

Jurisprudence on JCE – revisiting a never ending story

By Wolfgang Schomburg*

Introduction



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On 20 May 2010 the intense debate on the applicability of the doctrine of Joint Criminal Enterprise (JCE)^{1,2)} before the ECCC³ found an interim⁴ result in a decision rendered by the Pre-Trial Chamber.⁵ This decision is admirable in its thorough analysis of some post WW II decisions. The result is more than welcome after years of dangerous confusion. In its systematic approach regrettably the decision takes it as given from the outset that in International Criminal Law there is such a label called JCE.

In the recent past, hardly another topic in international criminal law has divided the minds of academics and practitioners alike as heavily as this dogmatic figure created for the purposes of imposing individual criminal responsibility in situations of mass atrocities and collective criminal activity. This holds true especially in regard to the third category of the doctrine, the so-called extended JCE (JCE III). It is with great relief to observe that the Pre-Trial Chamber reverses the prior order of the Co-Investigative Judges of 8 December 2009 that held JCE III applicable in relation to international crimes before the ECCC, even if only under a (allegedly) tightened mens rea requirement. By the same token, the Pre-Trial Chamber declares JCE I and JCE II applicable before the court in regard to international crimes as it considers these categories of the doctrine as undoubtedly recognized forms of responsibility in customary international law at the time relevant to the case before them.⁶ In doing so, the court omits to scrutinize the necessity to give these recognized forms of liability under international criminal law and in particular universal state practice law new labels. The Office of the Investigative Judges had declared JCE only inapplicable in regard to national Cambodian crimes, a finding upheld by the Pre-Trial Chamber.⁷

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¹ An abbreviation not intended to mean “Just Convict Everyone” as interpreted by some scholars. Cf. e.g. *Badar, M. E.* „Just Convict Everyone!“ – Joint Perpetration: From *Tadić* to *Stakić* and Back Again, 6 *International Criminal Law Review* (2006), pp.293 et seq., quoting the father of the cynical remark, Bill Schabas.

² Cf. e.g. *Badar, M. E.* „Just Convict Everyone!“ – Joint Perpetration: From *Tadić* to *Stakić* and Back Again, 6 *International Criminal Law Review* (2006), pp.293 et seq., quoting Bill Schabas

³ Extraordinary Chambers in the Courts of Cambodia.

⁴ **The Trial Chamber judgement in Case 002 is anticipated to be rendered on 26 July 2010.**

⁵ ECCC/Pre-Trial Chamber, Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), Case File No: 002/19-09-2007-ECCC/OCIJ (20 May 2010) [ECCC Decision].

⁶ ECCC Decision, *supra* n. 4, para. 69.

⁷ Cf. ECCC/Office of the Co-Investigating Judge, Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise, Case File No: 002/19-09-2007-ECCC/OCIJ (8 December 2009) [ECCC Order].

In the view of the ECCC Pre-Trial Chamber JCE III was not recognized as a form of responsibility applicable to violations of international humanitarian law at the time relevant to the case before it and thus not to be applied by the court in regard to international crimes.⁸ It bases this finding on a critical scrutiny of the authorities relied upon by ICTY⁹ in Tadić¹⁰, the mother judgement on JCE in international criminal law. Firstly, the Pre-Trial Chamber finds no support for the existence of JCE III as customary international law in the international instruments referred to in Tadić.¹¹ As to the international case law, the Pre-Trial Chamber refuses to rely upon cases such as Borkum Island and Essen Lynching as these lacked reasoned judgements.¹² The national case law relied upon in Tadić in turn is, in the view of the Pre-Trial Chamber, not to be considered as representing proper precedents for the purpose of determining the status of customary law as these do not amount to international case law.¹³ Moreover, the Pre-Trial Chamber, while turning to consider the possible existence of general principals of law in support of JCE III, takes the view that it did not need to decide whether a number of national systems representative of the world's major legal systems recognised a standard of mens rea analogous to the one in JCE III as it was not satisfied that such liability was foreseeable to the charged persons in 1975-1979.¹⁴ In such circumstances, the Pre-Trial Chamber concludes, "the principle of legality requires the ECCC to refrain from relying on the extended form of JCE in its proceedings."¹⁵

The purpose of today's remarks is to demonstrate that the doctrine of JCE in its entirety is an unnecessary and even dangerous attempt to describe a mode of liability not foreseen in the Statutes of today's international tribunals, in particular not in the Statutes of ICTY and ICTR¹⁶, however invented and applied by the Appeal Chamber of both Tribunals. This artefact still has all the potential of violating in part the fundamental right not to be punished without law (*nullum crimen, nulla poena, sine lege*). This potential risk unfortunately has realized itself for the first time ever before the SC/SL¹⁷ as will be shown below.

First the definition as developed before ICTY, and later ICTR, shall be described. This will be done solely by summarizing the jurisprudence of both ICTY and ICTR, including inherent criticism and dissenting opinions, thus the only authentic account of the roots of this doctrine.

Why was it necessary at all to again impose a new doctrine (JCE), absolutely unknown in the law of both areas of responsibility (the "Territory of Former Yugoslavia" and Rwanda)? The need to depart from the latter had arisen only when the domestic law was able or even intended to shelter the most senior responsible ones from criminal responsibility. Admittedly ICTY never had a real general part of substantive criminal law as would have been necessary and excellently realized for the first time on an international level in the Rome Statute for the permanent ICC.

Tadić explicitly started by showing, however without saying and drawing the necessary consequences, that indeed there was no customary international law supporting the

⁸ ECCC Decision, *supra* n. 4, para. 77.

⁹ International Criminal Tribunal for the former Yugoslavia.

¹⁰ *Prosecutor v. Tadić* (Appeal Judgment) IT-94-1 (15 July 1999).

¹¹ ECCC Decision, *supra* n. 4, para. 78.

¹² ECCC Decision, *supra* n. 4, para. 79-81.

¹³ ECCC Decision, *supra* n. 4, para. 82.

¹⁴ ECCC Decision, *supra* n. 4, para. 87.

¹⁵ ECCC Decision, *supra* n. 4, para. 87.

¹⁶ International Criminal Tribunal for Rwanda.

¹⁷ Special Court for Sierra Leone.

proposition that there was customary international law beyond reasonable doubt on modes of liability in the past WW II jurisprudence. The cited (and limited) jurisprudence was too divergent to hold that all three forms of JCE amounted to customary international law. Universal State practice was never under comparative scrutiny. In particular state practice of Former Yugoslavia was ignored. Indeed legally from the perspective of international criminal law, a law *sui generis*, and the margin of discretion (not free choice) in mind, it might be regarded unnecessary to make reference to the national law applicable FY or Rwanda.

No doubt Art. 15 ICCPR (Nullum crimen, nulla poena sine lege praevia) provides and allows for the concurrent applicability of three layers of law: National Law, International Law and acts and omissions that had been criminal at the time of commission according to the general principles of law recognized by the community of (civilised¹⁸) nations. Is it, however, not of assistance for a peace keeping mission based on Chapter VII of the UN-Charter to unnecessarily depart from the law applicable on the national level, thus giving perpetrators only the pretext to claim to be punished based on unforeseeable law. This is in particular so when national and international law has to be applied with different consequences on the modes of liability as the experience before the ECCC now shows.¹⁹ One should never underestimate the need for broad acceptance of criminal law. Justice must not only be done but also seen to be done by the human beings (victims, relatives, witnesses, alleged perpetrators, the individual population of a situation in general) as the addressees of all judicial decisions.

Back to the point of departure, *i.e.* Tadić. For me it is abundantly clear that the general part of the applicable domestic law was even better placed than JCE to accomplish the necessary:

- a) in general: to bring to justice without legal gaps and effectively the most serious actors in campaigns of genocide and/or ethnical cleansing;
- b) to hold responsible the perpetrators behind the perpetrators, the allegedly untouchables;
- c) not to run the risk that those perpetrators with clean hands escape as mere aiders and abettors (a trivialization realized in later judgments of ICTY/ICTR);
- d) not to confuse the membership in a JCE with a membership in a criminal group, the latter forming a separate broader (and thus least grave) mode of participation²⁰, not foreseen in the Statutes of the UN ad hoc-tribunals, however in the Rome Statute for the permanent ICC (Art. 25(3)(d):an additional *argumentum e contrario*);
- e) not to run the risk that, exactly opposed to the noble primary goal of International Criminal Law (cf. supra a), members of groups, or ethnicities would be punished solely based on a common purpose or intent, *i.e.* nearly every likeminded person.

It is not only to emphasize, as ECCC in its decision did, to clarify the role and scope of customary international law in this context. I want to show that in particular the third category of JCE has no basis in both the Statutes of ICTY and ICTR.²¹ The principle of *nullum crimen*,

¹⁸ Cf. this slightly different wording of Art. 7 ECHR, whatever “civilized nations” may mean.

¹⁹ As it reads in the – insofar upheld - disposition of the impugned decision of first instance: “-DECIDE THAT THE FORM OF RESPONSIBILITY KNOWN AS JOINT CRIMINAL ENTERPRISE DOES NOT APPLY TO NATIONAL CRIMES;”

²⁰ Cf. *Werle, G.*, Principles of International Criminal Law, The Hague, 2006 para. 493 at p. 184.

²¹ Article 7 ICTY Statute, Article 6 ICTR Statute.

nulla poena, sine lege stricta forbids the application of the JCE doctrine at least in its third category against the clear wording of both Statutes.

From the outset it has to be pointed out that the first and the second category of JCE will not be discussed in greater detail as these categories by and large overlap with traditional definitions of the term “committing”, thus a matter of unnecessary labelling, not worth any in-depth discussion. As regards these two categories it was only an unnecessary academic game first to invent a new doctrine and then to subsume this doctrine under one form of liability explicitly foreseen in the Statute. It was a waste of time and human resources for the ad hoc Tribunals. It still is a nice but misleading challenge for academics.

Beyond the reasoning of the decision to be discussed it is primarily the third category that in its broadness and vagueness infringes the principle of *nullum crimen, nulla poena sine lege stricta*. It is only the third category that takes issue with the fundamental basis of International Humanitarian Law, in that “[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced”²². It is again the principle of individual guilt to criminalize the *mens rea* of a person without an exhaustively and precisely described *actus reus*. In short, the mere membership *e.g.* in an ethnical group can never be punished. The membership in a criminal group is, opposed to the law of many countries²³ or, more importantly, the Statute of the ICC²⁴, not punishable under the Statutes of ICTY and ICTR. However, the striking similarity to the concept of JCE should have served as a warning.

Further, with a view to ICC jurisprudence²⁵, it has to be emphasized that in International Criminal Law there can be only one exhaustive enumeration of modes of liability. For this purpose also jurisprudence of SC/SL²⁶ has briefly to be revisited.

II The jurisprudence of ICTY and ICTR from Tadić to Seromba

Focussing exclusively on the jurisprudence this chapter shall show the development of JCE from its invention in Tadić for unknown reasons based on some out singled judgments of the

²² Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 1949, p. 223.

²³ See, *e.g.* § 129 (1) German Criminal Code which reads as follows: “Whosoever forms an organisation the aims or activities of which are directed at the commission of offences or whosoever participates in such an organisation as a member, recruits members or supporters for it or supports it, shall be liable to imprisonment of not more than five years or a fine.”

²⁴ Article 25(3)d of ICC-Statute which reads as follows: “In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: [...] (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) Be made in the knowledge of the intention of the group to commit the crime[.]” This norm, however, regulates a new form of participation. It does not deal with a form of perpetration, but constitutes the broadest, and the least grave, mode of participation (cf. *Werle, G.*, *Principles of International Criminal Law*, 2nd ed., The Hague, 2009, at para. 493).

²⁵ International Criminal Court, in: *The Prosecutor v. Lubanga* (Pre-Trial Chamber Decision on the Confirmation of Charges) ICC-01/04-01/06 (29 January 2007), *The Prosecutor v. Katanga et al.* (Pre-Trial Chamber Decision on the Confirmation of Charges) ICC-01/04-01/07 (30 September 2008), *The Prosecutor v. Bemba* (Pre-Trial Chamber Decision on the Confirmation of Charges) ICC-01/05-01/08 (15 June 2009).

