15, 18.

tice and *opinio juris* do not exist so as to make either theory part of customary international law'.<sup>186</sup>

The ICTR followed *Gacumbitsi* and *Seromba* in subsequent cases.<sup>187</sup> In the *Simić et al* case, Judge Lindholm supported charging the accused on the basis of co-perpetration.<sup>188</sup> The Appeals Chamber in *Simić et al*, however, relied on JCE liability to convict the accused.<sup>189</sup>

#### 5.5.2.4 Observations and summary

Case law demonstrates that indirect (co-)perpetration liability was less widely accepted by the ICTY and the ICTR in their convictions. Rare cases of two *ad hoc* tribunals support its customary status, and some decisions have stated that indirect co-perpetration does not exist under customary law.<sup>190</sup> The Trial Chamber in the *Milutinović et al* case did not ascertain or reject the form of liability labelled 'indirect co-perpetration' under customary law in general, but rejected indirect co-perpetration with the specific mental element.<sup>191</sup> In addition, rejecting this liability does not mean that the accused in these cases were not liable. Instead, the *ad hoc* tribunals employed JCE liability to convict. The tribunals rejected the use of the term 'indirect co-perpetration' for lack of customary basis, rather than the way of imposing liability on the accused in these scenarios. This way of solving issues in these decisions indicates that indirect co-perpetration and JCE deal with similar situations. In these cases, the ICTY's formulation of JCE, in effect, is a substitute for the construction of indirect co-perpetration in general.

In conclusion, indirect co-perpetration with these 'specific mental elements' was not recognised as a customary rule by the ICTY. These cases ascertaining or rejecting the customary status of indirect co-perpetration confirm the way of attributing liability to the accused for the crimes committed by non-members of his/her group who were indirectly used by the accused's co-perpetrators. The ICTY labelled this mode of liability with different elements as JCE rather than indirect co-perpetration.

186 *Gacumbitsi* Appeals Chamber Judgment (Separate Opinion of Judge Shahabuddeen), para 51; Mohamed Shahabuddeen, 'Judicial Creativity and Joint Criminal Enterprise' in S. Darcy and J. Powderly (eds), *Judicial Creativity at the International Criminal Tribunals* (Oxford: OUP 2010) 184-203.

187 *Kalimanzira v The Prosecutor* (Judgement) ICTR-05-88-A (20 October 2010), paras 218-19; *Rukundo v The Prosecutor* (Judgement) ICTR-2001-70-A (20 October 2010), paras 15-16, 38; *Prosecutor v Munyakazi* (Judgment) ICTR-97-36A-A (28 September 2011), paras 135-36.

188 *Simić et al* Trial Judgment (Separate and Partly Opinion of Judge Per-Johan Lindholm), para 2.

189 *Simić et al* Appeals Chamber Judgment, para 62.

190 *ibid*, para 40; *Stakić* Appeals Chamber Judgment, para 622; *Prosecutor v Gotovina et al* (Decision on Prosecution's Consolidated Motion to Amend the Indictment and Joinder) ICTY-03-73-PT, ICTY-01-45-PT (14 July 2006), para 26.

191 *Milutinović et al* Trial Chamber Decision on Indirect Co-perpetration 2006, para 39.

### 5.5.3 Brđanin joint criminal enterprise liability

This section examines indirect co-perpetration through the lens of the *Brđanin* JCE liability. In *Brđanin*, the accused was President of a 'War Presidency' of the Autonomous Region of Krajina (ARK) in Bosnia and Herzegovina. Based on JCE (I and III), Radoslav Brđanin was charged for the acts of deportation, forcible transfer of civilians and persecution committed by members of the police, the army and Serb paramilitary forces, which were used by the ARK Crisis Staff to implement a Strategy Plan of creating a separate Bosnian Serb state. Where physical executors (members of the army and Serb paramilitary forces) outside the enterprise (ARK) committed the crimes, the Trial and Appeals Chambers in *Brđanin* clarified the formulation of JCE in two different ways.

#### 5.5.3.1 JCE: 2004 *Brđanin* Trial Judgment and subsequent constructions

The issues of *Brđanin* JCE may be analysed in three related aspects: (i) what is the size of the enterprise, small or large-scale; (ii) must the physical executors be members of the same enterprise as the accused; and (iii) is an agreement required between the accused and the physical executor?

The *Brđanin* Trial Chamber first considered that JCE liability does not apply to a large-scale enterprise, where the physical executors and Brđanin are far from each other.<sup>192</sup> After analysing the evidence, the Trial Chamber found that an enterprise between Brđanin and the physical executors outside the enterprise (ARK) could not be established.<sup>193</sup> In addition, in its view, the prosecution failed to prove that: (i) all physical executors were members of the same JCE as Brđanin, and (ii) there was a mutual understanding or agreement between the accused and physical executors to commit a specific crime in furtherance of the common purpose.<sup>194</sup> The Chamber concluded that JCE was not an appropriate mode of liability to describe the responsibility of the accused and held the accused liable for aiding and abetting the crimes.<sup>195</sup>

This trial judgment is an attempt to limit the application of JCE liability. Its reasoning implies that the size of the enterprise is small, that physical executors must be a part of the same JCE as the accused, and that an agreement is required between the accused and physical executors. The *Brđanin* Trial Chamber rendered the judgment out of the concern that 'it is inappropriate to impose liability on an accused where the link between the accused and those who physically perpetrated the crimes for which the accused is

192 *Prosecutor v Brđanin* (Judgement) ICTY-99-36-T (1 September 2004) [*Brđanin* Trial Judgment], para 355.

193 *ibid*, paras 346-47.

194 *ibid*, paras 341-42, 344, 351-54. See also *Krnojelac* Trial Judgment, para 84; *Brđanin & Talin* Decision on Amended Indictment 2001, para 44; *Furundžija* Appeals Chamber Judgment, paras 120-21. *Krnojelac* Appeals Chamber Judgment, paras 84-97 supporting a common purpose, but rejecting a required proof of agreement.

195 *Brđanin* Trial Judgment, paras 355-56, 367-69.

charged is too tenuous'.<sup>196</sup> The agreement requirement ensures a close link between the accused and physical executors, thus, excluding the accused's responsibility for the crimes that occurred independently to achieve the common plan but are attributable to other JCE members.<sup>197</sup> In the Chamber's view, an accused is not liable for the crime directly executed by individuals outside the enterprise under the liability of JCE.

After the delivery of the *Brđanin* Trial Judgment, several indictments and decisions of the ICTY dismissed the ideas implied in the decision.<sup>198</sup> Firstly, it is argued that the size of the enterprise is irrelevant in relation to the applicability of JCE liability. In some circumstances, 'crimes committed by other participants in a large-scale enterprise will not be foreseeable to an accused'.<sup>199</sup> Nevertheless, JCE III applies to both small and large-scale enterprises in customary international law, only if the mental element of foreseeability has been satisfied.<sup>200</sup>

In addition, the notion of membership and shared agreement viewpoint were gradually dismissed.<sup>201</sup> The two issues occurred in the *Milutinović et al* and *Popović et al* cases. In *Milutinović et al*, aside from indirect co-perpetration as an alternative form of responsibility as analysed above, the accused were also indicted for 'participation in a joint criminal enterprise as a co-perpetrator' for the crimes committed by physical executors who were non-participants of the JCE but were used by the participants in the JCE to implement the common plan. An accused challenged the jurisdiction of the ICTY and argued that:

neither the Statute nor customary international law recognise[s] the proposition that an accused may be held responsible for his participation in a joint criminal enterprise ('JCE') where one or more of the JCE participants use persons outside the JCE to physically perpetrate the crime or crimes which constitute the JCE's common criminal purpose.<sup>202</sup>

196 *ibid*, para 418.

197 Boas *et al*, *International Criminal Law Practitioner Library*: Vol 1, 84-88. For an analysis of jurisprudence supporting the limitation approach prior to this Trial Chamber decision: at 89-95.

198 *Milutinović et al* Trial Chamber Decision on Indirect Co-perpetration 2006 (Separate Opinion of Judge Iain Bonomy); *Krajišnik* Trial Judgment.

199 *Karemera et al v The Prosecutor* (Decision on Jurisdictional Appeals: Joint Criminal Enterprise) ICTR-98-44-AR72.5, ICTR-98-44-AR72.6 (12 April 2006) [*Karemera et al* Appeals Chamber Decision on Jurisdiction 2006], para 17.

200 *Rwamakuba v The Prosecutor* (Decision on Interlocutory Appeal on Joint Criminal Enterprise to the Crimes of Genocide) ICTR-98-44-AR72.4 (22 October 2004), para 25; *Karemera et al* Appeals Chamber Decision on Jurisdiction 2006, paras 12, 16-17; *The Prosecutor v Karemera et al* (Decision on Defence Motion Challenging the Jurisdiction of the Tribunal – Joint Criminal Enterprise Rules 72 and 73 of the Rules of Procedure and Evidence) ICTR-98-44-R72 (5 August 2005), paras 7, 15-16; *Krajišnik* Trial Judgment, para 876; *Milutinović et al* Trial Chamber Decision on Indirect Co-perpetration 2006, para 22.

201 *Prosecutor v Haradinaj et al* (Amended Indictment) ICTY-04-84-PT (25 October 2006), paras 20-21; *Prosecutor v Haradinaj et al*, (Revised Second Amended Indictment) ICTY-04-84-PT (11 Jan 2007) [*Haradinaj et al* Revised Second Amended Indictment], para 29; *Krajišnik* Trial Judgment, para 883.

202 *Milutinović et al* Trial Chamber Decision on Indirect Co-perpetration 2006, para 3.

The Trial Chamber simply noted that: ‘the concept of JCE does not extend to circumstances in which the commission of a crime is said to have been effected through the hands of others whose *mens rea* is not explored and determined, and who are not shown to be participants in the JCE’.<sup>203</sup> The Chamber did not decide whether JCE liability applied in this context because these issues were not related to the tribunal’s jurisdiction but to the contours of JCE liability, which were matters to be addressed at trial.<sup>204</sup>

Judge Bonomy in his separate concurring opinion argued that membership of the physical executors in the same JCE as the accused was not necessary for the attribution of liability. Fellow members of the accused may ‘order’ or ‘induce’ non-members to commit crimes.<sup>205</sup> After reviewing other ICTY’s jurisprudence, Judge Bonomy concluded that:

it is not inconsistent with the jurisprudence of the Tribunal for a participant in a JCE to be found guilty of commission where the crime is perpetrated by a person or persons who simply act as an instrument of the JCE, and who are not shown to be participants in the JCE.<sup>206</sup>

Judge Bonomy analysed post-World War II cases and general principles of criminal law and posited that where evidence established a close and direct link between the accused the physical perpetrators, physical perpetrators’ mental state for the crime was not material for the interpretation of JCE liability.<sup>207</sup> It appears that he also disagreed with the viewpoint of a requirement of ‘shared agreement’ between the accused and the physical executors. The Trial Chamber in *Krajišnik* also rejected the requirements of membership and a shared agreement.<sup>208</sup>

In the *Popović et al* case, the prosecution proposed replacing ‘direct and/or indirect co-perpetration’ with that of ‘JCE with common purpose’ in the indictment.<sup>209</sup> According to the prosecution, ‘JCE with common purpose’ did not require the physical executors in the same JCE. The Trial Chamber allowed this amendment and missed the opportunity to discuss the membership and agreement issues, in particular, whether a shared agreement is

203 *ibid*, para 23.

