Individual Criminal Responsibility in International Criminal Law

Joint criminal enterprise or co-perpetration?

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1 Introduction

1.1 Problem statement

The subject for this study is the so-called joint criminal enterprise doctrine and its position in contemporary international criminal law. In this context the doctrine serves as a mode of individual criminal responsibility for participation in the commission of crimes. Focus for the thesis will be on the substance and legality of the doctrine, developed as such by the International Criminal Tribunal for the former Yugoslavia (ICTR) and for Rwanda (ICTR). In this regard, particular focus will be held on joint criminal enterprise as a form of liability for genocide convictions, and on the relationship between joint criminal enterprise and the principle of legality. The International Criminal Court’s (ICCs) position regarding joint criminal enterprise as a mode of liability will also be examined.

1.2 Introduction to joint criminal enterprise

A person who commits or participates in committing a crime is held responsible on different forms of liability, e.g. as a direct perpetrator or an accessory to the crime. Joint criminal enterprise (JCE) is a mode of participation when there are several perpetrators cooperating in committing crimes, which is often the case in international crimes. Participation in a joint criminal enterprise is not a crime itself but concerns how the crime is committed. While a version of this specific mode of liability is included in the Statute of the International Criminal Court, it is nowhere to be found (explicitly) in the statutes of the ad hoc tribunals. The joint criminal enterprise doctrine is a case law-developed doctrine, which has been applied in several judgements before the ad hoc tribunals. Judgements and decisions from the ICTY and ICTR will be relied upon to present and
analyse the issues under discussion. Currently, there are no final judgements from International Criminal Court (ICC) regarding JCE. However, the ICC has touched upon the subject in its first decisions regarding Lubanga, Katanga and Chui and Bemba. As the ICC was established after the ad hoc tribunals, and since their legal basis differs, the state of law for the respective courts will be analysed separately.

The Tadić case is a central source for investigating the joint criminal enterprise doctrine. Duško Tadić was the first individual to be convicted before the International Criminal Court for the former Yugoslavia (ICTY) and the case represents the first of several to come where this mode of liability was explicitly applied.\(^1\) The ICTY launched the doctrine of JCE based upon interpretations of the ICTY Statute and what was found to be customary international law. The Tribunal divided the JCE into three different categories in which the objective elements are the same for all categories while the subjective element differ. The substance of the doctrine will be explored through examining case law where it has been applied as a mode of liability.

In case law succeeding the Tadić judgement, the development and use of the doctrine has been both endorsed and criticized. Opinions in literature tend to be divided as well – indicating the controversy on the matter. JCE has, amongst other issues, been criticized for expanding the grounds of criminal liability for individuals participating in commission of crimes of a collective nature, and for lowering the threshold for the requisite mental element.\(^2\) Special attention will be dedicated to the application of the doctrine to the crime of genocide, as it raises principal questions due to the requisite mental element for this crime. For this reason, the crime of genocide will be introduced in chapter 1.6.

\(^1\) Tadić Appeal judgement (AJ) paras. 184 et seq.

Critics also claim that the doctrine has a dubious legal basis, as JCE is not to be found explicitly in the statutes of the international criminal tribunals, and it is said to be too divergent from the wording to be considered as within the principle of legality.\(^3\) The essence of the principle is the prohibition of convicting or punishing someone for an act that was not criminalized (by law) at the time the act was performed. The principle demands for a certain level of specificity so in order to know exactly which acts that will lead to criminal liability.\(^4\) The substance of the doctrine will be analysed against this principle.

1.3 Delimitation

The thesis will focus on the substance and legality of the joint criminal enterprise doctrine and related modes of liability; hence the elements of international crimes will not be subject for discussion (other than for the crime of genocide), as it is not of significance for the study. Neither will procedural elements be assessed. The establishment of the \textit{ad hoc} tribunals and the International Criminal Court is not of significance and will not be explained. The study will focus on individual criminal responsibility, thus state responsibility will not be explained.

Inchoate crimes such as incitement and conspiracy could be an interesting aspect but will not be a part of the study due to the limitations inherent in the nature of this thesis. For the same reason command responsibility will not be analysed, even if this form of responsibility is related to individual criminal liability, especially for participation in crimes of a collective nature.


1.4 Methodology

International criminal law is a branch of public international law, and the sources are those of international law. Recognized sources of international law are found in the Statutes of the International Court of Justice article 38. The Statutes are only binding for the International Court of Justice (ICJ), but they are often referred to in literature as the authoritative listing of the recognized sources of law. ⁵ According article 38 the primary sources are those of treaty law, customary law and general principles of law. These sources are considered to be of equal value for determining a rule of international law. Judicial decisions and the writings of the most highly qualified publicists are considered to be subsidiary sources. Where the primary sources fail to provide an answer, secondary sources may be applied. For the purpose of this study both judicial decisions and scholarly writings will be used to enlighten the issues under discussion.