²⁶ Special Court for Sierra Leone, in: *Prosecutor v. Sesay, Kallon and Gbao* (Appeal Judgment), SCSL-04-15-A (26 October 2009).

past only, via *Ojdanić*²⁷, limiting JCE to a definition of “committing”, and finally *Seromba*²⁸, an Appeals Judgment that in essence without saying embarked on the objective limitation by the criterion of *Tatherrschaft* (control over the act).²⁹

Let us now start with

1) *Prosecutor v. Tadić* (Appeal Judgement) IT-94-1 (15 July 1999), paras 192, 201, 220, 227-228, inventing three categories of JCE.³⁰ Before doing so, it has to be recalled what exactly is punishable in accordance with Article 7(1) ICTY Statute and Article 6(1) ICTR Statute. They have in common the following wording which must be the point of departure as it is strictly binding the judges:

“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 [...] of the present Statute, shall be individually responsible for the crime.”

In this context it has to be recalled that *Tadić* had already been accused by the German federal prosecutor (Generalbundesanwalt) and the case was ready for hearing before a court in Munich when primacy was exercised by ICTY, thus the case had to be transferred to The Hague in October/November 1994.³¹ In Germany he was accused for having “committed” crimes based on a strong degree of suspicion as it would have been in former Yugoslavia. As shown also ICTY Statute provides for “committing” as a mode of liability. Why was it necessary to translate this into JCE? It might be allowed to assume that some judges felt obliged to lay down what they always wanted to express without necessity in fact or law. Thus the doctrine of JCE has to be called what it was: an *obiter dictum* as it had no impact on the outcome of the case at hand.

The judgment starts precisely to the point at paras 192-201:

“192. Under these circumstances, to hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators of all those who in some way made it possible for the perpetrator physically to carry out that criminal act. At the same time, depending upon the circumstances, to hold the latter liable only as aiders and abettors might understate the degree of their criminal responsibility.”...

“201. It should be noted that in many post-World War II trials held in other countries, courts took the same approach to instances of crimes in which two or more persons participated with a different degree of involvement. However, they did not rely upon the notion of common purpose or common design, preferring to refer instead to the notion of co-perpetration. This applies in particular to Italian³² and German³³ cases.”

²⁷ *Prosecutor v. Milutinović et al.* (Decision on Draguljub *Ojdanić*'s Motion Challenging Jurisdiction – Joint Criminal Enterprise) IT-99-37-AR72 (21 May 2003).

²⁸ *The Prosecutor v. Seromba* (Appeal Judgment) ICTR-2001-66-A (12 March 2008).

²⁹ *Ibid.* at, paras. 171-174.

³⁰ *Prosecutor v. Tadić* (Appeal Judgement) IT-94-1 (15 July 1999), paras 185-229.

³¹ Cf. *Schomburg, W., and Nemitz, J.* in: *Schomburg et al., Internationale Rechtshilfe in Strafsachen*, 4th ed., Munich 2006, VI,A,3 para 27 at p. 1747.

³² See for instance the following decisions of the Italian Court of Cassation relating to crimes committed by militias or forces of the “*Repubblica Sociale Italiana*” against Italian partisans or armed forces: *Annalberti et al.*, 18 June 1949, in *Giustizia penale* 1949, Part II, col. 732, no. 440; *Rigardo et al.* case, 6 July 1949, *ibid.*, cols.

However, continuing unfortunately at para.220:

“220. [...] [T]he Appeals Chamber holds the view that the notion of common design as a form of accomplice liability is firmly established in customary international law and in addition is upheld, albeit implicitly [*sic: no reasoning is given for this statement*], in the Statute of the International Tribunal.(...)”

“227. In sum, the objective elements (*actus reus*) of this mode of participation in one of the crimes provided for in the Statute (with regard to each of the three categories of cases) are as follows:

- i. *A plurality of persons*. They need not be organised in a military, political or administrative structure, as is clearly shown by the *Essen Lynching*³⁴ and the *Kurt Goebell*³⁵ cases.
- ii. *The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute*. There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.
- iii. *Participation of the accused in the common design* involving the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of those provisions (for example, murder, extermination, torture, rape, etc.), but may take the form of assistance in, or contribution to, the execution of the common plan or purpose³⁶.

228. By contrast, the *mens rea* element differs according to the category of common design under consideration.

With regard to the first category, what is required is the intent to perpetrate a certain crime (this being the shared intent on the part of all co-perpetrators).

With regard to the second category (which, as noted above, is really a variant of the first), personal knowledge of the system of ill-treatment is required (whether proved by express testimony or a matter of reasonable inference from the accused's position of authority), as well as the intent to further this common concerted system of ill-treatment.

With regard to the third category, what is required is the *intention* to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal

733 and 735, no. 443; *P.M. v. Castoldi*, 11 July 1949, *ibid.*, no. 444; *Imolesi et al.*, 5 May 1949, *ibid.*, col. 734, no. 445. See also *Ballestra*, 6 July 1949, *ibid.*, cols. 732-733, no. 442.

³³ See for instance the decision of 10 August 1948 of the German Supreme Court for the British Zone in *K. and A.*, in *Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Strafsachen*, vol. I, pp. 53-56; the decision of 22 February 1949 in *J. and A.*, *ibid.*, pp. 310-315; the decision of the District Court (*Landgericht*) of Cologne of 22 and 23 January 1946 in *Hessmer et al.*, in *Justiz und NS-Verbrechen*, vol. I, pp. 13-23, at pp. 13, 20; the decision of 21 December 1946 of the District Court (*Landgericht*) of Frankfurt am Main in *M. et al.* (*ibid.*, pp. 135-165, 154) and the judgement of the Court of Appeal (*Oberlandesgericht*) of 12 August 1947 in the same case (*ibid.*, pp. 166-186, 180); as well as the decision of the District Court of Braunschweig of 7 May 1947 in *Affeldt*, *ibid.*, p. 383-391, 389.

³⁴ *Trial of Erich Heyer and six others*, British Military Court for the Trial of War Criminals, Essen 18th-19th and 21st-22nd December, 1945, UNWCC, vol. I, p. 88, at p. 91.

³⁵ Also called the *Borkum Island* case. See, Charge Sheet, in U.S. National Archives Microfilm Publications, I.

³⁶ Emphasis added by underlining

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*.”

Unfortunately the last element has been at times ignored. Only in *Blaškić*³⁷ and *Kordić and Čerkez*³⁸ it was clarified that to meet the standard of *dolus eventualis* the perpetrator must willingly accept or approve that risk.

2) *Prosecutor v. Milutinović et al.* (Decision on Draguljub *Ojdanić's* Motion Challenging Jurisdiction – Joint Criminal Enterprise) IT-99-37-AR72 (21 May 2003), paras. 18-20, *limiting JCE to “committing”*)

Already in this decision ICTY would have had the unique opportunity to harmonise its modes of liability with those described as customary international law in the Rome-Statute. However the Appeals Chamber missed this opportunity.

“18. The appellant in this case has advanced no cogent reason why the Appeals Chamber should come to a different conclusion than the one it reached in the *Tadić* case, namely, that joint criminal enterprise was provided for in the Statute of the Tribunal and that it existed under customary international law at the relevant time. The Defence's first contention is that the Appeals Chamber misinterpreted the drafters' intention as, it claims, they would have referred to joint criminal enterprise explicitly had they intended to include such a form of liability within the Tribunal's jurisdiction. As pointed out above, the Statute of the International Tribunal sets the framework within which the Tribunal may exercise its jurisdiction. A crime or a form of liability which is not provided for in the Statute could not form the basis of a conviction before this Tribunal.⁵⁵³⁹ The reference to that crime or to that form of liability does not need, however, to be explicit to come within the purview of the Tribunal's jurisdiction.⁵⁶⁴⁰ The Statute of the ICTY is not and does not purport to be, unlike for instance the Rome Statute of the International Criminal Court, a meticulously detailed code providing explicitly for every possible scenario and every solution thereto. It sets out in somewhat general terms the jurisdictional framework within which the Tribunal has been mandated to operate.”

In particular the two second to last sentences reveal the cogent question: Does JCE survive the test of *nullum crimen sine lege stricta*? Why not embrace the Rome-Statute? Has it become a question of misunderstood selfrespect and competition with ICC? Why was it necessary to continue with an apparent vicious circle or circle conclusion:

“19. As noted in the *Tadić* Appeal Judgment, the Secretary-General's Report provided that "all persons" who participate in the planning, preparation or execution of serious violations of international humanitarian law contribute to the

³⁷ *Prosecutor v. Tihomir Blaškić*, Appeal Judgement, Case No. IT-95-14-A, of 29 July 2004

³⁸ *Prosecutor v. Dario Kordić and Mario Čerkez*, Appeal Judgement, Case No. IT-95-14/2-A, of 17 December 2004

³⁹ Footnote omitted.

⁴⁰ The Tribunal has accepted, for instance, that Article 3 of the Statute was a residual clause and that crimes which are not explicitly listed in Article 3 of the Statute could nevertheless form part of the Tribunal's jurisdiction (ref to *Tadić*).

commission of the violation and are therefore individually responsible.⁵⁷⁴¹ Also, and on its face, the list in Article 7(1) appears to be non exhaustive in nature as the use of the phrase "or otherwise aided and abetted" suggests. But the Appeals Chamber does not need to consider whether, outside those forms of liability expressly mentioned in the Statute, other forms of liability could come within Article 7(1). It is indeed satisfied that joint criminal enterprise comes within the terms of that provision.”

“20. (...) The Prosecution pointed out in its indictment against Ojdanić that its use of the word “committed” was not intended to suggest that any of the accused physically perpetrated any of the crimes charged, personally. “Committing”, the Prosecution wrote, “refers to participation in a joint criminal enterprise as a co-perpetrator”.⁵⁹⁴² Leaving aside the appropriateness of the use of the expression “co-perpetration” in such a context, it would seem therefore that the Prosecution charges co-perpetration in a joint criminal enterprise as a form of “commission” pursuant to Article 7(1) of the Statute, rather than as a form of accomplice liability. The Prosecution’s approach is correct to the extent that, insofar as a participant shares the purpose of the joint criminal enterprise (as he or she must do) as opposed to merely knowing about it, he or she cannot be regarded as a mere aider and abettor to the crime which is contemplated. The Appeals Chamber therefore regards joint criminal enterprise as a form of “commission” pursuant to Article 7(1) of the Statute.⁴³”

What is the added value of this conclusion? Wouldn’t it have been more appropriate first to properly define the term “committing” as laid down in the Statute and then to find out to what extent this definition has its basis in customary international law? The Appeals Chamber made systematically the mistake to first ask what says customary law and then to subsume it under (better: press it into) the binding wording of the Statute.

3) In *Prosecutor v. Stakić (Trial Judgement)* IT-97-24-T (31 July 2003), paras 437-442 Trial Chamber II (composed of civil law judges only) undertook the unsuccessful attempt to make the best of it by overcoming the gap between the two mainstream approaches in international criminal law:

“ 438. The Trial Chamber emphasises that joint criminal enterprise is only one of several possible interpretations of the term “commission” under Article 7(1) of the Statute and that other definitions of co-perpetration must equally be taken into account. Furthermore, a more direct reference to “commission” in its traditional sense should be given priority before considering responsibility under the judicial term “joint criminal enterprise”.

439. The Trial Chamber prefers to define ‘committing’ as meaning that the accused participated, physically or otherwise directly or indirectly,⁹⁴²⁴⁴ in the material elements of the crime charged through positive acts or, based on a duty to act, omissions, whether individually or jointly with others. ⁹⁴³⁴⁵ The accused himself need not have participated in all aspects of the alleged criminal conduct.

⁴¹ *Tadić* Appeal Judgment, par 190, citing Secretary-General’s Report, par 54.

⁴² Indictment, par 16.

⁴³ Emphasis added by underlining.

⁴⁴ Indirect participation in German Law (*mittelbare Täterschaft*) or “the perpetrator behind the perpetrator”; terms normally used in the context of white collar crime or other forms of organised crime.