204 *ibid*, paras 23-24. The majority of the *Popović et al* Trial Chamber followed the *Milutinović et al* approach to dismissing the request on the issue of the physical perpetrator in the JCE, see *Popović et al* Trial Chamber Decision, paras 20-22. For an analysis of this case, see Mauro Gatencacci, ‘The Principle of Legality’ in F. Lattanzi and W.A. Schabas (eds), *2 Essays on the Rome Statute of the International Criminal Court* (Editrice il Sirente 1999) 85-89, 91-93.

205 *Milutinović et al* Trial Chamber Decision on Indirect Co-perpetration 2006 (Separate Opinion of Judge Iain Bonomy), paras 3-13.

206 *ibid*, para 13.

207 *ibid*, paras 14-30.

208 *Krajišnik* Trial Judgment, paras 883-84, 1082, 1085. For an analysis of this decision, see Boas *et al*, *International Criminal Law Practitioner Library*: Vol 1, 100-03.

209 *Popović et al* Trial Chamber Decision, para 11.

necessary between the accused and the non-member physical executors.<sup>210</sup> The Appeals Chamber in *Brđanin* rejected the two requirements.

### 5.5.3.2 *The Brđanin formulation of JCE: 2007 Brđanin Appeals Chamber Judgment*

The *Brđanin* Trial Judgment was appealed. The prosecutor claimed that an enterprise might exist only at a leadership level. Also, no basis supported a conclusion that physical executors must be members of the JCE, and that no requirement of agreement existed under customary law.<sup>211</sup> The defence submitted that the prosecutor's arguments would create new law instead of applying existing customary law.<sup>212</sup> Considering jurisprudence of the post-World War II tribunals and the ICTY, the *Brđanin* Appeals Chamber dismissed the Trial Chamber's findings on the size, membership and agreement issues of JCE.<sup>213</sup>

The Appeals Chamber held: first, that an enterprise is not static and JCE liability applies to a large-scale enterprise, including region-wide JCEs.<sup>214</sup> Second, to establish a link between the accused and the crime, the decisive matter is whether a member of the JCE used the physical executors to further the common purpose, even if that member is not the accused and that the crime needs to be attributable to the accused's fellow member. The existence of such a link is a case-by-case issue. Accordingly, physical executors may be non-members of an enterprise.<sup>215</sup>

Third, an agreement to commit a specific crime is not required between the accused and the (non)-member physical executors. According to the Appeals Chamber, if the physical executor is a JCE member, an agreement requirement is superfluous for JCE I because that member has already shared the common purpose. However, if the physical executor is a non-member of the JCE, the accused and his/her fellow members must share an intent to further that crime. In the latter situation, the key issue is whether 'the crime forms part of the common purpose', which is an evidential matter rather than a legal requirement.<sup>216</sup> In addition, the mental element of JCE III is that the accused has foreseen the commission of the offence. The Appeals Chamber dismissed an agreement between the non-physical executor and

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210 *ibid*, para 21.

211 *Brđanin* Appeals Chamber Judgment, paras 367-70, 377-82.

212 *ibid*, paras 371-73, 383-84.

213 *ibid*, paras 393-404, 411, 418-19, referring to Judge Bonomy's Separate opinion in the *Milutinović et al* Trial Chamber Decision on Indirect Co-perpetration 2006, *Krstić* Trial Judgment and the *Rwamakuba* Appeals Chamber Judgment.

214 *ibid*, paras 420-25; *Krajišnik* Trial Judgment, para 876; *Kvočka et al* Trial Judgment, para 307.

215 *ibid*, paras 367, 410-15, 430.

216 *ibid*, paras 415-19.

the accused. Judge Van den Wyngaert in her declaration also took a view similar to that of the majority on these issues.<sup>217</sup>

To hold the accused liable for the crime, the *Brđanin* Appeals Chamber held that:

[The accused] has the intent to commit a crime, he has joined with others to achieve this goal, and he has made a significant contribution to the crime's commission. Pursuant to the jurisprudence, which reflects standards enshrined in customary international law when ascertaining the contours of the doctrine of joint criminal enterprise, he is appropriately held liable not only for his own contribution, but also for those actions of his fellow JCE members that further the crime (first category of JCE) or that are foreseeable consequences of the carrying out of this crime, if he has acted with *dolus eventualis* (third category of JCE). It is not decisive whether these fellow JCE members carried out the *actus reus* of the crimes themselves or used principal perpetrators who did not share the common objective.<sup>218</sup>

In the *Brđanin* case, the centre of the three aspects of JCE seems to be the dismissal of an agreement between the accused and the physical executor. The *Brđanin* formulation of JCE appears to deconstruct the basis of JCE liability: common purpose or joint intention.<sup>219</sup> Dissenting opinions were expressed on this *Brđanin* formulation of JCE. Judge Meron declined to rely on the expansive employment of JCE liability to hold the accused liable for a crime attributable to another JCE member.<sup>220</sup> Judge Shahabuddeen also disagreed with the majority on the membership issue and restricted the application of JCE. In his view, an agreement between the accused and the physical executor is required, while an individual would be considered as a member of the JCE if s/he 'acquiesces in the JCE and perpetrates the crime within its common purpose'.<sup>221</sup> In this logic, the physical executor would be considered as a member in a large-size JCE if the enterprise were sufficiently large.<sup>222</sup> These controversies also indicate the difficulty in attributing liability to an accused at the leadership level, who has no personal contact with these perpetrators and victims, for a crime committed by physical executors at the executive level.

#### 5.4.3.3 Observations and summary

The *Brđanin* formulation of JCE shows a trend of expanding the application of JCE liability at the ICTY. It should be noted that the factual scenarios in the *Brđanin* case were different from the circumstance in the *Tadić* case. In the *Tadić* case, the accused was a reserve police officer and *Tadić's* enterprise

217 *Brđanin* Appeals Chamber Judgment (Declaration of Judge Van den Wyngaert), para 1.

218 *Brđanin* Appeals Chamber Judgment, para 431.

219 Ohlin, 'Second-Order Linking Principles: Combining Vertical and Horizontal Modes of Liability'.

220 *Brđanin* Appeals Chamber Judgment (Separate Opinion of Judge Meron), paras 6-8.

221 *Brđanin* Appeals Chamber Judgment (Partly Dissenting Opinion of Judge Shahabuddeen), paras 2-18.

222 *ibid.*, paras 2, 4.

comprised a small group of active participants. By contrast, Brđanin was a political figure at the leadership level, Brđanin's alleged enterprise co-participants at the leadership level were also not physically involved in the crimes, and the lower-ranking physical executors (members of the army and Serb paramilitary forces) were not participants in his enterprise. If the physical executors did belong to the same enterprise as the accused, it is presumed that they shared the common purpose of the enterprise.<sup>223</sup> If the physical executors are non-members of the accused's enterprise, but have reached an agreement with the accused to commit a crime in furthering a common plan of the accused's enterprise, this construction of JCE remains within the scope of *Tadić* JCE.

The *Brđanin* formulation of JCE, however, went further. *Brđanin* JCE removed the membership requirement, which in nature is a dismissal of a preliminary agreement between the accused and the physical executor. In addition, a common purpose is not required when the person is a non-member of the accused's enterprise. By virtue of *Brđanin* JCE, an accused is held liable for crimes committed by non-members of the same JCE, who were merely 'used' by the accused's fellow member of the JCE and shared no common purpose with the accused to commit the crimes. The essential link of this liability is that the accused's fellow members in the JCE acted with a common plan when using the physical executors as tools. In this way, *Brđanin* JCE is employed to impute liability to the accused at the leadership level of that enterprise for the crimes committed by these non-member physical executors.

The *Brđanin* formulation of JCE opens the door to hold leaders liable. *Brđanin* JCE enables convictions of all other members at intermediate and low levels of the enterprise. It also provides a way to prosecute masterminds who are far from the physical executors and the crime. *Brđanin* JCE has been called 'leadership level' JCE, which is a new form of liability.<sup>224</sup> As shown above, *Brđanin* JCE holds the leader of an enterprise without physical involvements to be legally responsible for a crime perpetrated by persons who were used by the accused's fellow members. Also, the accused's fellow members are not limited to those who committed the crime directly and physically by themselves. It suffices that the fellow members indirectly 'used' others to commit the crime in accordance with the common plan. Furthermore, the crimes committed may either form part of or exceed the common plan; however, the physical executor need not be a member of the accused's enterprise, nor share an understanding with the accused. The ICTY viewed the *Brđanin* JCE as a reflection of customary international law.<sup>225</sup>

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223 For discussions of the membership, see Cliff Farhang, 'Point of No Return: Joint Criminal Enterprise in *Brđanin*' (2010) 23 *Leiden J Intl L* 137, 153.

224 Héctor Olásolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes* (Oxford: Hart Publishing 2009) 182-84, 202-07, 227; Van Sliedregt, *Individual Criminal Responsibility in International Law* 136, 157.

225 *Brđanin Appeals Chamber Judgment*, para 431.