The International Criminal Court (ICC) has a corresponding provision on applicable law in ICCSt. 21 (1) - (4). The ICC concerns first and foremost applicable law for the ICC itself. The provision departs to some extent from ICJSt. article 38 as it presents a different hierarchy of the listed sources. The statutes of the International Criminal Tribunal for the former Yugoslavia and for Rwanda have no such provisions. Due to these differences there will be a chapter dedicated to the sources of international criminal law.

Abbreviations will be introduced where relevant. For a complete list of abbreviations, see appendix A.

1.5 International criminal law

“International criminal law is a body of international rules designed both to prescribe certain categories of conduct (war crimes, crimes against humanity, genocide, torture, aggression, terrorism) and to make those persons who engage in such conduct criminally liable.”

International criminal law (ICL) is a branch of public international law, with roots in international humanitarian law and human rights law. Leaning on both civil law and common law traditions, it is a complex discipline with a great variety of legal sources and no primary judiciary or legislative body. While public international law concerns mutual rights and obligations between states, international criminal law deals with prosecution of individuals accused of committing crimes of an international character. The principle of sovereignty or territorial/nationality jurisdiction entitles first and foremost the state concerned to prosecute crimes at a domestic level. However, both history and the present show that domestic courts have not always been able or willing to perform justice within the national system. Therefore, international conventions prohibiting certain serious crimes have materialised, making prosecution at the international level possible.

The need for criminal prosecution at the international level became urgent after the Second World War, and the establishment of the International Military Tribunals of Nuremberg and Tokyo was the beginning of international prosecution of individuals. As there were no established international courts, special tribunals were set up for investigation and prosecution, such as the International Military Tribunals. After the Second World War prosecutions in Nuremberg and Tokyo, the possibilities of establishing a permanent and independent international criminal court with universal jurisdiction were explored. The Convention on Prevention and Punishment of the Crime

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6 Cassese (2008) p.2
of Genocide (Genocide Convention) was adopted by the United Nations General Assembly in 1948, and with this, a step towards a permanent international criminal court were taken. Due to lack of international support it took 50 years before it became a reality. The International Criminal Court (ICC) was established by the enactment of the Rome Statute in 1998, which came into force in 2002. With some exceptions, the ICC has jurisdiction over “the most serious crimes of concern to the international community”.

As of today these crimes are war crimes, crimes against humanity and genocide. The Court’s jurisdiction is complementary to national criminal jurisdictions, which means that admissibility of a case to the ICC is limited to situations where a national court fails to perform investigations or prosecutions.

In the 1990s, the genocide in Rwanda and the Balkan wars occurred. The Security Council established the International Criminal Tribunal for the former Yugoslavia in 1993 and for Rwanda in 1994 in order to prosecute the crimes that were committed. The tribunals have geographically limited jurisdiction, namely to the areas where the crimes were committed. Jurisdiction is temporal and limited to certain crimes. The crimes within their jurisdiction are war crimes, crimes against humanity and genocide.

International criminal law has developed rapidly the last 50 years but is still a young branch of international law, and still under development. Therefore customary law and general principles of international law have played and still play an important role, which can be questioned as the principle of legality demand foreseeability and clearly defined crimes. Cassese writes about a change over time from the doctrine of substantive justice

7 Jurisdiction depends on ratification of the statutes, and not all states have done so in order to become party, ICCSt. article 4(2).
8 ICC has jurisdiction over the crime of aggression. While awaiting provisions, jurisdiction is not yet exercised.
to that of strict legality, which in short concerns a shift of focus from the protection of the society against crimes, to a human rights perspective considering the rights of the accused and thus the protection of the individual’s right from arbitrary action committed by the adjudicative/ruining powers.¹⁰

1.5.1 Sources and principles of international criminal law

The recognized sources of international law are listed in the Statutes of the International Court of Justice article 38 (1) (a)-(d). These sources will be introduced below. The International Criminal Court has a corresponding provision on applicable law in ICCSt. article 21(1). The ICC provision is not identical to ICJSt. article 38 and presents a somewhat different hierarchy of the recognized sources. According article 21, the primary source of law is the Rome Statute itself, including Elements of Crimes and Rules of Procedure and Evidence. If the Statute does not bring forth a rule or leave questions unanswered, customary law or other applicable treaties must be explored in order to find an answer, thus considered as subsidiary sources. The next step is to turn to general principles of law. If there is still a gap and general principles fail to provide an answer, the Court’s judicial decisions can be of assistance in interpreting the Statute.

The statutes of the ad hoc tribunals contain no such list of applicable sources but references in case law demonstrates that the tribunals recognize and make use of the ICJ list of sources.

ICJ article 38(1) reads as follows:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Treaty Law

International legislation is typically manifested in a treaty or convention. Treaties and conventions are international agreements containing rules that are legally binding for the ratifying parties/contracting states. Treaty law is applicable only to crimes within a court’s jurisdiction.