⁴⁵ *Kvočka* Trial Judgement, para. 251.

440. In respect of the above definition of ‘committing’, the Trial Chamber considers that a more detailed analysis of co-perpetration is necessary. 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. For this kind of co-perpetration it is typical, but not mandatory, that one perpetrator possesses skills or authority which the other perpetrator does not. These can be described as shared acts which when brought together achieve the shared goal based on the same degree of control over the execution of the common acts. In the words of *Roxin*: “The coperpetrator can achieve nothing on his own... The plan only ‘works’ if the accomplice⁹⁴⁴⁴⁶ works with the other person.”⁹⁴⁵⁴⁷ Both perpetrators are thus in the same position. As *Roxin* explains, “they can only realise their plan insofar as they act together, but each individually can ruin the whole plan if he does not carry out his part. To this extent he is in control of the act.”⁹⁴⁶⁴⁸ *Roxin* goes on to say, “[t]his type of ‘key position’ of each co-perpetrator describes precisely the structure of joint control over the act.”⁹⁴⁷⁴⁹ Finally, he provides the following very typical example:

If two people govern a country together - are joint rulers in the literal sense of the word - the usual consequence is that the acts of each depend on the co-perpetration of the other. The reverse side of this is, inevitably, the fact that by refusing to participate, each person individually can frustrate the action.⁹⁴⁸⁵⁰

441. The Trial Chamber is aware that the end result of its definition of co-perpetration approaches that of the aforementioned joint criminal enterprise and even overlaps in part. However, the Trial Chamber opines that this definition is closer to what most legal systems understand as “committing”⁹⁴⁹⁵¹ and avoids the misleading impression that a new crime⁹⁵⁰⁵² not foreseen in the Statute of this Tribunal has been introduced through the backdoor.⁹⁵¹⁵³

442. In respect of the *mens rea*, the Trial Chamber re-emphasises that modes of liability cannot change or replace elements of crimes defined in the Statute and that the 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.”

4) Similarly in *Prosecutor v. Simić (Trial Judgement) IT-95-9-T (17 October 2003)* in his Separate and Partly Dissenting Opinion **Judge Per-Johan Lindholm stated at paras 2 and 5:**

“2. I dissociate myself from the concept or doctrine of joint criminal enterprise in this case as well as generally. The so-called basic form of joint criminal enterprise does not, in my opinion, have any substance of its own. It is 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

⁴⁶ In this context the term ‘accomplice’ is used interchangeably with ‘co-perpetrator’ (footnote added). See also *Krnjelac* Trial Judgement, para. 77.

⁴⁷ *Roxin, Claus, Täterschaft und Tatherrschaft (Perpetration and control over the act)*, 6th Edition, Berlin, New York, 1994, p. 278.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ *Ibid.* p. 279

⁵¹ See *supra Roxin* as one example for the Civil Law approach. For the Common Law approach see: *Sworth, Andrew, Principals of Criminal Law*, 2nd Edition, Oxford 1995, p. 409 ff and *Fletcher, George P., Rethinking Criminal Law*, Oxford, 2000, p. 637ff.

⁵² *E.g.* “membership in a criminal organization”.

⁵³ Defence Final Brief, paras 168, 170, and 178.

law, namely co-perpetration. What the basic form of a joint criminal enterprise comprises is very clearly exemplified by Judge David Hunt in his Separate Opinion in *Milutinović, Šainović and Ojdanić*.²³⁵⁵⁵⁴ The reasoning in the *Kupreškić* Trial Judgement is also illustrative.²³⁵⁶⁵⁵ The acts of – and the furtherance of the crime by – the co-perpetrators may of course differ in various ways.²³⁵⁷⁵⁶ If something else than participation as co-perpetrator is intended to be covered by the concept of joint criminal enterprise, there seems to arise a conflict between the concept and the word “committed” in Article 7(1) of the Statute. Finally, also the *Stakić* Trial Judgement limited itself to the clear wording of the Statute when interpreting “committing” in the form of coperpetration. *Stakić* requires that co-perpetrators “can only realise their plan insofar as they act together, but each individually can ruin the whole plan if he does not carry out his part. To this extent he is in control of the act.”²³⁵⁸⁵⁷ The *Stakić* Trial Judgement can, based on the doctrine of “power over the act” (“Tatherrschaft”), be read as distancing itself from the concept of joint criminal enterprise.²³⁵⁹⁵⁸

5. ...”The concept or “doctrine” has caused confusion and a waste of time, and is in my opinion of no benefit to the work of the Tribunal or the development of international criminal law.”

5) The rigid answer followed immediately in the **Appeal Judgment** (it has to be noted that no party had appealed the legal assessment of the Trial Chamber): **Prosecutor v. Stakić** IT-97-24-A (22 March 2006), para. 62

“62. Upon a careful and thorough review of the relevant sections of the Trial Judgement, the Appeals Chamber finds that the Trial Chamber erred in conducting its analysis of the responsibility of the Appellant within the framework of “co-perpetratorship”. This mode of liability, as defined and applied by the Trial Chamber, does not have support in customary international law or in the settled jurisprudence of this Tribunal, which is binding on the Trial Chambers. By way of contrast, joint criminal enterprise is a mode of liability which is “firmly established in customary international law”¹⁴⁸⁵⁹ and is routinely applied in the Tribunal’s jurisprudence.¹⁴⁹⁶⁰ (...)”

6) Finally already in *The Prosecutor v. Seromba* (Appeal Judgement) ICTR-2001-66-A (12 March 2008), paras 171-172 the common Appeals Chamber came to accept a silent convergence:

“171. On the basis of these underlying factual findings, the Appeals Chamber finds that Athanase Seromba approved and embraced as his own the decision of Kayishema, Ndahimana, Kanyarukiga, Habarugira, and other persons to destroy the church in order to kill

⁵⁴ Footnote omitted.

⁵⁵ *Prosecutor v. Kupreškić et al.*, IT-95-16-T, Judgement, 14 January 2000, paras 772, 782.

⁵⁶ Footnote omitted.

⁵⁷ Quoting *Roxin, Claus*, Täterschaft und Tatherrschaft (Perpetration and control over the act), 6th ed. Berlin, New York, 1994, p. 278.

⁵⁸ *Prosecutor v. Stakić*, IT-97-24-T, Judgement, 31 July 2003, paras 436-438.

⁵⁹ *Tadić* Appeal Judgement, para. 220.

⁶⁰ See *Kvočka* Appeal Judgement, para. 79; *Vasiljević* Appeal Judgement, para. 95; *Krstić* Appeal Judgement, paras 79–134; *Ojdanić* Decision on Jurisdiction, paras 20, 43; *Furundžija* Appeal Judgement, para. 119; *Krnjelac* Appeal Judgement paras 29-32; *Celebići* Appeal Judgement, para. 366; *Tadić* Appeal Judgement, para. 220; *Prosecutor v. Radoslav Brđanin & Momir Talić*, Case No: IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, para. 24; *Babić* Judgement on Sentencing Appeal, paras 27, 38, 40.

the Tutsi refugees. It is irrelevant that Athanase Seromba did not personally drive the bulldozer that destroyed the church. What is important is that Athanase Seromba fully exercised his influence over the bulldozer driver who, as the Trial Chamber's findings demonstrate, accepted Athanase Seromba as the only authority, and whose directions he followed. The Appeals Chamber finds, Judge Liu dissenting, that Athanase Seromba's acts, which cannot be adequately described by any other mode of liability pursuant to Article 6(1) of the Statute than "committing", indeed were as much as an integral part of the crime of genocide as the killings of the Tutsi refugees.⁴¹¹⁶¹ Athanase Seromba was not merely an aidor and abettor but became a principal perpetrator in the crime itself.⁶²

172. The Appeals Chamber observes, Judge Liu dissenting, that Athanase Seromba's conduct was not limited to giving practical assistance, encouragement or moral support to the principal perpetrators of the crime, which would merely constitute the *actus reus* of aiding and abetting.⁴¹²⁶³ Quite the contrary, the findings of the Trial Chamber allow for only one conclusion, namely, that Athanase Seromba was a principal perpetrator in the killing of the refugees in Nyange church. The Appeals Chamber therefore finds that Athanase Seromba's conduct can only be characterized as "committing" these crimes."

In his dissenting opinion attached to this judgment Judge Liu, aware of this move of jurisprudence, made exactly this point:

"8. Thirdly, it is widely recognized that in various legal systems, however, "committing" is interpreted differently such that co-perpetratorship and indirect perpetratorship are also recognized as forms of "committing".¹⁵⁶⁴ Co-perpetrators pursue a common goal, either through an explicit agreement or silent consent, which they can only achieve by co-ordinated action and shared control over the criminal conduct. Each co-perpetrator must make a contribution essential to the commission of the crime.¹⁶⁶⁵ Indirect perpetration on the other hand requires that the indirect perpetrator uses the direct and physical perpetrator as a mere "instrument" to achieve his goal, *i.e.*, the commission of the crime. In such cases, the indirect perpetrator is criminally responsible because he exercises control over the act and the will of the direct and physical perpetrator.¹⁷⁶⁶ The Majority reasoned that "[i]t is irrelevant that Athanase Seromba did not personally drive the bulldozer that destroyed the church" in order to find Athanase Seromba responsible for committing genocide, and that, "[w]hat is important is that Athanase Seromba fully exercised his influence over the bulldozer driver who, as the Trial Chamber's findings demonstrate, accepted Athanase Seromba as the only authority, and whose directions he followed."¹⁸⁶⁷ Evident in this reasoning is the attribution of liability for "committing" to the "perpetrator behind the perpetrator"¹⁹⁶⁸ without the obvious

⁶¹ Cf. Gacumbitsi Appeal Judgement, para. 60.

⁶² Emphases added by underlining.

⁶³ *Blaškić* Appeal Judgement, para. 46.

⁶⁴ *Gacumbitsi* Appeal Judgement, Separate opinion of Judge Schomburg, para. 16.

⁶⁵ *Gacumbitsi* Appeal Judgement, Separate opinion of Judge Schomburg, para. 17 and fn. 31, referring to C. Roxin, *Täterschaft und Tatherrschaft*, 7th edn. (2000), pp. 275-305. See also K. Ambos, in: O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (1999), Art. 25 marginal no. 8.

⁶⁶ *Gacumbitsi* Appeal Judgement, Separate opinion of Judge Schomburg, para. 18 and fn. 33, referring to C. Roxin, *Täterschaft und Tatherrschaft*, 7th edn. (2000), pp. 142-274. See also K. Ambos, in: O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (1999), Art. 25 marginal no. 9.

⁶⁷ Appeal Judgement, para. 171.

⁶⁸ *Gacumbitsi* Appeal Judgement, Separate opinion of Judge Schomburg, para. 20 and fn. 36 ("As indirect perpetratorship focuses on the indirect perpetrator's control over the will of the direct and physical perpetrator, it

characterization of Athanase Seromba's conduct as co-perpetratorship or indirect perpetratorship.

9. Whilst the Majority's approach would make it much easier to hold criminally liable as a principal perpetrator those persons who do not directly commit offences, this approach is inconsistent with the jurisprudence. In the *Stakić* Appeal Judgement, the Appeals Chamber held that the Trial Chamber erred in conducting its analysis of the responsibility of the appellant within the framework of co-perpetratorship, and unanimously and unequivocally said of co-perpetratorship that, "[t]his mode of liability, as defined and applied by the Trial Chamber, does not have support in customary international law or in the settled jurisprudence of this Tribunal, which is binding on the Trial Chambers."⁶⁹ Consequently, the Appeals Chamber concluded that it "is not valid law within the jurisdiction of this Tribunal."⁷⁰

III) The author's opinion on this jurisprudence

In order not to repeat (or worse: to contradict) myself let me make use of and refer to excerpts of my own dissenting opinions as laid down *inter alia* in:

1) *Prosecutor v. Simić* (Appeal Judgement) IT-95-9-A (28 November 2006)

"3. The wording of the Statute ultimately limits its interpretation. It follows that the only crimes or modes of liability are those foreseen in the Statute. Even within the scope of the Statute, any interpretation may not exceed what is recognized by international law.⁷¹ Therefore, it is necessary and at the same time sufficient to plead a specific crime and a specific mode of participation as set out in the explicit provisions of the Statute. The Prosecution is consequently not required to plead any legal interpretation or legal theory concerning a mode of participation that does not appear in the Statute, such as joint criminal enterprise, in particular as the Appeals Chamber has held that joint criminal enterprise is to be regarded as a form of "committing".⁷²

"11. On a more general note, I wish to point out that it would have been possible to interpret Article 7(1) of the Statute⁷³ as a monistic model of perpetration (*Einheitstäterschaft*) in which each participant in a crime is treated as a perpetrator irrespective of his or her degree of participation.⁷⁴ Such an approach would have allowed the Prosecution to plead Article 7(1) of the Statute in its entirety without having to choose a particular mode of participation. In

is sometimes understood to require a particular "defect" on the part of the direct and physical perpetrator which excludes his criminal responsibility.")