Subsequent case law of the ICTY and the ICTR has endorsed *Brđanin* JCE and further clarified its construction.<sup>226</sup> In *Dorđević*, the defendant submitted that in the leadership cases *Brđanin* JCE was not clearly established in customary international law when the physical executors are not members of the JCE.<sup>227</sup> Also, it was argued that *Brđanin* JCE was ‘indirect co-perpetration by another name’.<sup>228</sup> The Appeals Chamber rejected the first argument because there is no cogent reason for it to depart from its consistent jurisprudence.<sup>229</sup> The second argument was also dismissed. The Appeals Chamber did not clarify the meaning of ‘use’ in the formulation of *Brđanin* JCE but held that it is not equivalent to ‘the use of a tool’. Other chambers, however, tried to identify how the accused members ‘used the forces’ to which these physical executors belonged.<sup>230</sup> The Appeals Chambers in the *Martić* case employed the approach of ‘control over the armed force’ to identify the essential link of ‘acted with common purpose’ to establish *Brđanin* JCE liability.<sup>231</sup> Relying on the ‘control over armed force’ approach, the Chamber

226 For confirming the physical perpetrators as non-JCE members, see *Brđanin* Appeals Chamber Judgment, para 367; *Prosecutor v Haradinaj et al* (Third Amended Indictment) ICTY-04-84-PT (7 September 2007), paras 25-29; *Prosecutor v Limaj et al* (Judgement) ICTY-03-66-A (27 September 2007) [*Limaj et al* Appeals Chamber Judgment], para 120; *Martić* Appeals Chamber Judgment, paras 168-169; *Prosecutor v Krajišnik* (Judgement) ICTY-00-39-A (17 March 2009) [*Krajišnik* Appeals Chamber Judgment], paras 664-665; *Prosecutor v Gotovina & Markač* (Judgement) ICTY-06-90-A (16 November 2012), para 89; *Haradinaj et al* Retrial Judgment, para 618; *Prlić et al* Appeals Chamber Judgment, Vol 1, paras 218-19; *Dorđević* Appeals Chamber Judgment, paras 72, 165; *Karemera & Ngirumtse v The Prosecutor* (Partially Dissenting Opinion of Judge Tuzmukhamedov), para 14; *Ngirabatware* Appeals Chamber Judgment, para 325. For endorsing the dismissal of an agreement requirement, see *Kvočka et al* Appeals Chamber Judgment, para 168; *Limaj et al* Appeals Chamber Judgment, para 120; *Martić* Appeals Chamber Judgment, paras 171-72, 195; *Krajišnik* Appeals Chamber Judgment, paras 225-26, 235-36; *Haradinaj et al* Retrial Judgment, para 621; *Prosecutor v Karadžić* (Judgement) ICTY-95-5/18-AR98bis.1 (11 July 2013), para 79; *Prosecutor v Stanišić & Simatović* (Judgement) ICTY-03-69-T (20 May 2013), para 1259; *Prlić et al* Trial Judgment, Vol 1, paras 202-05, 210, 220; *Šainović et al* Appeals Chamber Judgment, paras 1256-60; *Dorđević* Appeals Chamber Judgment, para 165; *Prosecutor v Popović et al* (Judgement) ICTY-05-88-A (30 January 2015) [*Popović et al* Appeals Chamber Judgment], para 1050; *Prosecutor v Stanišić & Župljanin* (Judgement) ICTY-08-91-A (6 March 2016) [*Stanišić & Župljanin* Appeals Chamber Judgment], para 119; *Prosecutor v Mladić* (Judgment) ICTY-09-92-T (22 November 2017), para 3561; *Prlić et al* Appeals Chamber Judgment, Vol II, paras 584-91; *Karemera & Ngirumtse v The Prosecutor* (Judgment) ICTR-98-44-A (29 September 2014) [*Karemera & Ngirumtse* Appeals Chamber Judgment], para 605.

227 *Prosecutor v Dorđević* (Vlastimir Dorđević’s Appeal Brief) ICTY-05-87/1-A (15 August 2011), para 75. The *Justice*, *RuSHA* and *Einsatzgruppen* cases are inadequate basis to sustain JCE liability in leadership cases.

228 *Dorđević* Appeals Chamber Judgment, para 61 and fn 194.

229 *ibid*, paras 59-72.

230 *Brđanin* Appeals Chamber Judgment, paras 412-13, 418; *Martić* Appeals Chamber Judgment, paras 168-69; *Krajišnik* Appeals Chamber Judgment, paras 225-26; *ibid*, paras 63, 165.

231 *Martić* Appeals Chamber Judgment, paras 169, 187; *Stakić* Appeals Chamber Judgment, paras 59, 62-63, 79-85; *Dorđević* Appeals Chamber Judgment, paras 69, 165.

concluded that Milan Martić's fellow members acted with the common purpose when they used the members of another armed force to carry out the crimes.<sup>232</sup> The *Brđanin* formulation of JCE also tends to cover using 'the armed forces' or 'organisation' as a way of 'use'. Despite a missing reference to the notion of indirect perpetration (through an organisation), the ICTY in some cases, in effect, combined the *Tadić* JCE with indirect perpetration to attribute liability to the accused at the leadership level.<sup>233</sup>

The *Brđanin* formulation of JCE seems to cover a scenario similar to what occurred in the *Katanga & Ndjudjlo* case.<sup>234</sup> At the ICTY, *Brđanin* JCE dates from 2007. In 2008, the Pre-Trial Chamber of the ICC in *Katanga & Ndjudjlo* introduced indirect co-perpetration. The Chamber held that indirect co-perpetration is encompassed in the Rome Statute. One reason why the Pre-Trial Chamber in this case did not clarify why it employed 'indirect co-perpetration' rather than the expression of '*Brđanin* JCE', which is said to be enshrined under customary law, to depict liability for 'joint commission of a crime through one or more persons', might be that the Chamber was aiming at legal consistency.<sup>235</sup> In a preceding decision, the *Lubanga* Pre-Trial Chamber employed the 'widely recognised' theory of 'control over the act' in interpreting perpetration.<sup>236</sup> The *Lubanga* Pre-Trial Chamber deemed JCE a liability derived from a purely subjective approach, which requires a shared intent and neglects objective factors relating to the commission of the crime.<sup>237</sup> Therefore, the Pre-Trial Chamber in *Katanga & Ndjudjlo* adhered to the control theory and did not employ subjective-oriented *Brđanin* JCE liability to address the scenario.

The ICTY and the ICC have developed the concepts of *Brđanin* JCE and indirect co-perpetration. The *Brđanin* JCE is reminiscent of the rejected rulings of the ICTY on co-perpetratorship and indirect co-perpetration. The *Stakić* Appeals Chamber rejected the use of the term 'indirect co-perpetration' for its lack of customary status with specific elements but employed JCE liability to hold the accused responsible. The construction of the *Brđanin* JCE seems to revive the rejected indirect co-perpetration, although under the label of JCE, for crimes physically committed by an individual who is out-

232 *Milutinović et al* Trial Judgment, Vol 3.

233 Yanev, *Theories of Co-perpetration in International Criminal Law* 353-57.

234 Chantal Meloni, 'Fragmentation of the Notion of Co-perpetration in International Criminal Law' in C. Stahn and L. Van den Herik (eds), *The Diversification and Fragmentation of International Criminal Law* (Leiden: Martinus Nijhoff 2012) 498-99.

235 *Katanga & Ndjudjlo* Decision on Confirmation of Charges, para 486.

236 *Lubanga* Decision on Confirmation of Charges, para 330. For a discussion on the claim of 'widely recognised', see Jens D. Ohlin, 'Co-Perpetration: German *Dogmatik* or German Invasion?' in C. Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford: OUP 2015) 517, 523-24.

237 *Lubanga* Decision on Confirmation of Charges, para 329.

side the enterprise.<sup>238</sup> Van Sliedregt writes that '[i]ndirect (co-) perpetration seems to have recently gained recognition in ICTY case law, albeit in the context of JCE liability.'<sup>239</sup> William Schabas also notes that the two approaches seem to 'lead to much the same result in [their] ability to facilitate convictions'.<sup>240</sup> As Lachezar Yanev's research has shown, if the standard that the physical executors are deemed 'tools' is accepted, *Brđanin* JCE at the leadership level as a combination of JCE and indirect perpetration would allow to brand the JCE members as indirect co-perpetrators of the crimes committed by the non-members of the enterprise.<sup>241</sup> Barbara Goy points out that, compared to the *Brđanin* JCE of the ICTY, indirect co-perpetration at the ICC has 'more onerous objective requirements, and different subjective requirements'.<sup>242</sup>

With regard to the liability of an accused at the leadership level, the material elements of the two notions share some similarities: (i) a common plan between the accused and the co-perpetrators; (ii) a level of contribution to the commission of the crime; (iii) physical executors who may not belong to the same enterprise as the accused or to the organisation under direct control of the accused;<sup>243</sup> and (iv) no requirement of an agreement between the accused and the physical executors.<sup>244</sup> Differences also exist between the two notions. Indirect co-perpetration is constrained by 'the control over the act' doctrine and the 'essential contribution' requirements as opposed to *Brđanin* JCE. Indirect co-perpetration requires the joint control over the organisation and the accused's *condition sine qua non* contribution to the commission of the crime.<sup>245</sup> In contrast, *Brđanin* JCE requires the co-perpetrators 'acting with common purpose' and a significant contribution. The similarities and differences in the elements merit further detailed discussions but go beyond the focus of this research.<sup>246</sup>

The differences above indicate that the jurisprudence of the UN *ad hoc* tribunals concerning *Brđanin* JCE plays less of a role in interpreting indirect co-perpetration than at the ICC. In addition, the quarrels seem to be about

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238 *Haradinaj et al* Revised Second Amended Indictment, paras 25, 29; Van Sliedregt, *Individual Criminal Responsibility in International Law* 158-63.

239 Van Sliedregt, *ibid*, 93.

240 Schabas, *The International Criminal Court: A Commentary on the Rome Statute* 568.

241 Yanev, *Theories of Co-perpetration in International Criminal Law* 390.

242 Barbara Goy, 'Individual Criminal Responsibility before the International Criminal Court: A Comparison with the *ad hoc* Tribunals' (2012) 12 *ICLR* 1, 49-50.

243 *Brđanin* Appeals Chamber Judgment, para 413.

244 Van Sliedregt, *Individual Criminal Responsibility in International Law* 170-71.

245 *Lubanga* Decision on Confirmation of Charges, paras 342, 347.

246 Barbara Goy, 'Individual Criminal Responsibility before the International Criminal Court: A Comparison with the *ad hoc* Tribunals' (2012) 12 *ICLR* 1, 26-50; Yanev, *Theories of Co-perpetration in International Criminal Law*, chapters 3 and 5.

detailed elements rather than a different way of attributing liability. Commentators debated whether the link between the accused and the physical executor in *Brđanin* JCE is too loose, and proposed alternative theories and qualifications to fill a linkage gap in dealing with the *Brđanin* scenario, such as functional perpetration (perpetration by means) theory.<sup>247</sup> This functional perpetration idea is closely linked to indirect co-perpetration at the ICC. Furthermore, the convergences demonstrate that both liabilities allow establishing a link to charge the accused at the leadership level for crimes committed by an individual who was not in the same enterprise or organisation but used by the accused's fellow member. The two notions deal with a similar factual scenario: a crime was committed by physical executors at the executive level who were used by the accused's co-perpetrators at the leadership level to carry out a common plan of an enterprise/organisation, and these executors were non-members of the enterprise/organisation to which the accused belongs. Ohlin points out that they may function in a similar way to convict the accused for the crimes committed by the physical executors.<sup>248</sup>

In conclusion, case law of the ICTY relating to *Brđanin* JCE evidences a departure from the *Tadić* JCE but serves a similar function of indirect co-perpetration in the context where a leader is far from the physical executors. After the delivery of the *Brđanin* Appeals Chamber judgment, an expansive JCE liability for international crimes has developed to deal with the scenario covered by indirect co-perpetration, although with different objective and subjective elements. To establish a link between the accused and the crime in this scenario, *Brđanin* JCE and indirect co-perpetration would attribute the liability to the accused for a crime committed by or imputed to his/her fellow member of the enterprise at the leadership level through a non-JCE member perpetrator at the executive level. The ICC jurisprudence and decisions of two *ad hoc* tribunals that combined *Tadić* JCE and indirect perpetration seem to support this unique mode of liability, indirect co-perpetration, in general, but not this mode of liability with specific elements. Yet, rare practice and *opinio juris* of States acknowledge such a liability as will be seen below.

#### 5.5.4 Modes of liability: national legislation and cases

International crimes are punishable in different ways on a national level.<sup>249</sup> A war crime in a State might be covered by a special law, but a crime against

247 For discussions on alternatives for dealing with the circumstance, see Yanev, *Theories of Co-perpetration in International Criminal Law* 328-94; Van der Wilt, 'Joint Criminal Enterprise: Possibilities and Limitations'; Katrina Gustafson, 'The Requirement of an "Express Agreement" for Joint Criminal Enterprise Liability: A Critique of *Brđanin*' (2007) 5 JICJ 134; Cassese *et al* (eds), *Cassese's International Criminal Law* 169.

248 Jens D. Ohlin, 'Second-Order Linking Principles: Combining Vertical and Horizontal Modes of Liability' (2012) 25 *Leiden J Intl L* 771.

249 A. Eser *et al* (eds), *National Prosecution of International Crimes*, Vols 1-7 (Freiburg im Breisgau: Ed. Iuscrim 2003-2006).

humanity might be punishable as an ordinary criminal offence enumerated in a criminal code; and the crime of genocide might be covered by special provisions in a criminal code.<sup>250</sup> Likewise, the liability provisions in a national criminal code might apply to international crimes that were set out in the code and a special law. For example, Australia's *War Crimes Act 1945*, as amended in 2010, provides that 'Chapter 2 of the Criminal Code [concerning the general principles of criminal responsibility] applies to all offences [of war crimes] against this Act'.<sup>251</sup> Due to different ways of national prosecution for international crimes, the applicable laws in attributing liability are mainly covered by special implementation laws, penal codes and military manuals. This subsection focuses on the practice of States concerning complicity for joint commission or common purpose. For this purpose, it analyses attribution of liability for a crime committed by several persons in available national law (criminal codes and case law) and special implementation legislation of States to show whether indirect co-perpetration is well accepted.

#### 5.5.4.1 National criminal codes and implementation legislation

Two considerations should be kept in mind in analysing the customary status of liabilities relying on national criminal codes. Some States Parties have only implemented international crimes in their criminal codes or special laws.<sup>252</sup> Additionally, several penal laws of non-party States of the Rome Statute only deal with ordinary criminal offences. These national laws are not valuable for the identification of a customary rule in this regard.

At the national level, there are different kinds of national provisions that may be relevant to indirect co-perpetration. Firstly, some national laws provide liability for joint commission with or without prior agreement.<sup>253</sup> These States provide a provision similar or identical to the following paragraph that:

250 In some States, their Penal Codes cover all the three crimes, for example, Croatia, Costa Rica, Czech Republic, Estonia, Finland, Georgia, Hungary, Lesotho and Panama, Poland, Romania, Serbia and Spain, see National Implementing Legislation Database. In US and Israel, crimes against humanity are deemed ordinary criminal offence, while genocide is regulated as a special criminal offence.

251 Australia, *War Crimes Act 1945*, amended 2010, § 3A; Australia, *Geneva Conventions Act 1957*, amended 2016, § 6A.

252 See National Implementing Legislation Database.

253 Afghanistan, *Penal Code 1976*, art 39(2), art 49; Australia, *Criminal Code Act 1995*, § 11.2A; Bangladesh, *Penal Code 1860*, amended 1973, arts 34-35, 37; Botswana, *Penal Code 1964*, amended 2005, § 22; Brunei Darussalam, *Penal Code 1951*, revised edition 2001, §§ 34-35, 37; Canada, *Criminal Code 1985*, amended 2017, § 21(2); Cook Islands, *Criminal Act 1969*, § 68(2); Cyprus, *Criminal Code 1959*, § 21; Ethiopia, *Criminal Code 2005*, art 38; Fiji, *Crimes Decree 2009*, § 46; India, *Penal Code 1860*, amended 2013, §§ 34-35, 37; Kenya, *Criminal Code 1930*, amended 2010, § 21; Kiribati, *Criminal Code 1965*, amended 1977, art 22; Lesotho, *Penal Code Act 2010*, § 26; Malaysia, *Penal Code 1936*, amended 2014, §§ 34-35, 37; Myanmar, *Penal Code 1861*, amended 2016, §§ 34-35, 37; Malawi, *Penal Code 1930*, § 22; Nauru, *Criminal Code 1899*, amended 2011, § 8; New

When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.<sup>254</sup>

These rules concerning joint commission with shared purpose are limited to joint commission of the crimes at the execution stage. They are similar to *Tadić* JCE (common purpose) liability, but distinct from indirect co-perpetration or *Brđanin* JCE at the leadership level. Therefore, they do not indicate the way to attribute liability as depicted by indirect co-perpetration.

Secondly, a large amount of national legislation supports the liability of co-perpetration<sup>255</sup> and indirect perpetration.<sup>256</sup> Judge Schomburg argued that both co-perpetration and indirect perpetration were accepted as modes of

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Zealand, Criminal Code 1961, amended 2013, § 66(2); Nigeria, Criminal Code Act 1916, amended 1990, § 8; Pakistan, Penal Code 1860, amended 2017, §§ 34-35; Philippines, Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity 2009, § 8(a)(3); Papua New Guinea, Criminal Code Act 1974, § 8; Samoa, Crimes Act 2013, § 33(2); Seychelles, Penal Code 1955, amended 2014, § 23; Singapore, Penal Code 1871, amended 2015, §§ 34-35, 37; Solomon Islands, Penal Code 1996, amended 2016, § 22; Sri Lanka, Penal Code 1883, amended 2006, §§ 32-33, 35; Sudan, Criminal Act 1991, § 21; Tanzania, Code of Criminal Law 1945, amended 2007, § 23; Tuvalu, Penal Code 2008, § 22; Uganda, Penal Code Act 1950, revised edition 1998, § 20; UK, Penal Code 1990, amended 2014, § 20; Ukraine, Criminal Code 2001, amended 2010, art 28(2); Vanuatu, Penal Code 1981, amended 2016, § 31; Zambia, Penal Code Act 1931, amended 2011, § 22.

254 Identical provisions in Botswana, Penal Code 1964, amended 2005, § 22; Cyprus, Criminal Code 1959, § 21; Kenya, Criminal Code 1930, amended 2010, § 21; Kiribati, Criminal Code 1965, amended 1977, art 22; Nauru, Criminal Code 1899, amended 2011, § 8; New Zealand, Criminal Code 1961, amended 2013, § 66(2); Nigeria, Criminal Code Act 1916, amended 1990, § 8; Papua New Guinea, Criminal Code Act 1974, § 8; Samoa, Crimes Act 2013, § 33(2); Solomon Islands, Penal Code 1963, amended 1990, § 22; Seychelles, Penal Code 1955, amended 2014, § 23; Tanzania, Code of Criminal Law 1945, amended 2007, § 23; Uganda, The Penal Code Act, revised edition 1998, § 20; UK, Penal Code 1990, amended 2014, § 20; Zambia, Penal Code Act 1931, amended 2011, § 22.

255 More than 90 State legislation provide provisions of co-perpetration. See Afghanistan, Penal Code 1976, art 38(1); Afghanistan, Law on Combat against Terrorist Offences 2008, art 18; Armenia, Criminal Code 2003, amended 2013, art 41(2); Andorra, Penal Code 2005, amended 2008, art 21; Austria, Criminal Code 1974, amended 2015, § 12; Azerbaijan, Criminal Code 1999, amended 2003, arts 32.2, 33.2; Bahamas, Penal Code 1924, amended 2014, art 14(2); Bolivia, Criminal Code and Criminal Procedural Code 1997, amended 2010, art 20; Bosnia and Herzegovina, Criminal Code 2003, amended 2016, art 31; Burundi, Penal Code 2009, art 37(1); Belarus, Penal Code of 9 July 1999, amended 2012, art 16(1), 17; Cabo Verde, Penal Code 2003, art 25; Cambodia, Provisions relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia during the Transitional Period 1991, art 27; Cameroon, Penal Code 1967, amended 2016, art 96; Chile, Criminal Code 2011, art 15(3); China, Criminal Law 1997, amended 2015, art 25; Colombia, Penal Code 2000, art 29(2); Democratic Republic of the Congo, Criminal Code 1940, amended 2004, art 21(1); Costa Rica, Penal Code 1970, art 45; Côte d'Ivoire, Penal Code 1981, amended 1995, arts 26, 29; Croatia, Criminal Code 1998, amended 2011, art 36(2); Cuba, Penal Code 1987, amended 1997, art 18(2)(ch); Czech Republic, Criminal Code 2009, amended 2011, § 23; Ecuador, Penal Code 1997, amended 2013, art 42; El Salvador, Penal Code 1997, amended 2010, art 33; Estonia, Criminal Code 2002, amended 2017, § 21(2); Eritrea, Penal Code 2015, art 37(3); Finland, Criminal Code 1889, amended