⁶⁹ *Stakić* Appeal Judgement, para. 62.

⁷⁰ *Stakić* Appeal Judgement, para. 62.

⁷¹ See Report of the Secretary-General, U.N. Doc. S/25704, para. 34.

⁷² As to this, see *Karemera, Ngirumpatse and Nzirorera* Decision on Defence Motions Challenging the Pleading of a Joint Criminal Enterprise in a Count of Complicity in Genocide in the Amended Indictment, 18 May 2006, para. 8 and para. 5; *Odžanić* Decision Joint Criminal Enterprise, para. 20.

⁷³ See ICTY Statute, Art. 7(1): A person who planned, instigated, ordered, committed or *otherwise* aided and abetted [...] (emphasis added). Art. 6(1) of the ICTR Statute is identical to this provision. My views therefore also apply to the ICTR Statute as stated in *Gacumbitsi* Appeal Judgement, Separate Opinion of Judge Schomburg on the Criminal Responsibility of the Appellant for Committing Genocide, para. 6.

⁷⁴ See, for example, *Strafgesetzbuch* (Austria), Sec. 12: "Treatment of all participants as perpetrators"; for further details, see *W. Schöberl*, *Die Einheitstäterschaft als europäisches Modell* (2006), pp. 50-65; 197-227. See also *Straffeloven* (Denmark), Sec. 23(1), reprinted in Danish and in German translation in *K. Cornils and V. Greve*, *Das Dänische Strafgesetz*, 2nd edn. (2001); for further details, see *K. Cornils, ibid.*, p. 9. See also *Straffelov* (Norway), Sec. 58; for further details regarding Norway, see *W. Schöberl*, *Die Einheitstäterschaft als europäisches Modell* (2006), pp. 67-102; 192-227.

that case, the Judges would have been able to assess the significance of an accused's contribution to a crime under the Statute at the sentencing stage, thereby saving the Tribunal the trouble of developing an unnecessary participation doctrine. Unfortunately, the Tribunal's jurisprudence has come to distinguish on a case-by-case basis between the different modes of liability.

12. In the case at hand, the Trial Chamber applied the theory of joint criminal enterprise. However, this concept is not expressly included in the Statute and is only one possible interpretation of "committing" in relation to the crimes under the Statute.⁷⁵

13. Indeed, the laws of the former Yugoslavia and the laws of the successor States on the territory of the former Yugoslavia all include the concept of co-perpetratorship:

State	Relevant Provision (in part as an unofficial translation)
Former Yugoslavia (<i>Krivični Zakon</i> , 1990)	Art. 22: "If several persons jointly commit a criminal act by participating in the act of commission or in some other way, each of them shall be punished as prescribed for the act."
Bosnia and Herzegovina (<i>Krivični Zakon Federacije Bosne i Hercegovine</i> , 2003)	Art. 29: "If several persons, by participating in the perpetration of a criminal offence or by taking some other act by which a decisive contribution has been made to its perpetration, jointly perpetrated a criminal offence, each shall be punished as prescribed for the criminal offence."
Croatia (<i>Kazneni Zakon</i> , 1999)	Article 35 (3): "Co-principals of a criminal offence are two or more persons who, on the basis of a joint decision, commit a criminal offence in such a way that each of them participates in the perpetration or, in some other way, substantially contributes to the perpetration of a criminal offence."
The former Yugoslav Republic of Macedonia (<i>Krivičen Zakonik</i> , 2004)	Art. 22: "If two or more persons, with their participation or any other special contribution to the perpetration of the crime, jointly commit a crime, each of them shall be punished with the sentence prescribed for that crime."
Montenegro (<i>Krivični Zakonik</i> , 2004)	Art. 23: "If several persons who, by participating in the perpetration of a criminal offence or by carrying out some other act, have jointly perpetrated a criminal offence, each shall be punished with the penalty prescribed for the criminal offence."
Serbia (<i>Krivični Zakon Republike Srbije</i> , 2005)	Art. 33: "Co-perpetrators: If several persons who, by participating in the perpetration of a criminal offence, have jointly perpetrated a criminal offence, or jointly perpetrated a criminal offence out of negligence, or in the course of the realization of a joint decision decisively contributed to the commission of the offence with some other act, each person shall be punished by the penalty prescribed for the criminal offence."
Slovenia (<i>Kazenski zakonik</i> , 1995)	Art. 25: "If two or more persons are engaged jointly in the committing of a criminal offence by collaborating in the execution thereof or by performance of any act representing a decisive part of the committing of the offence in question, each of these persons shall be punished according to the limits set down in the statutes for the offence in question."

The Statute of the Tribunal in Article 24(1) explicitly only provides for the Tribunal to have recourse to the general practice regarding prison sentences in the former Yugoslavia. However, this does not exclude the possibility that the Tribunal should also, by the same token, and (at least) as a matter of judicial fairness and courtesy have recourse to the relevant substantive laws applicable on the territory of the former Yugoslavia.

14. Moreover, in many other legal systems, committing is interpreted differently from the jurisprudence of the Tribunal. Since Nuremberg and Tokyo, both national and international criminal law have come to accept, in particular, co-perpetratorship as a form of

⁷⁵ See in particular Participation in Crime: Criminal Liability of Leaders of Criminal Groups and Networks, Expert Opinion, Commissioned by the United Nations – International Criminal Tribunal for the Former Yugoslavia, Office of the Prosecutor- Project Coordination: Prof. Dr. Ulrich Sieber., Priv. Doz. Dr. Hans-Georg Koch, Jan Michael Simon, Max-Planck-Institut für ausländisches und internationales Strafrecht, Freiburg, Germany ("Expert Opinion"), 2006.

committing⁷⁶. For example, the recent Comparative Analysis of Legal Systems, carried out by the Max-Planck-Institute, Freiburg, Germany, illustrates that, *inter alia*, the following States include co-perpetratorship in their criminal codes⁷⁷:

State	Relevant Provision (in part as an unofficial translation)
Cameroon (<i>Livre I du Code pénal</i>)	Art. 96: "Est coauteur celui qui participe avec autrui et en accord avec lui à la commission de l'infraction."
Chile (<i>Código Penal</i>)	Art. 15: "Se consideran autores: 3° Los que, concertados para su ejecución, facilitan los medios con que se lleva a efecto el hecho o lo presencian sin tomar parte inmediata en él."
Czech Republic (<i>Trestní zákon</i>)	Sec. 9(2): "If a crime is committed by the joint conduct of two or more persons, each of them shall be criminally liable as if he alone had committed the crime (accomplice)".
Germany (<i>Strafgesetzbuch</i>)	Sec. 25(2): "If more than one person commit the crime jointly, each shall be punished as a perpetrator (co-perpetrator)."
Greece (<i>Poinikos Kodikas</i>)	Art. 45: "Co-Perpetrators: If two or more persons commit a criminal offence jointly, each of them shall be punished as a perpetrator."
Hungary (1978. évi IV. Törvény a Büntető Törvénykönyvről)	Art. 20(2): "Co-principals are the persons who jointly realize the legal facts of an intentional crime in awareness of each other's activities."
Israel (הורק העונשין)	Section 29(b): "Participants in the commission of an offence, who perform acts for its commission are joint perpetrators, and it is immaterial whether all acts were performed jointly or some were performed by one person and some by another."
Japan (刑法 <i>Keihō</i>)	Art. 60: "(Co-principals): Two or more persons who jointly commit a criminal act shall all be dealt with as principals."
Mexico (<i>Código Penal</i>)	Art. 13(3): "Son autores o partícipes del delito: Los que lo realicen conjuntamente."
Netherlands (<i>Wetboek van Strafrecht</i>)	Art. 47(1): "As perpetrators of a criminal offence will be punished: Those who commit a criminal offence, who cause a criminal offence to be committed or who jointly commit a criminal offence."
Poland (<i>Kodeks Karny</i>)	Art. 18 §1 "Not only the person who has committed a prohibited act himself or together and under arrangement with another person, but also a person who has directed the commission of a prohibited act by another person or taken advantage of the subordination of another person to him, orders such a person to commit such a prohibited act, shall be liable for perpetration."
Portugal (<i>Código Penal</i>)	Art. 26: "É punível como autor quem executar o facto, por si mesmo ou por intermédio de outrem, ou tomar parte directa na sua execução, por acordo ou juntamente com outro ou outros, e ainda quem, dolosamente, determinar outra pessoa à prática do facto, desde que haja execução ou começo de execução."
Republic of Korea (<i>Hyeong-beop</i>)	§ 30: "Co-perpetratorship: If two or more persons commit a criminal offence jointly, each shall be punished as a perpetrator."
Spain (<i>Código Penal</i>)	Art. 28: "Son autores quienes realizan el hecho por sí solos, conjuntamente o por medio de otro del que se sirven como instrumento."

In addition, the following States have accepted the concept of co-perpetratorship:

⁷⁶ With all due respect, I maintain my position that co-perpetratorship is firmly entrenched in customary international law. Unfortunately, when the *Stakić* Trial Judgement was rendered, the Trial Chamber – solely composed of civil law judges – took it for granted that the notion of co-perpetratorship need not be academically supported by reference to State practice. With the availability of the Expert Opinion, *supra* note 19 [i.e. *supra* note 63 of this article], such an *empirical basis can now be delivered*.

⁷⁷ See Expert Opinion, *supra* note 19 [i.e. *supra* note 63 of this article]. Moreover, this research illustrates that even States which do not codify co-perpetratorship in their criminal codes recognize this concept, as demonstrated by settled jurisprudence. This includes Sweden (Expert Opinion, Report on Sweden, p. 10) and France (Expert Opinion, Report on France, p. 6). Although not included in the legal analysis of the Expert Opinion, Switzerland's courts have also developed a similar approach: see *M. A. Niggli* and *H. Wiprächtiger* (eds.), *Basler Kommentar – Strafgesetzbuch I*, Vor Art. 24 marginal number 7 et seq.

State	Relevant Provision (in part as an unofficial translation)
Colombia (<i>Código Penal</i>)	Art. 29: “Son coautores los que, mediando un acuerdo común, actúan con división del trabajo criminal atendiendo la importancia del aporte.”
Finland (<i>Rikoslaki</i>)	Chapt. 5, Sec. 3: “If two or more persons have committed an intentional offence together, each is punishable as an offender.”
Paraguay (<i>Código Penal</i>)	Art. 29(2): “También será castigado como autor el que obrara de acuerdo con otro de manera tal que, mediante su aporte al hecho, comparta con el otro el dominio sobre su realización.”

“17. As an *international* criminal court, it is incumbent upon this Tribunal not to turn a blind eye to these developments in modern criminal law and to show open-mindedness, respect and tolerance – unalienable prerequisites to all kinds of supranational or international cooperation in criminal matters – by accepting internationally recognized legal interpretations and theories such as the notion of co-perpetratorship. Co-perpetratorship differs slightly from joint criminal enterprise with respect to the key element of attribution.⁷⁸ However, both approaches widely overlap and have therefore to be harmonized in the jurisprudence of both *ad hoc* Tribunals. Such harmonization could at the same time provide all categories of joint criminal enterprise with sharper contours by combining objective and subjective components in an adequate way. As pointed out by the Appeals Chamber in the *Kunarac* Appeal Judgement, “the laws of war ‘are not static, but by continual adaptation follow the needs of a changing world.’”⁷⁹ In general, harmonization will lead to greater acceptance of the Tribunal’s jurisprudence by international criminal courts in the future and in national systems, which understand imputed criminal responsibility for “committing” to include co-perpetratorship[...].”

“20. Modern criminal law has come to apply the notion of indirect perpetration even where the direct and physical perpetrator is criminally responsible (“perpetrator behind the perpetrator”).⁸⁰ This is especially relevant if crimes are committed through an organized structure of power. Since the identity of the direct and physical perpetrator(s) is irrelevant, the control and, consequently, the main responsibility for the crimes committed shifts to the persons occupying a leading position in such an organized structure of power.⁸¹ These

⁷⁸ While joint criminal enterprise is based primarily on the common state of mind of the perpetrators (subjective criterion), co-perpetratorship also depends on whether the perpetrator exercises control over the criminal act (objective criterion).

⁷⁹ *Kunarac* Appeal Judgement, para. 67, quoting the International Military Tribunal at Nuremberg.

⁸⁰ For a detailed analysis and references, see *Gacumbitsi* Appeal Judgement, Separate Opinion of Judge Schomburg on the Criminal Responsibility of the Appellant for Committing Genocide; see also *C. Roxin*, *Täterschaft und Tatherrschaft*, 8th edn. (2006), pp. 141-274; see also *Héctor Olásolo* and *Ana Pérez Cepeda*, 4 ICLR (2004), pp. 475-526.

⁸¹ In one of its leading cases, the *Politbüro* Case, the German Federal Supreme Court (*Bundesgerichtshof*) held three high-ranking politicians of the former German Democratic Republic responsible as indirect perpetrators for killings of persons at the East German border by border guards (German Federal Supreme Court (*Bundesgerichtshof*), Judgement of 26 July 1994, *BGHSt.* 40, pp. 218-240); Argentinean Courts have entered convictions for crimes committed by members of the Junta regime based on indirect perpetratorship (See Argentinean National Appeals Court, *Judgement on Human Rights Violations by Former Military Leaders* of 9 December 1985. For a report and translation of the crucial parts of the judgement, see 26 ILM (1987), pp. 317-372. The Argentine National Appeals Court found the notion of indirect perpetratorship to be included in Art. 514 of the Argentine Code of Military Justice and in Art. 45 of the Argentine Penal Code. The Argentine Supreme Court upheld this judgement on 30 December 1986). The Expert Opinion gives further examples: In Portugal a law was enacted to address the crimes during the *Estado Novo* which made it possible to convict those organising the crimes “behind the scenes” by relying only on their function and power within the organisational system: Lei n.º 8/75 de 25 Julho de 1975, published in *Boletim do Ministério da Justiça* N° 249 de Outubro de 1975, p. 684 *et seq.* (cited in Report on Portugal, p. 15). The Spanish Tribunal Supremo employed the notion of “perpetrator behind the perpetrator” in a case dating from 1994: Sentencia Tribunal Supremo núm. 1360/1994

persons must therefore be regarded as perpetrators irrespective of whether the direct and physical perpetrators are criminally responsible themselves or (under exceptional circumstances) not.”

2) *Prosecutor v. Martić* (Appeal Judgement) IT-95-11-A (08 October 2008)

“2. However, I feel compelled to write separately because I firmly believe that Martić's criminal conduct has to be qualified as that of a (co)-perpetrator under the mode of liability of “committing” pursuant to Article 7(1) of the Statute of the International Tribunal. My concern is that Martić's criminal conduct is primarily qualified as relying on membership in a group – the so-called joint criminal enterprise (JCE) – which cannot be reconciled with the Statute and on the contrary seems to trivialize Martić's guilt. Martić has to be seen as a high-ranking principal perpetrator and not just as a member of a criminal group.”

“5. The Statute does not penalize individual criminal responsibility through JCE. The Statute does not criminalize the membership in any association or organization. The purpose of this International Tribunal is to punish individuals and not to decide on the responsibility of states, organizations or associations. As stated in Nuremberg:

Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.⁶²

Consequently, any idea of collective responsibility, shifting the blame from individuals to associations or organizations and deducing criminal responsibility from membership in such associations or organizations, must be rejected as not only *ultra vires* but also counterproductive to the International Tribunal's mandate of bringing peace and reconciliation to the territory of the former Yugoslavia. It is therefore that I cannot agree with this Judgement when it describes a perpetrator as “a member of a JCE”⁷⁸³, when it speaks of “members of a JCE [who] could be held liable for crimes committed by principal perpetrators who were not members of the JCE”⁸⁴ and when it refers to the accused's “fellow members [of the JCE].”⁹⁸⁵ While the Appeals Chamber has in the past explicitly stated that “criminal liability pursuant to a joint criminal enterprise is not a liability for mere membership or for conspiring to commit crimes,”¹⁰⁸⁶ the constant expansion of the concept of JCE in the jurisprudence of the International Tribunal suggests the contrary. In this context, I recall the report of the Secretary-General of the United Nations, in which he stated that:

The question arises ... whether a juridical person, such as an association or organization, may be considered criminal as such and thus its members, for that reason alone, be made subject to the jurisdiction of the International Tribunal. The Secretary-General believes that this concept should not be retained in regard to the International Tribunal. The criminal acts set out in this statute are carried out by natural persons;

(cited in Report on Spain, p. 15). On a more general note see *C. Roxin*, *Täterschaft und Tatherrschaft*, 8th ed. (2006), pp. 242 - 252.

⁸² International Military Tribunal, Judgement and Sentence of 1 October 1946, *Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946*, Vol. I, p. 223.

⁸³ Footnote omitted.

⁸⁴ Footnote omitted.

⁸⁵ Footnote omitted.

⁸⁶ *Prosecutor v. Milan Milutinović Challenging Jurisdiction – Joint Criminal Enterprise*, 21 May 2003, para. 26.

such person would be subject to the jurisdiction of the International Tribunal irrespective of membership in groups.¹¹⁸⁷

6. I need not reiterate the fact that the Appeals Chamber of this International Tribunal has unnecessarily and without any reasoning proprio motu discarded internationally accepted definitions of the term committing, such as the concepts of co-perpetration, perpetrator behind the perpetrator or indirect perpetrator, all of them forming part of customary international law¹³⁸⁸ as was held in particular in the most important recent decisions of the International Criminal Court.¹⁴⁸⁹ Suffice it to say that it is not helpful at all, at this stage of the development of international criminal law, that there now exist two competing concepts of commission as a mode of liability. The unambiguous language of both decisions rendered by Pre-Trial Chamber I of the International Criminal Court endorses the concept of co-perpetration when interpreting the word “to commit” under Article 25(3)(a) of the ICC Statute.¹⁵⁹⁰ For this mode of liability, there can be only one definition in international criminal law.¹⁶⁹¹

7. Furthermore, the Appeals Chamber’s constant adjustment of what is encompassed by the notion of JCE¹⁷⁹² raises serious concerns with regard to the principle of *nullum crimen sine lege*. The lack of an objective element in the so-called third (“extended”) category of JCE is particularly worrying. It cannot be sufficient to state that the accused person is liable for any actions by another individual, where “the commission of the crimes ... were a natural and foreseeable consequence of a common criminal purpose.”¹⁸⁹³ What is missing here is an additional objective component, such as control over the crime,¹⁹⁹⁴ as would be provided under the concepts of co-perpetration or indirect perpetration. This necessary element of having control over the crime would on the one hand serve as a safeguard to adequately limit the scope of *individual* criminal responsibility, and on the other hand properly distinguish between a principal and an accessory. By contrast, the current shifting definition of the third category of JCE has all the potential of leading to a system, which would impute guilt solely by association.

8. To avoid any misunderstanding: In the present case, based on the sum of all findings of the Trial Chamber, Martić exercised the necessary control over the criminal conduct and was consequently a principal perpetrator of all the crimes for which he was convicted. It is

⁸⁷ The Secretary General, *Report of the Secretary-General pursuant to Paragraph 2 of the Security Council Re808 (1993)*, U.N. Doc S/25704 (3 May 1993), para. 51.

⁸⁸ See for a detailed argument: *Prosecutor v. Blagoje Simić*, Case No. IT-95-9-A, Appeal Judgement, Dissenting Opinion of Judge Schomburg, 28 November 2006 and *Sylvestre Gacumbitsi v. The Prosecutor*, Case No. ICTR-2001-64-A, Appeal Judgement, Separate Opinion of Judge Schomburg on the Criminal Responsibility of the Appellant for Committing Genocide, 7 July 2006

⁸⁹ Footnote omitted.

⁹⁰ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges, 30 September 2008, para. 510. *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, 29 January 2007, para. 338.

⁹¹ Footnote omitted.

⁹² See for instance the varying language employed in the *Tadić* Appeal Judgement (paras 204 *et seq.*, para. 228), the *Brđanin* Appeal Judgement (paras 410 *et seq.*, paras 418 *et seq.*), the *Limaj* Appeal Judgement (para. 119), explicitly limiting the responsibility for crimes committed by members [*sic*] of the JCE, whereas in this Judgement, at para. 171, such limitation is explicitly rejected.

⁹³ Judgement, para. 171

⁹⁴ See *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges, 30 September 2008, para. 485 with further exhaustive references.

immaterial that he was physically removed from many of the crimes. As was posited by the Jerusalem District Court in the *Eichmann* case:

In such an enormous and complicated crime as the one we are now considering, wherein many people participated at various levels and in various modes of activity – the planners, the organizers and those executing the acts, according to their various ranks – there is not much point in using the ordinary concepts of counselling and soliciting to commit a crime. For these crimes were committed en masse, not only in regard to the number of the victims, but also in regard to the numbers of those who perpetrated the crime, and the extent to which any one of the many criminals were close to, or remote from, the actual killer of the victim, means nothing as far as the measure of his responsibility is concerned. On the contrary, in general, the degree of responsibility increases as we draw further away from the man who uses the fatal instrument with his own hands and reach the higher ranks of command...²⁰⁹⁵

9. I also note with concern that neither the artificial concept of JCE nor its compartmentalization in three categories has any added value when it comes to sentencing. The decisive element must be in principle the individual contribution of an accused. At times, the incorrect impression is given that the third category of JCE attracts a lower sentence simply because of its catch-all nature. However, in principle, a person's guilt must be described as increasing in tandem with his position in the hierarchy: The higher in rank or further detached the mastermind is from the person who commits a crime with his own hands, the greater is his responsibility.²¹⁹⁶

3) *Gacumbitsi v. The Prosecutor* (Appeal Judgement) ICTR-2001-64-A (7 July 2006),

“19. Especially the notion of indirect perpetration has been employed in cases concerning organized crime, terrorism, white collar crime or state induced criminality. For example, Argentinean Courts have entered convictions for crimes committed by members of the Junta regime based on indirect perpetration.³⁴⁹⁷ In one of its leading cases, the *Politbüro* Case, the German Federal Supreme Court (*Bundesgerichtshof*) held three high-ranking politicians of the former German Democratic Republic responsible as indirect perpetrators for killings of persons at the East German border by border guards.³⁵⁹⁸

20. Modern criminal law has come to apply the notion of indirect perpetration even where the direct and physical perpetrator is criminally responsible (“perpetrator behind the

⁹⁵ *Attorney General of Israel v. Adolf Eichmann*, District Court of Jerusalem, Judgement of 12 December 1961, 36 ILR 18 (168), para. 197.

⁹⁶ Footnote omitted.