2015, Chapter 5, § 3; Georgia, Criminal Code of 1999, amended 2016, arts 22, 25(2), 27(2); Germany, Criminal Code 1871, amended 2016, art 25(2); Ghana, Criminal Code 1960, art 13(2); Greece, Penal Code 1950, amended 2003, art 45; Grenada, Criminal Code 1987, amended 1993, § 14(2); Guatemala, Penal Code 1973, arts 36; Guinea, Criminal Code 1998, art 52; Haiti, Penal Code 1995, art 44; Honduras, Penal Code 1983, amended 2008, art 32; Hungary, Criminal Code 1978, amended 2012, § 13(3); Iraq, Statute of the Iraqi Special Tribunal 2005, art 15(2)(a); Iraq, Penal Code 1969, paragraph 47(2); Iran, The Islamic Penal Code 2013, art 125; Israel, Penal Code 1977, amended 1990, § 29(b); Italy, Criminal Code 1930, amended 2017, art 113; Japan, Criminal Code 1907, amended 2006, art 60; Kazakhstan, Criminal Code 1997, amended 2004, art 29(2); Kyrgyzstan, Criminal Code 1997, amended 2006, art 30(3); Latvia, Criminal Law 1998, amended 2013, § 19; Liechtenstein, Criminal Code 1988, amended 2013, § 12; Lithuania, Criminal Code 2000, amended 2015, art 24(3); Luxembourg, Criminal Code 1879, amended 2016, art 66(1); Maldives, Penal Code 1968, amended 2004, § 10; Malta, Criminal Code 1854, amended 2016, § 45; Macedonia, Criminal Code 1996, amended 2009, art 22; Mexico, Criminal Code 1931, amended 2013, art 13(3); Moldova, Criminal Code 2002, amended 2009, art 44; Mongolia, Criminal Code 2002, art 36.2; Montenegro, Criminal Code 2003, amended 2012, art 23(2); Morocco, Penal Code 1962, amended 2016, art 128; Netherlands, Criminal Code 1881, amended 2012, § 47(1)(1); Nicaragua, Penal Code 1974, art 24.3; Panama, Penal Code 2007, art 44; Paraguay, Penal Code 1997, art 29(2); Peru, Penal Code 1991, amended 2010, art 23; Poland, Criminal Code 1997, amended 2016, art 18 § 1; Portugal, Criminal Code 2006, amended 2015, art 26; Republic of Korea, Criminal Act 1953, amended 2005, art 30; Romania, Criminal Code, 2009, amended 2012, art 46; Rwanda, Penal Code 1977, amended 2012, art 90; Philippines, the Revised Penal Code 2012, art 17(3); Russian Federation, Criminal Code 1996, amended 2012, arts 33(2), 34(2); Serbia, Criminal Code 2005, amended 2014, art 33; Singapore, Penal Code 1871, amended 2015, § 37; Sao Tome and Principe, Penal Code 2012, art 26(c); Spain, Criminal Code 1995, amended 2015, art 28; Slovakia, Criminal Code 2005, amended 2009, § 20; Slovenia, Criminal Code 2008, amended 2009, § 20(2); Somalia, Penal Code 1963, art 72; Thailand, Penal Code 1956, amended April 2016, § 83; Timor-Leste, Penal Code 2009, art 30(2); Turkmenistan, Penal Code 1997, amended 2013, art 33(2); Turkey, Penal Code 2016, art 37(1); Tajikistan, Criminal Code 1998, arts 36(2), 37(2); Ukraine, Criminal Code 2001, amended 2010, arts 28(1)-(2); Uruguay, Criminal Code 1933, amended 2010, art 61; Uzbekistan, Criminal Code 1994, amended 2012, art 27; Vietnam, Penal Code 1999, art 20(3); Yemen, Republican Decree for Law No 12 for the Year 1994 Concerning Crimes and Penalties, art 21.

256 More than 70 State legislation provide indirect perpetration. See Andorra, Penal Code 2005, amended 2008, art 21; Austria, Criminal Code 1974, amended 2015, § 12; Azerbaijan, Criminal Code 1999, amended 2003, art 32.2; Bahamas, Penal Code 1924, amended 2014, arts 14(1), (4); Belize, Criminal Code, Revised Edition 2000, § 11(4); Bolivia, Criminal Code and Criminal Procedural Code 1997, amended 2010, art 20; Burundi, Penal Code 2009, art 20; Cabo Verde, Penal Code 2003, art 25; Chile, Criminal Code 2011, art 15(3); China, Criminal Law 1997, amended 2015, art 25; Colombia, Penal Code 2000, art 29(1); Cook Islands, The Geneva Conventions and Additional Protocols Act (2002); Democratic Republic of the Congo, Criminal Code 1940, amended 2004, art 21(3); Costa Rica, Penal Code 1970, art 45; Côte d'Ivoire, Penal Code 1981, amended 1995, art 25; Croatia, Criminal Code 1998, amended 2011, art 36(1); Cuba, Penal Code 1987, amended 1997, art 18(2)(d); Czech Republic, Criminal Code 2009, amended 2011, § 22(2); Djibouti, Penal Code 1995, art 23(3); Ecuador, Penal Code 1997, amended 2013, art 42; El Salvador, Penal Code 1997, amended 2010, art 34; Estonia, Criminal Code 2002, amended 2017, § 21(1); Ethiopia, Criminal Code 2005, art 32(1)(c); Eritrea, Penal Code 2015, art 37(1)(c); Finland, Criminal Code 1889, amended 2015, Chapter 5, § 4; France, Penal Code 1994, amended 2016, § 121-7; Ghana, Criminal Code 1960, art 13(1); Georgia, Criminal Code of 1999, amended 2016, art 22; Germany, Criminal Code 1871, amended 2016, art 25(1); Guatemala, Penal Code 1973, art 36; Honduras, Penal Code 1983, amended 2008, art 32; Hungary, Criminal Code 1978, amended 2012, § 13(2); Iran, The Islamic Penal Code 2013, art 128; Iraq, Statute of the Iraqi Special Tribunal 2005, art 15(2)(a); Italy,

liability in customary international law.<sup>257</sup> Even if Judge Schomburg's viewpoint is valid, it cannot be concluded that indirect co-perpetration as a merger of the two notions is a rule of customary law.<sup>258</sup> An empirical inductive overview of these provisions in penal laws of States shows that they do not demonstrate an expansive understanding of (co-)perpetration or indirect perpetration to cover the form of 'joint commission through an organisation'.<sup>259</sup>

A special form of liability for offences of conspiracy and criminal association should be noted. The liability for criminal association stipulates that leaders/organisers of a criminal organisation (group/community/association/society) are liable for all crimes committed by members of the group

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Criminal Code 1930, amended 2017, art 112; Israel, Penal Code 1977, amended 1990, § 29(c); Kyrgyzstan, Criminal Code 1997, amended 2006, art 30(3); Liberia, Criminal Code 1976, § 3.1(a); Latvia, Criminal Law 1998, amended 2013, § 17; Liechtenstein, Criminal Code 1988, amended 2013, § 12; Lithuania, Criminal Code 2000, amended 2015, art 24(3); Luxembourg, Criminal Code 1879, amended 2016, art 66(3); Maldives, Penal Code 1968, amended 2004, § 14; Malta, Criminal Code 1854, amended 2016, § 47(b); Mexico, Criminal Code 1931, amended 2013, art 13(4); Moldova, Criminal Code a 2002, amended 2009, art 42(2); Montenegro, Criminal Code 2003, amended 2012, art 23(1); Netherlands, Criminal Code 1881, amended 2012, § 47(1)(1); Nicaragua, Penal Code 1974, art 24.2; Panama, Penal Code 2007, art 43; Paraguay, Penal Code 1997, art 29(1); Peru, Penal Code 1991, amended 2010, art 23; Poland, Criminal Code 1997, amended 2016, art 18, § 1; Portugal, Criminal Code 2006, amended 2015, art 26; Rwanda, Law Setting up Gacaca Jurisdictions (2001), art 51; Slovenia, Criminal Code 2008, amended 2009, § 20(1); Spain, Criminal Code 1995, amended 2015, art 28; Sri Lanka's Geneva Conventions Act (2006), §§ 2-3; Sao Tome and Principe, Penal Code 2012, art 26(a); Somalia, Penal Code 1963, art 73; Tajikistan, Criminal Code 1998, art 36(2); Turkmenistan, Penal Code 1997, amended 2013, art 33(2); Turkey, Penal Code 2016, art 37(2); Timor-Leste, Penal Code 2009, art 30(1); Togo, Criminal Code 1992, amended 2012, art 247; Ukraine, Criminal Code 2001, amended 2010, art 27(2); Uruguay, Criminal Code 1933, amended 2010, art 60(2); Uzbekistan, Criminal Code 1994, amended 2012, art 28(2); US, Criminal Justice Code 1967, § 46.3207; Venezuela, Penal Procedure Code 2009, art 124; Yemen, Republican Decree for Law No 12 for the Year 1994 Concerning Crimes and Penalties, art 21.

257 *Gacumbitsi* Appeals Chamber Judgment (Separate Opinion of Judge Schomburg), para 21; *Simić et al* Appeals Chamber Judgment (Dissenting Opinion of Judge Schomburg), para 14 and fn 20. Judge Schomburg also proposed the control over the act theory to interpret perpetration. For critics of the control doctrine, see Lachezar D. Yanev and Tijs Kooijmans, 'Divided Minds in the Lubanga Trial Judgment: A Case against the Joint Control Theory' (2013) 13 *ICLR* 789, 808, arguing that 'the labels of these liabilities in national law is one thing, while whether these criminal systems have applied the 'joint control' theory to interpret co-perpetration liability is a different issue'.

258 See also Yanev, *Theories of Co-perpetration in International Criminal Law* 390, 490 arguing that combining JCE with indirect perpetration is theoretically possible, but there is a fundamental problem. In his view, the latter form of liability is not recognised as customary international law. In addition, he argued that 'it is erroneous and misleading to refer to the presence of the phraseology "co-perpetration" in the penal code of a given state as evidence that it adopts the joint control theory'.

259 For a review of the domestic approach to co-perpetration liability, see Yanev, *Theories of Co-perpetration in International Criminal Law* 497-513.

if the crimes committed were embraced by the intention of the accused.<sup>260</sup> For instance, the Criminal Code of Uzbekistan explicitly provides that: '[h]eads for crime, as well as members of a criminal group organised by the previous concert, organised criminal group, or criminal community shall be subject to liability for all crimes, of which preparation or commission they participated'.<sup>261</sup> After analysing 43 legal systems worldwide, researchers of the Max-Planck-Institute project *General Legal Principles of International Criminal Law on the Criminal Liability of Leaders of Criminal Groups and Networks* concluded:

A result of this comparison of the various rules of complicity is that structurally differing concepts of the doctrine of complicity yield results that are, to a large extent, functionally equivalent. [...] the classification of the organiser of a network who directs the activities from the background as the primarily responsible offender of a crime does not fail due to the fact that the person who directly commits the crime, a 'little cog in the big wheel', has no knowledge of the crime's overriding goals or of its specific character and magnitude. In contrast, the various legal systems treat very differently the issue of the attributability [...] to hierarchically superior participants of actions by individual group members that are not (expressly) encompassed by the common crime plan.<sup>262</sup>

These national provisions also indicate that 'clear differences exist as far as the issue of minimum requirements regarding the *mens rea* of those who themselves remain inactive is concerned'. These laws and other legislation evidence a liability similar to the expansive interpretation of 'indirect perpetration through an organisation',<sup>263</sup> rather than indirect co-perpetration.