⁹⁷ See Argentinean National Appeals Court, *Judgement on Human Rights Violations by Former Military Leaders* of 9 December 1985. For a report and translation of the crucial parts of the judgement, see 26 *ILM* (1987), pp. 317-372. The Argentinean National Appeals Court found the notion of indirect perpetration to be included in Art. 514 of the Argentinean Code of Military Justice and in Art. 45 of the Argentinean Penal Code. The Argentinean Supreme Court upheld this judgement on 30 December 1986. See also K. Ambos and C. Grammer, *Tatherrschaft qua Organisation. Die Verantwortlichkeit der argentinischen Militärführung für den Tod von Elisabeth Käsemann*, in: T. Vormbaum (ed.), 4 *Jahrbuch für juristische Zeitgeschichte* (2002/2003), pp. 529-553 (official Legal Opinion on the Responsibility of the Argentinean Military Leaders for the Death of Elisabeth Käsemann, commissioned by the (German) Coalition against Impunity). On the (German) Coalition against Impunity, see <<http://www.fdcl-berlin.de>>.

⁹⁸ German Federal Supreme Court (*Bundesgerichtshof*), Judgement of 26 July 1994, *BGHSt* 40, pp. 218-240.

perpetrator”).³⁶⁹⁹ This is especially relevant if crimes are committed through an organized structure of power in which the direct and physical perpetrator is nothing but a cog in the wheel that can be replaced immediately. Since the identity of the direct and physical perpetrator is irrelevant, the control and, consequently, the main responsibility for the crimes committed shifts to the persons occupying a leading position in such an organized structure of power.³⁷¹⁰⁰ These persons must therefore be regarded as perpetrators irrespective of whether the direct and physical perpetrators are criminally responsible themselves or (under exceptional circumstances) not. This approach was applied, for example, by German courts in cases concerning killings at the East German border: as far as border guards who had killed persons were identified and brought to trial, they were generally convicted as perpetrators. This, however, did not reduce the criminal responsibility of those who had acted “behind the scenes”. As the German Federal Supreme Court (*Bundesgerichtshof*) held in the aforementioned *Politbüro* Case:

[I]n certain groups of cases, however, even though the direct perpetrator has unlimited responsibility for his actions, the contribution by the man behind the scenes almost automatically brings about the constituent elements of the offence intended by that man behind the scenes. Such is the case, for example, when the man behind the scenes takes advantage of certain basic conditions through certain organisational structures, where his contribution to the event sets in motion regular procedures. Such basic conditions with regular procedures are found particularly often among organisational structures of the State [...] as well as in hierarchies of command. If the man behind the scenes acts in full awareness of these circumstances, particularly if he exploits the direct perpetrator’s unconditional willingness to bring about the constituent elements of the crime, and if he wills the result as that of his own actions, then he is a perpetrator by indirect perpetration. He has control over the action [...]. In such cases, failing to treat the man behind the scenes as a perpetrator would not do justice to the significance of his contribution to the crime, especially since responsibility often increases rather than decreases the further one is from the scene of the crime [...].³⁸¹⁰¹

21. For these reasons, the notion of indirect perpetration suits the needs also of international criminal law particularly well.³⁹¹⁰² It is a means to bridge any potential physical distance from the crime scene of persons who must be regarded as main perpetrators because of their overall involvement and control over the crimes committed. This was recognized upon the establishment of the International Criminal Court whose Statute, in Article 25(3)(a),

⁹⁹ As indirect perpetration focuses on the indirect perpetrator’s control over the will of the direct and physical perpetrator, it is sometimes understood to require a particular “defect” on the part of the direct and physical perpetrator which excludes his criminal responsibility.

¹⁰⁰ See C. Roxin, *Täterschaft und Tatherrschaft*, 7th edn. (2000), pp. 242 - 252.

¹⁰¹ German Federal Supreme Court (Bundesgerichtshof), Judgement of 26 July 1994, *BGHSt* 40, pp. 218-240, p. 236.

¹⁰² This appears to be acknowledged also by Pre-Trial Chamber I of the International Criminal Court, who stated in a recent decision: In the Chamber’s view, there are reasonable grounds to believe that, given the alleged hierarchical relationship between Mr Thomas Lubanga Dyilo and the other members of the UPC and the FPLC, the concept of indirect perpetration which, along with that of co-perpetration based on joint control of the crime referred to in the Prosecution’s Application, is provided for in article 25(3) of the Statute, could be applicable to Mr Thomas Lubanga Dyilo’s alleged role in the commission of the crimes set out in the Prosecution’s Application. *Prosecutor v. Thomas Lubanga Dyilo*, Decision Concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, ICC-01/04-01/06, 24 February 2006, Annex I: Decision on the Prosecutor’s Application for a Warrant of Arrest, Article 58, para. 96 (emphasis added).

includes both the notion of co-perpetration and indirect perpetration (“perpetrator behind the perpetrator”)... Given the wide acknowledgement of co-perpetratorship and indirect perpetratorship, the ICC Statute does not create new law in this respect, but reflects existing law.”

Let me now turn to

IV) Decisions rendered by the ICC to discontinue the use of the concept of JCE

Already in **The Prosecutor v. Lubanga** (Pre-Trial Chamber Decision on the Confirmation of Charges) ICC-01/04-01/06 (29 January 2007),¹⁰³ ICC clearly departs in particular at paras 235 et seq. from the overly subjective concept of JCE.

The ICC went on with its in-depth analysis of this mode of liability in **The Prosecutor v. Katanga et al.** (Pre-Trial Chamber Decision on the Confirmation of Charges) ICC-01/04-01/07 (30 September 2008):

“495. The commission of a crime through another person is a model of criminal responsibility recognised by the world's major legal systems.⁶⁵⁵¹⁰⁴ The principal (the 'perpetrator-by-means') uses the executor (the direct perpetrator) as a tool or an instrument for the commission of the crime. Typically, the executor who is being used as a mere instrument will not be fully criminally responsible for his actions.⁶⁵⁶¹⁰⁵ As such, his innocence will depend upon the availability of acceptable justifications and/or excuses for his actions. Acceptable justifications and excuses include the person's: i) having acted under a mistaken belief; ii) acted under duress; and/or iii) not having the capacity for blameworthiness.

496. A concept has developed in legal doctrine that acknowledges the possibility that a person who acts through another may be individually criminally responsible, regardless of whether the executor (the direct perpetrator) is also responsible. This doctrine is based on the early works of Claus Roxin and is identified by the term: 'perpetrator behind the perpetrator' (Täter hinter dem Täter).⁶⁵⁷¹⁰⁶

497. The underlying rationale of this model of criminal responsibility is that the perpetrator behind the perpetrator is responsible because he controls the will of the direct perpetrator. As such, in some scenarios it is possible for both perpetrators to be criminally liable as principals: the direct perpetrator for his fulfilment of the subjective and objective elements of the crime, and the perpetrator behind the perpetrator for his control over the crime via his control over the will of the direct perpetrator.

498. Several groups of cases have been presented as examples for the perpetrator behind the perpetrator's being assigned principal responsibility despite the existence of a responsible, direct perpetrator (i.e., one whose actions are not exculpated by mistake, duress, or the lack of

¹⁰³ *The Prosecutor v. Lubanga* (Pre-Trial Chamber Decision on the Confirmation of Charges) ICC-01/04-01/06 (29 January 2007), paras 322-367.

¹⁰⁴ See FLETCHER, O.P., *Rethinking Criminal Law*, New York, Oxford University Press, 2000, p. 639; WERLE, G., "Individual criminal responsibility under Article 25 of the Rome Statute", 5 J. Int'l Criminal Justice 963 (2007).

¹⁰⁵ AMBOS, K., "Article 25: Individual Criminal Responsibility", in TRIFFTERER, O. (Ed.), *Commentary on the Rome Statute of the International Criminal Court*, Baden-Baden, Nomos, 1999, p. 479; JIMENEZ DE ASÚA, L., *Lecciones de Derecho Penal*, México, Colección Clásicos del Derecho, 1995, p. 337.

¹⁰⁶ ROXIN, C., "Straftaten im Rahmen organisatorischer Machtapparate", *Goltdammer's Archiv für Strafrecht*(\963\pp. 193-207.

capacity for blame-worthiness).⁶⁵⁸¹⁰⁷ This notwithstanding, the cases most relevant to international criminal law are those in which the perpetrator behind the perpetrator commits the crime through another by means of "control over an organisation" (Organisationsherrschaft).⁶⁵⁹¹⁰⁸

a. Control over the organisation

500. For the purposes of this Decision, the control over the crime approach is predicated on a notion of a principal's "control over the organisation". The Chamber relies on this notion of "control over the organisation" for numerous reasons, including the following: (i) it has been incorporated into the framework of the Statute; (ii) it has been increasingly used in national jurisdictions; and (iii) it has been addressed in the jurisprudence of the international tribunals. Such notion has also been endorsed in the jurisprudence of Pre-Trial Chamber III of this Court.

506. This doctrine has also been applied in international criminal law in the jurisprudence of the international tribunals.⁶⁷²¹⁰⁹ In *The Prosecutor v. Milomir Stakić* Judgement, Trial Chamber II of the ICTY relied on the liability theory of coperperation of a crime through another person as a way to avoid the inconsistencies of applying the so-called "Joint Criminal Enterprise" theory of criminal liability to senior leaders and commanders.⁶⁷³¹¹⁰

507. As noted by the Defence for Germain Katanga,⁶⁷⁴¹¹¹ the Trial Chamber's Judgement was overturned on appeal. However, the reasoning of the ICTY Appeals Chamber's Judgement is of utmost importance to an understanding of why the impugned decision does not obviate its validity as a mode of liability under the Rome Statute.

508. The Appeals Chamber rejected this mode of liability by stating that it did not form part of customary international law.⁶⁷⁵¹¹² However, under article 21(1)(a) of the Statute, the first source of applicable law is the Statute. Principles and rules of international law constitute a secondary source applicable only when the statutory material fails to prescribe a legal solution. Therefore, and since the Rome Statute expressly provides for this specific mode of liability, the question as to whether customary law admits or discards the 'joint commission

¹⁰⁷ Such scenarios include, inter alia, cases in which the perpetrator behind the perpetrator commits a crime through the direct perpetrator by misleading the latter about the seriousness of the crime; the qualifying circumstances of the crime; and/or the identity of the victim. See STRATENWERTH, G. & KUHLEN L., *Strafrecht, Allgemeiner Teil I*, 5th ed., Köln, Heymanns, 2004, § 12/59-67; ROXIN, C., *Strafrecht, Allgemeiner Teil II*, München, C.H. Beck, 2003, § 25/94-104.

¹⁰⁸ ROXIN, C., "Straftaten im Rahmen organisatorischer Machtapparate", *Goltdammer's Archiv für Strafrecht* (1963), pp. 193-207; AMBOS, K., *La parte general del derecho penal internacional*, Montevideo, Temis, 2005, p. 240.

¹⁰⁹ ICTR, *Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-A, Appeals Judgement, "separate opinion of Judge Schomburg", 7 July 2006, paras 14-22; ICTY, *The Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Judgement, 31 July 2003, paras 439 et seq.; paras 741 et seq. According to AMBOS, K., *Internationales Strafrecht*, München Beck 2006, §7/29, its principles are to be recognized in the Nuremberg's jurisprudence. *United States of America v. Alstotter et al.* ("The Justice Case"), 3 T.W.C. 1 (1948), 6 L.R.T.W.C. 1 (1948), 14 Ann. Dig. 278 (1948).

¹¹⁰ ICTY) *The Prosecutor v Milomir Stakić*, Case No. IT-97-24-T, Trial Judgement, 31 July 2003, para. 439, 741 [rest omitted].

¹¹¹ ICC-01/04-01/07-698, para. 26.

¹¹² Footnote omitted.

through another person' is not relevant for this Court. This is a good example of the need not to transfer the ad hoc tribunals' case law mechanically to the system of the Court.⁶⁷⁶¹¹³

509. Finally, most recently, the Pre-Trial Chamber III of the Court also endorsed this notion of individual criminal responsibility in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*. Having established the suspect's position as the leader of the organisation and described the functioning of the militia, the Pre-Trial Chamber III stated:

In light of the foregoing, the Chamber considers that there are reasonable grounds to believe that, as a result of his authority over his military organisation, Mr. [...] had the means to exercise control over the crimes committed by MLC troops deployed in the CAR.⁶⁷⁷¹¹⁴

510. In sum, the acceptance of the notion of 'control over an organised apparatus of power' in modern legal doctrine,⁶⁷⁸¹¹⁵ its recognition in national jurisdictions,⁶⁷⁹¹¹⁶ its discussion in the jurisprudence of the ad hoc tribunals which, as demonstrated, should be distinguished from its application before this Court, its endorsement in the jurisprudence of the Pre-Trial Chamber III of the International Criminal Court but, most importantly, its incorporation into

¹¹³ WERLE, G., "Individual Criminal Responsibility in Article 25 ICC Statute", 5 J. Int'l Criminal Justice 953 (2007), pp. 961-962: "the ICC Statute must be seen on its own as an independent set of rules. Hence, a mechanical transfer of the ad hoc tribunals' case law is definitely not the correct approach; WERLE, G., *Volkerstrafrecht*, 2nd ed., Tübingen, Mohr Siebeck, 2007, paras 425 et seq.

¹¹⁴ ICC-01/05-01/08-14-tENG, para. 78.

¹¹⁵ SANCINETTI, M., *Teoría del delito y disvalor de acción • una investigación sobre las consecuencias prácticas de un concepto personal de ilícito circunscripto al disvalor de acción*, Buenos Aires, Hammurabi, 1991, pp. 712 et seq.; SANCINETTI, M., *Derechos humanos en la Argentina post dictatorial*, Buenos Aires, Lea, 1988, pp. 27 et seq.; SANCINETTI, M. & FERRANTE, M., *El derecho penal en la protección de los derechos humanos*, Buenos Aires, Hammurabi, 1999, p. 313; BACIGALUPO, E., *Principios de Derecho Penal*, Parte General, Buenos Aires, Hammurabi, 1987, p. 334; AMBOS, K., *La parte general del derecho penal internacional*, Montevideo, Terner, 2005, pp. 216-240; AMBOS, K., *Internationales Strafrecht*, München, Beck, 2006, §§ 7/29 et seq.; STRATEN WERTH, G. & KUHLEN, L., *Strafrecht, Allgemeiner Teil I*, 5* ed., Köln, Heymanns, 2004, § 12/65 et seq.; KÜHL, K., *Strafrecht, Allgemeiner Teil*, 4th ed., München, Vahlen, 2002, § 20/73 et seq.; WESSELS, J. & BEULKE, W., *Strafrecht, Allgemeiner Teil*, 36th ed., Heidelberg, Müller, 2006, n. 541; ROXIN, C., "Straftaten im Rahmen organisatorischer Machtapparate", *Goltdammer's Archiv für Strafrecht* (1963), pp. 193-207; ROXIN, C., *Täterschaft und Tatherrschaft*, 8th ed., Berlin, De Gruyter, 2006, pp. 248 et seq.; ROXIN, C., "Organisationsherrschaft und Tatentschlossenheit", 7 *Zeitschrift für Internationale Strafrechtsdogmatik* (2006), p. 294; ROXIN, C., "Anmerkungen zum Vortrag von Prof. Herzberg", in AMELUNG, K. (Ed.), *Individuelle Verantwortung und Beteiligungsverhältnisse bei Straftaten in bürokratischen Organisationen des Staates, der Wirtschaft und der Gesellschaft*, Sinzheim, Pro Universitate, 2000, pp. 55 et seq.; HERZBERG, R.D., *Täterschaft und Teilnahme*, München, Beck, 1977, pp. 42 et seq.; HIRSCH, H., *Rechtsstaatliches Strafrecht und staatlich gesteuertes Unrecht*, Opladen, Westdeutscher Verlag, 1996, pp. 22-23; BLOY, R., "Grenzen der Täterschaft bei fremdhändiger Tatausführung", *Goltdammer's Archiv für Strafrecht* (1996), pp. 425-442; SCHÖNKE, A. & SCHRÖDER, H., *Kommentar zum Strafgesetzbuch*, 26* ed., München, Beck, 2001, § 25/25a; TRÖNDLE, H. & FISCHER, T., *Strafgesetzbuch, Kommentar*, 53rd ed., München, Beck, 2006, § 25/7; KÜPPER, G., "Zur Abgrenzung der Täterschaftsformen", *Goltdammer's Archiv für Strafrecht* (1998), p. 524; SCHLÖSSER, J., *Soziale Tatherrschaft*, Berlin, Duncker und Humblot, 2004, p. 145 et seq.; RADTKE, H., "Mittelbare Täterschaft kraft Organisationsherrschaft im nationalen und internationalen Strafrecht", *Goltdammer's Archiv für Strafrecht* (2006), pp. 350 et seq.

¹¹⁶ Federal Supreme Court of Germany, BGHSt 40, 218, at pp. 236 et seq.; 45, 270 at p. 296; BGHSt 47, 100; BGHSt 37, 106; BGH NJW 1998, 767 at p. 769. The Federal Appeals Chamber of Argentina, *The Juntas Trial*, Case No. 13/84, chap. 7/5. Judgement of the Supreme Court of Justice of Peru, Case No. 5385-200. 14 December 2007. Supreme Court of Chile (investigating magistrate), *Fallos de Mes*, ano XXXV, noviembre de 1993, 12 November 1993; Supreme Tribunal of Spain, penal chamber, Case No. 12966/1994, 2 July 1994 (Judge Bacigalupo). National Court of Spain, Central investigating tribunal No. 5, 29 March 2006

the legal framework of the Court, present a compelling case for the Chamber's allowing this approach to criminal liability for the purposes of this Decision.”

521. Co-perpetration based on joint control over the crime involves the division of essential tasks between two or more persons, acting in a concerted manner, for the purposes of committing that crime. As explained, the fulfilment of the essential task(s) can be carried out by the co-perpetrators physically or they may be executed through another person.”

a. Existence of an agreement or common plan between two or more persons

522. In the view of the Chamber, the first objective requirement of co-perpetration based on joint control over the crime is the existence of an agreement or common plan between the persons who physically carry out the elements of the crime or between those who carry out the elements of the crime through another individual. Participation in the crimes committed by the latter without coordination with one's co-perpetrators falls outside the scope of co-perpetration within the meaning of article 25(3)(a) of the Statute.

523. As explained in the Lubanga Decision, the common plan must include the commission of a crime.⁶⁸⁷¹¹⁷ Furthermore, the Chamber considered that the agreement need not be explicit, and that its existence can be inferred from the subsequent concerted action of the co-perpetrators.⁶⁸⁸¹¹⁸

b. Coordinated essential contribution by each co-perpetrator resulting in the realisation of the objective elements of the crime

524. The Chamber considers that the second objective requirement of co-perpetration based on joint control over the crime is the coordinated essential contribution made by each co-perpetrator resulting in the realisation of the objective elements of the crime.

525. When the objective elements of an offence are carried out by a plurality of persons acting within the framework of a common plan, only those to whom essential tasks have been assigned - and who, consequently, have the power to frustrate the commission of the crime by not performing their tasks - can be said to have joint control over the crime. Where such persons commit the crimes through others, their essential contribution may consist of activating the mechanisms which lead to the automatic compliance with their orders and, thus, the commission of the crimes.

526. Although some authors have linked the essential character of a task – and hence, the ability to exercise joint control over the crime - to its performance at the execution stage,⁶⁸⁹¹¹⁹ the Statute does not encompass any such restriction. Designing the attack,

¹¹⁷ ICC-01/04-01/06-803-OEN, para. 344.

¹¹⁸ ICC-01/04-01/06-803-tEN, para. 345.

¹¹⁹ ROXIN, C., *Täterschaft und Tatherrschaft*, 8th ed., Berlin, De Gruyter, 2006, pp. 292 et seq. According to ROXIN, those who contribute only to the commission of a crime at the preparatory stage cannot be described as co-perpetrators even if they carry out tasks with a view to implementing the common plan. This point of view is shared by MIR PUIG, S., *Derecho Penal, Parte General, Editorial Reppertor*, 6* ed., Barcelona, Editorial Reppertor, 2000, p. 385; HERZEBERG, R.D., *Täterschaft und Teilnahme*, München, Beck, 1977, pp. 65 et seq.; KÖHLER, M., *Strafrecht Allgemeiner Teil*, Berlin, Springer, 1997, p. 518. However, many other authors do not share this point of view. See inter alia: MUNOZ CONDE, F., "Dominio de la voluntad en virtud de aparatos organizados en organizaciones no desvinculadas del Derecho", 6 *Revista Penal* (2000), p. 113; PEREZ CEPEDA, A., "Criminalidad en la empresa: problemas de autoría y participación", 9 *Revista Penal* (2002), p. 106 et seq.; JESCHECK, H. & WEIGEND, T., *Lehrbuch des Strafrechts, Allgemeiner Teil*, 5th ed., Berlin, Duncker und Humblot, 1996, p. 680; KÜHL K., *Strafrecht Allgemeiner Teil*, 2nd ed., München, Vahlen, 1997, p. 111 ;

supplying weapons and ammunitions, exercising the power to move the previously recruited and trained troops to the fields; and/or coordinating and monitoring the activities of those troops, may constitute contributions that must be considered essential regardless of when are they exercised (before or during the execution stage of the crime).

This jurisprudence was accepted and further fine-tuned in **The Prosecutor v. Bemba** (Pre-Trial Chamber Decision on the Confirmation of Charges) ICC-01/05-01/08 (15 June 2009), there in particular at paras 350-353, 369-371. Space available does not allow going into further details even though a careful reading of all these three decisions (Lubanga, Katanga, Bemba) is more than warranted.

V) The unexpected but not surprising revival of the JCE doctrine by hybrid/internationalized tribunals

1) Special Court/Sierra Leone

Prosecutor v. Sesay, Kallon and Gbao (Appeal Judgement), SCSL-04-15-A (26 October 2009), paras 400-402, 475, 485

“400. Based on the legal authorities and reasoning provided for these holdings, and considering that they have been consistently affirmed by the subsequent jurisprudence of both the ICTY and the ICTR,⁹⁷⁵¹²⁰ the Appeals Chamber is satisfied that the holdings reflect customary international law at the time the crimes in the present case were committed, and on that basis endorses them. Kallon’s submission that JCE liability cannot attach for crimes committed by principal perpetrators who are not proven to be members of the JCE is therefore dismissed.

401. Kallon fails to develop whether, and if so how, the above holdings in *Brđanin* are contrary to his position that the accused must be shown to have participated “causally” in at least one element of the *actus reus* by the principal perpetrator.⁹⁷⁶¹²¹ Although the accused’s participation in the JCE need not be a *sine qua non*, without which the crimes could or would not have been committed,⁹⁷⁷¹²² it must at least be a significant contribution to the crimes for which the accused is to be found responsible.⁹⁷⁸¹²³ As *Brđanin* makes clear, this standard applies also where the accused participates in the JCE by way of using non-JCE members to commit crimes in furtherance of the common purpose.⁹⁷⁹¹²⁴

402. Lastly, Kallon’s submission that the *Brđanin* holdings are inapplicable in the present case is based on the premise that the Common Criminal Purpose found by the Trial Chamber was not inherently criminal. As that premise is erroneous, this submission fails.⁹⁸⁰¹²⁵

475. At issue here are primarily the mens rea elements for JCE 1 and JCE 3. Under JCE 1, also known as the “basic” form of JCE, liability attaches where the accused intended the

KINDHÄUSER, U., Strafgesetzbuch, Lehr- und Praxiskommentar, Baden-Baden, Nomos, 2002, para. 25, No. 38.

¹²⁰ *Martić* Appeal Judgment, paras 168-169; *Limaj et al.* Appeal Judgment, para. 120; *Krajišnik* Appeal Judgment, paras 225-226; *Milutinović et al.* Trial Judgment, Vol. I, paras 98, 99; *Zigiranyirazo* Trial Judgment, para. 384.

¹²¹ *Kallon* Appeal, para. 48.

¹²² *Kvočka et al.* Appeal Judgment, para. 98; *Tadić* Appeal Judgment paras 191, 199.

¹²³ *Krajišnik* Appeal Judgment, para. 675; *Brđanin* Appeal Judgment, para. 430.