260 Armenia, Criminal Code 2003, amended 2013, arts 38(3), 41(4)-(5); Albania, Criminal Code 1995, amended 2013, arts 27-28; Azerbaijan, Criminal Code 1999, amended 2003, art 34.6; Kazakhstan, Criminal Code 1997, amended 2004, art 29(3); Latvia, Criminal Law 1998, amended 2013, § 21(2); Belarus, Penal Code of 9 July 1999, amended 2012, arts 18(2), 19(4); Bosnia and Herzegovina, Criminal Code 2003, amended 2016, art 342(3); Canada, Criminal Code 1985, amended 2017, §§ 467.1, 467.13; China, Criminal Law 1997, amended 2015, art 26; Georgia, Criminal Code of 1999, amended 2016, art 27(4); Honduras, Penal Code 1983, amended 2008, art 34(1); Iran, The Islamic Penal Code 2013, art 130; Kazakhstan, Criminal Code 1997, amended 2014, art 31(4); Kyrgyzstan, Criminal Code 1997, amended 2006, art 34(1); Lithuania, Criminal Code 2000, amended 2015, art 26(4); Moldova, Criminal Code 2002, amended 2009, art 47(4); Mongolia, Criminal Code 2002, art 37.2; Slovenia, Criminal Code 2008, amended 2009, art 41(3); Tajikistan, Criminal Code 1998, art 39(6); Russian Federation, Criminal Code 1996, amended 2012, arts 35(5); Ukraine, Criminal Code 2001, amended 2010, art 30(1); Uzbekistan, Criminal Code 1994, amended 2012, art 30.

261 Uzbekistan, Criminal Code 1994, arts 29-30; Kazakhstan, Criminal Code 1997, amended 2014, art 31(3).

262 'General Legal Principles of International Criminal Law on the Criminal Liability of Leaders of Criminal Groups and Networks', Project Coordination: Ulrich Sieber, Hans-Georg Koch and Jan Michael Simon, available at: <https://www.mpicc.de/en/forschung/forschungsarbeit/strafrecht/participation.html> [accessed 15 January 2018].

263 Thomas Weigend, 'Perpetration through an Organisation: The Unexpected Career of a German Legal Concept' (2011) 9 *JICJ* 91, 106. Weigend argues that 'there is certainly nothing that even remotely suggests that the concept of perpetration through an organisation is a form of criminal liability recognised as customary international law'.

These provisions do not demonstrate a consensus on the liability of a head of the organisation for crimes that neither are committed by members of the organisation nor fall within the scope of the common plan.

Some national legislation provides that: '[a] crime is considered committed by a criminal association, if it was committed [...] by a member (members) of the association [...], as well as, committal of a crime by a person not considered a member of the association, by instruction of the criminal association'.<sup>264</sup> The Criminal Code of Uzbekistan provides a similar rule and also stipulates that '[c]riminal community shall be a previous association of at least two groups for criminal activity'.<sup>265</sup> Combining the liability of the leaders for offences committed by a criminal association with this notion of criminal community, these provisions evince support for the construction of indirect co-perpetration (or *Brdanin* JCE I). The head of one group would be held liable for the crime committed by a person of another group. Nevertheless, these provisions do not extend to crimes that fall outside the scope of the common plan. These few instances are also not sufficient to support a rule of indirect co-perpetration liability under customary law.

Another liability for the offences of conspiracy exists in national legislation.<sup>266</sup> One example is the US 2010 *Manual for Military Commissions*, which provides that

Any person [...] who conspires to commit one or more substantive offences triable by military commission under this chapter, and who knowingly does any overt act to effect the object of the conspiracy, shall be punished. [...] Each conspirator is liable for all offences committed pursuant to or in furtherance of the conspiracy by any of the co-conspirators, after such conspirator has joined the conspiracy and while the conspiracy continues and such conspirator remains a party to it.<sup>267</sup>

These provisions on conspiracy offer a different solution to crimes committed in an organised way at the offence level, instead of at the liability level. Article 5 of the UN Convention against Transnational Organised Crime also provides for the offence of 'participation in an organised criminal group', which stipulates that the action of the heads of a criminal organisation, who plan, coordinate and manage the commission of the crimes committed, is criminalised.<sup>268</sup> The head of the organisation, therefore, would be held lia-

264 Armenia, Criminal Code 2003, amended 2013, art 41(4); Azerbaijan, Criminal Code 1999, amended 2003, art 34.5; Moldova, Criminal Code 2002, amended 2009, art 47(2); Tajikistan, Criminal Code 1998, art 39(5); Uzbekistan, Criminal Code 1994, arts 29-30.

265 Uzbekistan, Criminal Code 1994, arts 29-30; Kazakhstan, Criminal Code 1997, amended 2014, art 31(3).

266 Belize, Criminal Code 2000, § 24(1).

267 US, Manual for Military Commissions of 2010, Part IV Crimes and Elements, § 950v (29), IV 23-24. See also US, Military Commissions Act of 2006, 10 USC 948a, § 6(b)(1)(A); *US v Harman* (Judgment, US Army Court of Criminal Appeals) Army 20050597 (30 June 2008); Australia, War Crimes Act 1945, amended 2001, § 6(1)(k).

268 United Nations Convention against Transnational Organised Crime, 15 November 2000, 29 September 2003, 2225 UNTS 209.

ble for the crimes committed based on direct perpetration through his/her plan or coordinated actions. This provision indicates an attitude to expand the scope of responsible persons through an extensive criminalisation of offences. By contrast, the ICC tends to expand that scope through an expansive interpretation of liability because the Rome Statute does not generally criminalise all plans or coordinated actions. The practice of States in implementing this Convention against Transnational Organised Crime does not further contribute to the development of indirect co-perpetration liability at the international level.

There are more distinctions than similarities in national laws concerning liability. Some national criminal laws provide a distinction between principals (perpetrators) and accessories (accomplices), while some others do not distinguish principals from accessories.<sup>269</sup> The former is generally classified as a differentiation system, while the latter is called a unitary system.<sup>270</sup> In the unitary system, liability is attributed to an accused through criminalising actions of plan and encouragement as well as execution as the commission of offences. In the differentiation system, divergent approaches exist to hold an individual liable for a crime committed by others, for example, joint criminal enterprise and complicity through association, as well as aiding and abetting liability. The above analysis of national laws indicates that without the employment of indirect co-perpetration, the accused would also not go unpunished. Taking these various regimes and approaches into consideration, it appears that indirect co-perpetration liability would not frequently be used in prosecuting international crimes.

Indeed, military manuals of States do not help much in assessing the customary status of indirect co-perpetration.<sup>271</sup> States Parties' special implementation legislation also does not evince the acceptance of indirect co-perpetration. Some implementation legislation of the Geneva Conventions and the 1948 Genocide Convention follows the mode of liability either in article 7 of the ICTY Statute or in that provided in the Genocide Convention.<sup>272</sup>

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269 Kai Ambos, 'Is the Development of a Common Substantive Criminal Law for Europe Possible? Some Preliminary Reflections' (2005) 12 *MJECL* 173, 182-86.

270 Van Sliedregt, *Individual Criminal Responsibility in International Law* 65-67.

271 For sources of military manuals concerning individual criminal responsibility, see JM. Henckaerts and L. Doswald-beck (eds), *Customary International Humanitarian Law*, Vol II: Practice (New York: CUP 2005), practice concerning Rules 102 and 151. Some military manuals refer to individual criminal responsibility as that provided in art 7 of the ICTY Statute. See Australia, LOAC Manual 2006, § 13.39; Canada, LOAC Manual 2001, § 1610; Netherlands, Military Manual 2005, §§ 1147-48; Sierra Leone, Instructor Manual 2007, p 65; UK, LOAC Manual 2004, § 16.35; US, Field Manual 2004, § 500.

272 ICTY Mode: Australia, Geneva Conventions Act 1957, amended 2002, § 7(1); Burundi, Law on Genocide, Crimes against Humanity and War Crimes 2003, art 5; Ireland, Geneva Conventions Act 1962, amended 1998, § 4; Rwanda, Law on Repressing the Crime of Genocide, Crimes against Humanity and War Crimes 2003, art 17; UK, Geneva Conventions Act 1957, amended 1995, § 1(1).

Some implementation legislation merely repeats the text in article 25(3)(a) of the Rome Statute,<sup>273</sup> while other laws only implement the rule in article 25(3)(d) of the Rome Statute.<sup>274</sup> In short, a large number of national laws and implementation legislation concerning joint commission, co-perpetration and indirect perpetration, as well as unique forms of liability in various jurisdictions, are not valuable evidence to show the acceptance of indirect co-perpetration under customary law.

#### 5.5.4.2 National case law

National case law is an important source for the assessment of State practice. It appears that scarce national case law employs indirect co-perpetration in prosecuting international crimes.

Canadian courts endorsed the view of complicity through association in dealing with the issue of refugee protection. The Canadian courts argued that ‘the broadest modes of commission recognised under current international criminal law are most relevant to our complicity analysis, namely, common purpose liability under art. 25(3)(d) of the Rome Statute and joint criminal enterprise developed in the *ad hoc* tribunals’ jurisprudence’.<sup>275</sup> In the *Peters* case, the Canadian Immigration and Refugee Protection Board clarified the liability of complicity through a shared common purpose.<sup>276</sup> In its view, complicity liability may arise either from facilitating the organisation’s mission by aiding and abetting or from ‘the existence of a shared common purpose and knowledge that all parties in question may have of the

273 Philippines, Philippine Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity 2009, § 8(a)(3).

274 *ibid*, § 8(a)(3); Mauritius, International Criminal Court Act 2011, § 4(2)(b); Iraq, Statute of the Iraqi Special Tribunal 2005, art 15(2)(d); Sri Lanka, Geneva Conventions Act 2006, § 2(1); UK, Geneva Conventions Act 1957, amended 1995, § 1(1).

275 *Ezokola v Canada* (Minister of Citizenship and Immigration), [2013] 2 SCR 678, 2013 SCC 40, paras 52-67.

276 *Peters v Canada* (Minister of Citizenship and Immigration) (Record of an Admissibility Hearing under the Immigration and Refugee Protection Act, Immigration and Refugee Protection Board) 0003-B2-02557 (29 January 2013), ‘[i]n complicity resulting from membership in an organisation, it is important to know [...] the nature and type of the organisation to which the person belongs, [as] there are three types of organisations, brutal, non-brutal, and/or hybrid. Briefly, a brutal organisation is one whose main purpose, or activity, is to be involved in human rights abuses. Non-brutal organisations are those originally established for legitimate purposes and functions, but which would quite frequently get involved in human rights abuses, such as regular armed forces, militias, political parties. Hybrid organisations are those organisations which have [different] units some of which are involved in crimes against humanity, others [are] not. To attach responsibility through peripheral participation in the crimes of non-brutal organisations, that is complicity arising from the actions of a participant, a person could either aid [...], or [abet] the perpetration of those crimes or may be complicit in the perpetration of those crimes through a shared common purpose’.

purpose of the organisation'.<sup>277</sup> Also, the Canadian Supreme Court in the *Ezokola* case openly stated:

While individuals may be complicit in international crimes without a link to a *particular crime*, there must be a link between the individuals and the *criminal purpose* of the group [...]. [T]his link is established where there are serious reasons for considering that an individual has voluntarily made a significant and knowing contribution to a group's crime or criminal purpose.<sup>278</sup>

With reference to the *Brđanin* Appeals Chamber judgment, the Canadian Supreme Court adhered to *Brđanin* JCE liability. Therefore, if no shared common purpose exists between the accused and the executors, 'a significant and knowing contribution' will suffice to hold the accused liable by virtue of complicity through association. The Canadian case law cited above shows that an accused at the leadership level would be responsible for crimes committed by that executor. However, depending on the facts of each case, the accused would be liable based on aiding and abetting liability or complicity through the shared common purpose/association. The Canadian courts did not rely on article 25(3)(a) of the Rome Statute to broaden the forms of perpetration or use the label of indirect co-perpetration.

According to the UK Crown Prosecution Service, the common law doctrine of joint enterprise:

can apply where two or more persons are involved in an offence or offences. The parties to a joint enterprise may be principals (P) or secondary parties (accessories/accomplices) (D).<sup>279</sup>

When a joint enterprise is pre-planned, a category of the UK joint enterprise is similar to the *Tadić* JCE. However, as analysed above, cases supporting *Tadić* JCE do not show the practice of *Brđanin* JCE in attributing liability to the person at the leadership level. Additionally, if there is no shared purpose, the accused who was convicted based on joint enterprise has to 'act' in concert, or the accused ought to be acquitted. Cases from the UK concerning joint enterprise, therefore, are not valuable evidence for the assessment of indirect co-perpetration under customary law. On the other hand, the UK in recent decisions re-set a threshold of the mental element of JCE III by arguing that it was 'illegitimate' 'to treat foresight as an inevitable yardstick of common purpose'.<sup>280</sup> According to the English courts, 'the correct approach is to treat it [foresight] as evidence of intent.'<sup>281</sup> The accused must have an 'intention' rather than 'foresight' for the crime that was not agreed upon but committed

277 *Ramirez v Canada* (Minister of Employment and Immigration), [1992] 2 FC 306, p 318; *Sivakumar v Canada* (Minister of Citizenship and Immigration), [1994] 1 FC 433.

278 *Ezokola v Canada* (Minister of Citizenship and Immigration), [2013] 2 SCR 678, para 8 (emphasis in original).

279 UK, 'CPS Guidance On: Joint Enterprise Charging Decisions', December 2012, para 5.

280 *Jogee and Ruddock v R* (Judgment from the Court of Appeal of Jamaica) [2016] UKPC 7, [2016] UKSC 8, [2016] 2 WLR 681 (18 February 2016), para. 87.

281 *ibid.*

by physical executors. This change shows a more restrictive attitude of the UK towards the expansion of responsible persons by virtue of joint enterprise.

The Australia Administrative Appeals Tribunal has also dealt with some cases concerning international crimes attributable to refugee applicants who did not directly or physically commit offences of war crimes or crimes against humanity.<sup>282</sup> In the *SAH* case, the accused was a member and an administrative officer of the Iraqi Army when war crimes and crimes against humanity were committed. The Australia Administrative Appeals Tribunal held that: 'under the Rome Statute, a person need not have directly committed the act him or herself.' The Tribunal recognised that to bear criminal responsibility, a person must have 'aided, abetted or otherwise assisted' in the commission by persons acting with a common purpose.<sup>283</sup> The Australia Administrative Appeals Tribunal, however, did not rely on an interpretation of article 25(3)(a) of the Rome Statute to hold the accused liable.<sup>284</sup> In interpreting article 25(3)(d), the Tribunal noted that, apart from the mental and material elements of the crime, 'there must be a *shared common purpose*, as between the perpetrator and the accomplice, to engage in conduct which constitutes a crime'.<sup>285</sup> Therefore, currently, the Australian tribunals still adhere to the narrow interpretation of *Tadić* JCE, instead of adopting *Brđanin* JCE (indirect co-perpetration).

In the DRC *Barnaba Yonga Tshopena* case, the accused was considered the supreme leader of the Ngiti combatants of this political-military movement. The Military Garrison Court held that 'in this capacity, together with other commanders of this political-military movement, he organised, planned or encouraged in any way the successive attacks.'<sup>286</sup> In fact, in the DRC, military, police and political leaders used their power to initiate the crimes committed by physical executors. They were liable because they were the ones

282 Australia, War Crimes Act 1945, amended 2010, § 9(1); *AXOIB v Australia* (Minister for Immigration and Multicultural and Indigenous Affairs), [2002] AATA 365, para 33. For other cases after World War II, see D. Blumenthal and T. McCormack (eds), *The Legacy of Nuremberg: Civilising Influence or Institutionalised Vengeance?* (The Hague: Martinus Nijhoff Publishers 2008).

283 *SAH v Australia* (Minister for Immigration and Multicultural and Indigenous Affairs), [2002] AATA 263, paras 58-59.

284 See *SAL v Australia* (Minister for Immigration and Multicultural and Indigenous Affairs), [2002] AATA 1164, para 85; *VAG v Australia* (Minister for Immigration and Multicultural and Indigenous Affairs), [2002] AATA1332, para 66; *SHCB v Australia* (Minister for Immigration and Multicultural and Indigenous Affairs) [2003] FCAFC 308, para 13; *SZCWP v Australia* (Minister for Immigration and Multicultural and Indigenous Affairs), [2006] FCAFC 9, para 107; *WBR v Australia* (Minister for Immigration and Multicultural and Indigenous Affairs), [2006] AATA 754, para 28.

285 *WBR v Australia*, *ibid.*

286 *Garrison Military Auditor, Public Prosecutor's Office and civil parties v Barnaba Yonga Tshopena* (Judgment, Military Garrison Court of Ituri-Bunia, DRC) RP No 071/09, 009/010 and 074/010, RMP No 885/EAM/08, RMP No 1141/LZA/010, RMP No 1219/LZA/010 and RMP No 1238/LZA/010 (9 July 2010), para 132.

who conceived the crime.<sup>287</sup> This case does not support attributing liability to the accused for the crimes committed by the executors who were not affected by the accused's power. Liability of indirect co-perpetration is not rooted in this approach to attribution of liability.

In the *Fujimori* case, Peru's Supreme Court of Justice examined whether former Peruvian president Alberto Fujimori was liable for crimes against humanity carried out by State officials.<sup>288</sup> The prosecution argued that the crimes committed could be attributed to the ex-president 'by recourse to the mode of criminal liability of perpetration-by-means'. The court held that the liability of perpetration-by-means through control over an organised apparatus of power is 'a form of commission which, however, is transferred from an order issued at the highest strategic level to the concrete execution of the ordered act by a proxy'.<sup>289</sup> This case only supports the interpretation of indirect perpetration through an organisation, which has been supported by several civil law criminal systems as mentioned above.<sup>290</sup> Other cases supporting this form of indirect perpetration<sup>291</sup> also do not support indirect co-perpetration.<sup>292</sup>

National practice relating to individual criminal responsibility for war crimes, as shown in Rules 102 and 151 of the 2005 ICRC *Study*, does not show a trend of accepting indirect co-perpetration liability.<sup>293</sup> In fact, the majority of national cases concerning co-perpetration and indirect perpetration about ordinary crimes are not relevant for the analysis of custom. The analysis of case law above concerning complicity through association, aiding, abetting or assisting, complicity through a shared common purpose, and joint enterprise, as well as indirect perpetration, shows that few national cases support indirect co-perpetration, especially where the crimes committed are outside the common plan of the organisation.

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287 DRC, 'Training manual by the Prosecutor at the Military High Court for magistrates on techniques for investigating sexual crimes, adopted as part of the Programme on Investigating Sexual Crimes of the Democratic Republic of the Congo, Military Justice seminar', 2008, pp 8-9.

288 Kai Ambos, 'The *Fujimori* Judgment, A President's Responsibility for Crimes Against Humanity as Indirect Perpetrator by Virtue of an Organised Power Apparatus' (2011) 9 *JICJ* 137.

289 *Prosecutor v Alberto Fujimori* (Judgment, Supreme Court of Justice, Special Criminal Chamber, Peru) A.V 19-2001 (7 April 2009), para 744.

290 *ibid.*

291 For an analysis of indirect perpetration through organisation, see Francisco Muñoz-Conde and Héctor Olásolo, 'The Application of the Notion of Indirect Perpetration through Organised Structures of Power in Latin America and Spain' (2011) 9 *JICJ* 113, 114; Olásolo, *Essays on International Criminal Justice* 102-42.

292 *Simić et al Appeals Chamber Judgment* (Dissenting Opinion of Judge Schomburg), fn 32.

293 Available at: [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule102](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule102) [accessed 20 January 2018].