¹²⁴ *Brđanin* Appeal Judgment, para. 430.

¹²⁵ *See supra*, para. 305.

commission of the crime in question and intended to participate in a common plan aimed at its commission.¹²³⁵¹²⁶ In other words, JCE 1 liability attaches to crimes within the common criminal purpose.¹²³⁶¹²⁷ By contrast, JCE 3 liability attaches to crimes which are *not* part of the common criminal purpose.¹²³⁷¹²⁸ That is why it is often referred to as the “extended” form of JCE.¹²³⁸¹²⁹ However, before an accused person can incur JCE 3 liability, he must be shown to have possessed “the *intention* to participate in and further the criminal activity or the criminal purpose of a group.”¹²³⁹¹³⁰ Therefore, both JCE 1 and JCE 3 require the existence of a common criminal purpose which must be shared by the members of the JCE, including in particular the accused.¹²⁴⁰¹³¹ Where that initial requirement is met, JCE 3 liability can attach to crimes outside the common criminal purpose committed by members of the JCE or by non-JCE perpetrators used by members of the JCE if it was reasonably foreseeable to the accused that a crime outside the common criminal purpose might be perpetrated by other members of the group in the execution of the common criminal purpose and that the accused willingly took that risk (*dolus eventualis*).¹²⁴¹¹³²

485. The Trial Chamber defined the Common Criminal Purpose of the JCE as consisting of the objective to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas, and the crimes as charged under Counts 1 to 14 as the means of achieving that objective.¹²⁵²¹³³ The Trial Chamber further found that Gbao was a “participant” in the JCE.¹²⁵³¹³⁴ The Appeals Chamber, Justices Winter and Fisher dissenting, considers that in consequence Gbao, as with the other participants of the JCE, would be liable for all crimes which were a natural and foreseeable consequence of putting into effect that criminal purpose.”

Attached are two remarkable **Partially Dissenting and Concurring Opinions (Justice Shireen Avis Fisher, paras 17-19, 26, 44-45 and President Judge Renate Winter insofar concurring)**

“17. In affirming Gbao’s convictions under JCE, the Majority adopts the Trial Chamber’s circular reasoning, but compounds the Trial Chamber’s error by collapsing the distinction between JCE 1 and JCE 3. The Majority reasons that it was sufficient for the Trial Chamber to conclude that Gbao was a “participant” in the JCE and therefore shared the Common Criminal Purpose.²⁷¹³⁵ By virtue of that conclusion, the Majority reasons, he is responsible for all crimes by members of the JCE that either he intended or were reasonably foreseeable.²⁸¹³⁶ Therefore, according to the Majority’s reasoning, it matters not whether

¹²⁶ *Brđanin* Appeal Judgment, para. 365.

¹²⁷ *Brđanin* Appeal Judgment, para. 418; *Martić* Appeal Judgment, para. 82.

¹²⁸ See e.g., *Stakić* Appeal Judgment, para. 87.

¹²⁹ See e.g., *Kvočka et al.* Appeal Judgment, para. 83.

¹³⁰ *Tadić* Appeal Judgment, para. 228.

¹³¹ See e.g. *Stakić* Appeal Judgment, paras 85, 86 (establishing that a common criminal purpose existed and that the accused shared its intent and participated in it, before moving on to assess whether the accused could be held liable under JCE 3 for “crimes beyond the scope of that enterprise”).

¹³² *Brđanin* Appeal Judgment, para 365; *Stakić* Appeal Judgment, para. 87; *Tadić* Appeal Judgment, para. 228; *Kvočka et al.* Appeal Judgment, para. 83. The Appeals Chamber recalls that 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 purpose. See supra, paras. 393-455.

¹³³ Trial Judgment, paras 1979-1985; see supra, para. 305

¹³⁴ Trial Judgment, para. 1990.

¹³⁵ Appeal Judgment, paras 486, 492.

¹³⁶ Appeal Judgment, paras 485, 492.

Gbao intended the crimes in Bo, Kenema and Kono;²⁹¹³⁷ given that he was “a member of the JCE,” he was liable for the commission of “the crimes in Bo, Kenema and Kono Districts, which were within the Common Criminal Purpose,” so long as it was “reasonably foreseeable that some of the members of the JCE or persons under their control would commit crimes.”³⁰¹³⁸

18. This reasoning is not only circular, but dangerous. First, describing Gbao as a “participant” under this theory is mistaken because whether or not he was a “participant” is only significant if it means that he shared the common intent of the JCE, that is, the Common Criminal Purpose. The Trial Chamber’s findings, unquestioned, and indeed quoted by the Majority, state unequivocally that he did not.³¹¹³⁹

19. Second, the Majority collapses the distinction between the *mens rea* required for JCE 1 and the *mens rea* applicable to JCE 3 by holding that Gbao can be liable for crimes *within* the Common Criminal Purpose that he did not intend and that were only reasonably foreseeable to him. Such an extension of JCE liability blatantly violates the principle *nullum crimen sine lege* because it imposes criminal responsibility without legal support in customary international law applicable at the time of the commission of the offence. The Majority makes no effort to reason why it considers that this extension of JCE liability was part of the law to which Gbao was subject at the time these offences were committed and it fails to cite a single case in which this extension of liability is recognized as part of customary international law. This dearth of jurisprudential support was acknowledged by the Prosecution which admitted at the Appeal Hearing that there “may be no authority” in international criminal law in which the *mens rea* element for JCE is characterized or applied as the Trial Chamber applied it to Gbao.³²¹⁴⁰

“26. The Trial Chamber’s error with respect to Gbao’s *mens rea* is not simply a harmless mistake that can be rectified or overlooked on appeal. Rather, because of this error, the entire legal edifice the Trial Chamber and Majority have constructed for Gbao’s JCE liability is so fundamentally flawed that those convictions which rest upon it collapse.”

“ 44. In concluding, I am obliged to note that the doctrine of JCE, since its articulation by the ICTY Appeals Chamber in *Tadić*, has drawn criticism for its potentially overreaching application. International criminal tribunals must take such warnings seriously,⁵⁹¹⁴¹ and ensure that the strictly construed legal elements of JCE are consistently applied⁶⁰¹⁴² to safeguard against JCE being overreaching or lapsing into guilt by association.⁶¹¹⁴³

45. For Gbao, the Trial Chamber and the Majority have abandoned the safeguards laid down by other tribunals as reflective of customary international law. As a result, Gbao stands convicted of committing crimes which he did not intend, to which he did not significantly contribute, and which were not a reasonably foreseeable consequence of the crimes he did intend. The Majority’s decision to uphold these convictions is regrettable. I can only hope that the primary significance of that decision will be as a reminder of the burden resting on triers

¹³⁷ Appeal Judgment, paras 492, 493.

¹³⁸ Appeal Judgment, para. 493.

¹³⁹ Appeal Judgment, paras 488-491.

¹⁴⁰ Footnote omitted.

¹⁴¹ See e.g. *Brđanin* Appeal Judgment, para. 426; *Krajišnik* Appeal Judgment, paras 657-659, 670, 671; *Krajišnik* Appeal Judgment, Separate Opinion of Judge Shahabuddeen; *Milutinović et al.* Decision on Jurisdiction- JCE, paras 24-26; *Rwamakuba* JCE Decision.

¹⁴² *Krajišnik* Appeal Judgment, para. 671.

¹⁴³ *Brđanin* Appeal Judgment, paras 426-431.

of fact applying JCE, and as a warning of the unfortunate consequences that ensue when they fail to carry that burden.”

2) Extraordinary Chambers in the Courts of Cambodia (ECCC)

I do not want to comment on the **Order on the Application at the ECCC of the Form of Liability Known as Joint Criminal Enterprise**, Office of the Co-Investigating Judge / Extraordinary Chambers in the Courts of Cambodia, Case File No: 002/19-09-2007-ECCC-OCIJ (8 December 2009)

This overly simplistic (in essence: un)reasoned decision and its surprising disposition (three dense expert-opinions had been submitted but not discussed) has received its appropriate answer in the decision before us.

The only remaining questions are:

Why was it that the alleged necessity of a creating a new doctrine was not discussed in general and in order to harmonize the jurisprudence on modes of liability with the one elaborated in great detail by ICC?

The second question is too difficult for me to answer, being predominantly a practice oriented lawyer focussing on a concrete behaviour of human beings. How is it possible to apply two different modes of liability when the *nullum crimen* test at the end of the day focuses, the margin of discretion in mind, on nothing but a foreseeability test. It seems to be artificial to make a to be proven distinction whether an individual can foresee the criminality of his or her behaviour based on international law, national law or on principles generally accepted in civilised countries.

VI Conclusion

The doctrine of Joint Criminal Enterprise has its origin in the first judgment ever handed down by an Appeal Chamber of an independent impartial international criminal court not established by the winners of a war. The authors apparently were eager to set the tone and the standard for a not yet existing general part of international crimes.

However, neither legally nor factually it was necessary to depart from the strict wording of the ICTY-Statute. The Tadić-case as such did not call for this academic exercise, JCE was and is an obiter dictum.

The intention, no doubt, was good. The goal was to develop a catch all mode of liability abolishing “impunity” in macro-criminality in humanitarian law during times of an armed conflict based on customary international law for the time to come. Something for eternity. In doing so and writing obiter at length the judges went beyond their mandate in the case before them. They did not show the necessary self-restraint. Customary international law and the need to observe, in the framework of Article 15 ICCPR, the principle of *nullum crimen sine lege stricta* is like cat and dog. There is the wishful thinking¹⁴⁴ that something “must be punishable”, a phrase often heard in legal discussions, and the limitation of both, the wording of binding statutory law, and the dictate not to create retroactively new criminal law.

¹⁴⁴ *Simma, B./Alston, P.* in this context refer to a quote by John Humphrey who observed that “human rights lawyers are notoriously wishful thinkers.” *Simma, B./Alston, P.*, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 *Aust. YBIL* 82 (84) (1988-1989).

The baby JCE was born. It was and is under the permanent control of the parents, judges of ICTY and ICTR. I am convinced that until today's date no harm was done to any perpetrator before ICTY/ICTR due to the application of the JCE doctrine. On the contrary, as shown above, based on JCE the criminal conduct of a perpetrator was trivialized in a few cases from committing to aiding and abetting, sometimes (*Seromba*) corrected by the Appeals Chamber. The Appeals Chambers of ICTY/ICTR maintained control over the act (*Tatherrschaft*) in that the majority of judges were eager to maintain this doctrine, always prepared to adjust the doctrine to the needs of a concrete case.

However, jurisprudence in particular of SC/SL shows that a child grows and becomes independent from parental control. The foreseeable and predicted risk emanating from the vagueness of the third category of JCE has found its realization at least in part in the final conviction of the accused *Gboa* as convincingly shown by the dissenting judges. This may never happen again. The lesson to be learned is that judges should never yield to the temptation to act as kind of legislator and when only developing the law with legitimate "judicial creativity" they must act with the highest degree of scrutiny always envisaging: what can be in a worst case scenario the result, how can an exaggerated interpretation or application be avoided when a doctrine is no longer subject to own control.

We should applaud the mothers and fathers of the Rome-Statute. It shows that a well drafted general part of a code of criminal procedure (with the sufficient time, which was not available for the skeleton Statutes of ICTY and later ICTR) is able to meet the challenges of today's macro criminality. At the end of the day the strict modes of liability and responsibility as laid down there and carefully applied by the acting judges will be the only surviving account in International Criminal Law.

We should be grateful to the authors of the extremely well-founded and detailed judgement before us. It allows for the necessary harmonisation of international criminal law, here the applicable modes of liability.

Two wishes remain:

- a) That the other benches of ECCC uphold the rejection of JCE III
- b) That it will be expressly said that a sound interpretation of "committing" needs no other labelling (aka JCE)

No doubt international criminal law will prevail based on a humble, patient but self-confident step by step approach taking also carefully and respectfully into account the individual specificities of the national law of a situation, if only they do not militate against the common goal: to achieve peace by justice and to try to achieve justice by finding the truth as far as possible. There is no truth without justice, no justice without truth!