### 5.5.5 Other international tribunals and special national tribunals: instruments and cases

Differences also exist in instruments in other international and national tribunals specially designed for the prosecution of international crimes. Article 15(2) of the 2003 Statute of the Iraqi Special Tribunal is similar to article 25(3) of the Rome Statute. It provides that:

[...] a person shall be criminally responsible if that person: A. Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that this person is criminally responsible; [...].<sup>294</sup>

The text of article 15 appears to leave no room for the tribunal to interpret a mode of liability for crimes 'by contribution via another individual'. The Iraqi Special Tribunal was created to prosecute international crimes committed in Iraq from July 1968 to May 2003.<sup>295</sup>

In practice, the Iraqi Special Tribunal in the *Al-Dujail* decision systematically interpreted article 15(2), which addressed that:

[...] the actor, despite his role and legal-official description, is reckoned in-charge in perpetrating one of the crimes which falls under the court's jurisdiction, whether the offender [...] committed the crime by personal attribution, contribution or via another individual, even if the latter was not criminally responsible (for any reason), enticed, urged, assisted, instigated, or helped in whatsoever mean, to facilitate the execution of the crime, provided its tools, instigated or contributed with other individuals, aiming a joint criminal contribution conditioned by premeditation and effectively granting [...].<sup>296</sup>

In its view, 'the legislator goes to the equilibrium of all factors contributing to create the crime's result'. All actors, therefore, would be charged for 'perpetrating' the crime, regardless of the degree of contribution to the crime.<sup>297</sup> This interpretation indicates that an accused would be held liable for committing the crime via another person. On the other hand, the tribunal would not attribute crimes 'jointly committed via another individual' to an accused through indirect co-perpetration, or an expansive interpretation of co-perpetration, because the accused would also be held liable as an offender based on the other way of contribution. It seems that the Iraqi High Tribunal did not follow the ICC's approach of indirect co-perpetration.

294 Statute of the Iraqi Special Tribunal, 43 ILM 231 (2004), art 15(2)(A). See also Iraq, Law of the Iraqi Higher Criminal Court, Law No. (10) 2005, art 15(2)(A).

295 Statute of the Iraqi Special Tribunal, *ibid*, art 1(b).

296 *The Public Prosecutor in the High Iraqi Court et al v Saddam Hussein Al-Majeed et al* (Verdict, Second Criminal Court, Iraqi High Tribunal)1/CSecond/2006 (24 June 2007), p 8. Saddam Hussein Al-Majeed, the former president of the Iraqi, and other five former high officials were charged with murder constituting crimes against humanity committed in 1982.

297 *ibid*, pp 128-31.

In addition, the text of section 14(3)(a) of the Special Panels for Serious Crimes within the District Court of Dili in East Timor is identical to article 25(3)(a) of the Rome Statute.<sup>298</sup> The Special Panels adopted diverse approaches in interpreting section 14(3)(a). The Special Panels in some cases cited the *Tadić* Appeals Chamber judgment and employed joint criminal enterprise to interpret liability for commission jointly with another under section 14(3)(a).<sup>299</sup> For instance, Salvador Soares was held 'responsible for committing the crime of murder as a crime against humanity pursuant to a joint criminal enterprise to murder the pro-independence supporters'.<sup>300</sup> Additionally, the Special Panels simply relied on the literal reading of the phrase 'jointly with another' for incurring co-perpetration liability of physical executors.<sup>301</sup> These different approaches at a minimum do not show an expansive interpretation of co-perpetration to include indirect co-perpetration. In fact, in the Special Panels in East Timor, the accused were mostly mid-to-low-level militants who participated in the killing of civilians. These cases would be less helpful for the construction of indirect co-perpetration to hold the high-level leaders responsible.

Other international instruments and case law also do not tend to support indirect co-perpetration. Bangladesh's International Crimes (Tribunal) Act 1973, as amended in 2009, provides that conspiracy to commit and complicity in the commission of international crimes are criminalised.<sup>302</sup> The Bangladesh tribunals criminalise the act of conspiracy and complicity, instead of attributing liability to the accused for the crimes committed by other executors. A leader is liable for the crime of conspiracy directly committed by him/herself. This *Act* with a broad scope of criminalised offences leaves no room for the development of indirect co-perpetration liability. Also, although the Extraordinary Chambers in the Courts of Cambodia (ECCC) aims to try senior leaders, the Law on the Establishment of the ECCC provides no general rule on liability as to different crimes falling under the jurisdiction of the court.<sup>303</sup> In practice, the two UN *ad hoc* tribunals' *Tadić* JCE

298 East Timor, Regulation for Special Panels for Serious Crimes 2000, § 14.3.

299 *Prosecutor v Jose Cardoso* (Judgment, District Court of Dili) SPSC-4c/2001 (5 April 2003), paras 367-71; *Prosecutor v Salvador Soares* (Judgment, District Court of Dili) SPSC-7a/2002 (9 December 2003) [*Salvador Soares* Judgment], paras 187-89. For decisions of joint criminal enterprise under section 14(3)(d), see *Prosecutor v Sisto Barros and Cesar Mendonca* (Judgment, District Court of Dili) SPSC-1/2004 (12 May 2005), paras 123-24, 134.

300 *Salvador Soares* Judgment, para 189.

301 *Prosecutor v João Sarmiento* (Judgment, District Court of Dili) SPSC-18a/2001 (12 August 2003), paras 81-82; *Prosecutor v Domingos Mendonca* (Judgment and Dissenting Opinion, District Court of Dili) SPSC-18b/2001 (12 October 2003), paras 110-02; *The Prosecutor v de Carvalho* (Judgment, District Court of Dili) SPSC-10/2001 (18 March 2004), para 61.

302 Bangladesh, The International Crimes (Tribunals) Act 1973, amended 2009, §§ 3(2)(g)-(h), 4(1).

303 Law on the Establishment of the ECCC, 27 October 2004, arts 1-2, 4-8.

doctrine played a vital role in the cases of the ECCC.<sup>304</sup> Furthermore, article 3 of the Statute of the Special Tribunal for Lebanon (STL) and article 6(1) of the Statute of SCSL<sup>305</sup> provide rules similar to those in article 7(1) of the ICTY Statute concerning liability.<sup>306</sup> However, the STL denied the customary status of perpetration by means.<sup>307</sup>

#### 5.5.6 Assessment and conclusions

After the adoption of the Rome Statute, the two UN *ad hoc* tribunals adopted the JCE approach. The ICTY and the ICTR first developed and clarified the liability of *Tadić* JCE. The tribunals in their subsequent cases rejected the liability of co-perpetratorship and indirect co-perpetration but introduced the liability of *Brđanin* JCE. *Brđanin* JCE has been adhered to by subsequent cases of the two tribunals. *Brđanin* JCE has also been accepted as a part of customary law by the two UN *ad hoc* tribunals, whereas it is highly criticised in academia. The ICC appears to interpret article 25(3)(a) as achieving a function similar to *Brđanin* JCE by using the notion of indirect co-perpetration. It should be emphasised that legal elements of *Brđanin* JCE are different from those of indirect co-perpetration required at the ICC.

This section shows that case law of the two tribunals supporting *Tadić* JCE is irrelevant to the analysis of indirect co-perpetration. Jurisprudence based on the *Brđanin* formulation of JCE, which combined *Tadić* JCE with indirect perpetration, generally supports indirect co-perpetration imposing liability on the accused at the leadership level. National laws and implementation legislation share more divergence than convergence, and there is little support for indirect co-perpetration. Instruments and cases of other international and national tribunals share the same feature. According to Cherif Bassiouni: 'it can hardly be said that the choice [in the Rome Statute] reflected a method of comparative legal analysis that is required to ascertain the existence of a general principle in the major legal systems of the world, reflecting the families of legal systems'.<sup>308</sup>

304 Lachezar D. Yanev, 'The Theory of Joint Criminal Enterprise at the ECCC: A Difficult Relationship' in S. Meisenberg and I. Stegmüller (eds), *The Extraordinary Chambers in the Courts of Cambodia* (The Hague: TMC Asser Press 2016) 203-54.

305 Statute of the SCSL, art 6(1).

306 Statute of the Special Tribunal for Lebanon (Statute of the STL), attached to the Agreement between the United Nations and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon annexed to UN Security Council Resolution 1757, 30 May 2007, art 3(1). See also Rwanda, Law Setting up Gacaca Jurisdictions 2001, art 51.

307 Michael Scharf, 'Introductory Note to the Decision of the Appeals Chamber of the Special Tribunal for Lebanon on the Definition of Terrorism and Modes of Participation' (2011) 50 ILM 509, 601; STL 2011 Decision, paras 255-56.

308 Bassiouni, *Introduction to International Criminal Law* 286; M. Cherif Bassiouni, 'Negotiating the Treaty of Rome on the Establishment of an International Criminal Court' (1999) 32 *Cornell Intl LJ* 443, 454.

These few instances of practice, as well as the ICC's adherence to indirect co-perpetration, would be helpful in the development of a similar to attribute liability under customary law. Nevertheless, it is difficult to conclude that the liability of indirect co-perpetration is widely recognised by States at the present time. Therefore, it is inconclusive to argue that these instances suffice to evince a firmly established customary rule, in particular, with all these elements set out by the ICC. Indirect co-perpetration is not part of the corpus of customary law. Article 25(3)(a) of the Rome Statute, thus, is not declaratory of customary law concerning indirect co-perpetration.

## 5.6 CONCLUDING REMARKS

The way to assign liability to leaders, who are far from the scene of offences committed by physical executors, is a demanding issue in international criminal law. This Chapter focuses on article 25(3)(a) of the Rome Statute and indirect co-perpetration liability under customary law. The above analysis shows that article 25(3)(a) contains three forms of perpetration: direct perpetration, indirect perpetration, and co-perpetration. The notion of indirect co-perpetration is not subsumed in article 25(3)(a). Nevertheless, through an interpretation of article 25(3)(a) and by relying on the idea of joint control over an organisation, the ICC introduced indirect co-perpetration to deal with a situation in which the identity of the physical executor is unclear. Indirect co-perpetration is deemed a form of commission, and its legal elements derive from the elements of indirect perpetration and co-perpetration. This practice should not be ignored.

After analysing the post-World War II instruments and subsequent trials, this Chapter concludes that only few cases support indirect co-perpetration. Indirect co-perpetration was not firmly established in international criminal law before the adoption of the Rome Statute. If the crime committed falls within the scope of the common plan among the leaders, the newly developed indirect co-perpetration is very similar to part of *Brđanin* JCE I, but with different standards of mental and material elements. After analysing the cases of international and national tribunals, as well as national laws, the conclusion that a customary rule concerning indirect co-perpetration or an extensive construction of co-perpetration with the specific elements is emerging at the international level cannot be sustained. In conclusion, even assuming article 25(3)(a) of the Rome Statute covers indirect co-perpetration, article 25(3)(a) neither was declaratory nor is declaratory of a customary rule on indirect co-perpetration.