The Convention of Prevention and Punishment for the Crime of Genocide of 1948 is the primary source of law for defining and establishing criminal responsibility for the crime of genocide. The Genocide Convention (GC) is declaratory of customary law for the crime of genocide. The provisions in the Statutes of the ICTY and ICTR are based upon the Genocide Convention. The Statutes of the International Criminal Tribunal for the former Yugoslavia and for Rwanda were both created by UN Security Council Resolutions, thus they receive their binding force through Article 25 of the UN Charter.\textsuperscript{11} As they are based on a treaty (the UN Charter), they are recognized as subsidiary sources of international law.\textsuperscript{12} The legal content is based on customary rules, meaning that other courts can apply

\textsuperscript{11} According article 25 of the UN Charter, Security Council Resolutions are binding for the member states.

\textsuperscript{12} Cassese (2008) p. 15 et seq.
them as well. As such, the tribunals’ interpretations of these rules might serve as a (subsidiary) source of law.\textsuperscript{33}

**Customary International Law**

Customary law is a non-written source of law, defined in the Statute of the International Court of Justice (ICJ) Article 38 (1) (b) as “international custom, as evidence of a general practice accepted as law”. For something to be considered as customary law, the existence of state practice and *opinio juris* are required elements.\textsuperscript{34}

While treaty law is applicable only to the relevant court in question and only binding for contracting parties, customary law is applicable to all international and national courts and is legally binding without any ratification and without possibilities for reservations. However, treaty law that codifies customary law is applicable to other courts. As for treaty law, a customal rule is applicable only to crimes that are within a court’s jurisdiction.\textsuperscript{35}

**General principles of law**

General principles of law are recognized as a source of law in both ICJSt. article 38 (1)(c) and ICCSt. article 21. However, as a subsidiary source these principles may only become applicable where none of the primary sources provide for a rule.

\begin{itemize}
\item \textsuperscript{33} See sub-chapter below about judicial decisions.
\item \textsuperscript{34} Opinio juris is “the belief that what is done is required by or in accordance with law”, ref. Cryer *et al.* (2010) p. 11.
\item \textsuperscript{35} Cassese (2008) p. 3.
\end{itemize}
Principle of legality in international criminal law

The principle of legality is central for all states governed by law and bearing in criminal law, both at the domestic and international level. The principle of legality of crimes (strict principle of legality) is often expressed with the Latin term *nullum crimen sine lege, nulla poena sine lege*, meaning “no crime without law, no punishment without law”. Treaties, conventions and general principles of law are all subject to the principle of legality. The principle is embodied in the Universal Declaration of Human Rights article 11(2), which is the foundation for article 15 in the International Covenant of Civil and Political Rights (ICCPR) where the principle is legally established. The International Criminal Court has its version of it in ICCSt. article 22. The principle is also included in regional instruments, such as the European Convention on Human Rights (ECHR) article 7, and is considered not merely as a principle of justice but also a basic human right. The principle is considered to be a general principle of law and a fundamental principle within ICL.

The principle has several dimensions to it. The prohibition of non-retroactivity is found in ICCPR article 15(1): “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nobody can be held criminally liable for performing an act that was not prescribed by law at the time the act was committed.” A person must be able to foresee whether his or her actions are illegal and will lead to criminal liability – or not. For the same reason it is of importance that the law is accessible and clear, in order to actually foresee the consequences. Criminal provisions must be as detailed as possible, and the subjective and objective elements must be defined. Another dimension to the principle of legality is the ban on analogy, which prohibits the application of existing rules to areas of law or to situations that are unregulated by law (criminalizing through analogy). There is a fine line between interpretation and clarification of an existing rule, to extending the scope of it. The
greatest difference is that the former is not prohibited, while the latter is. As Cassese puts it, resorting to general principles of ICL in order to fill any gaps is not prohibited.\footnote{Cassese (2008) p. 49.}

Application of the principle varies depending on whether the legal system in question is following common law or civil law tradition. Common law tradition relies upon judge-made law, where jurisprudence acts as precedents, forming binding rules. In the civil law tradition, formal (written) law passed by a legislative body (the parliament) is considered as \textit{law}, and case law is considered to be a subsidiary source of law, serving as tools for interpreting formal law.\footnote{The \textit{ad hoc} tribunals mix elements from both traditions.}

\textbf{Judicial decisions and scholarly writings}

According the ICJSt. Article 38 (1)(e), judicial decisions and scholarly writings are not recognized as sources of law but as subsidiary means of determining what rules of law are. Seen in context with the character of ICL as a developing discipline without a common judicature, both judicial decisions and literature are useful sources for finding interpretations and analysis of primary sources of international law.

\textbf{Principles of interpretation}

The Vienna Convention on the Law of Treaties lays down principles for interpretation of these legal instruments.\footnote{VCLT articles 31-33.} The provisions are declaratory of customary law, thus the principles are binding even for non-parties to the convention.\footnote{E.g. Cassese (2008) p. 17.} Expressed in ICTY jurisprudence that they follow the convention.
General and supplementary rules of interpretation are found in articles 31 and 32:

Article 31 General rule of interpretation
1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
   (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   (c) any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 Supplementary means of interpretation
Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
   (a) leaves the meaning ambiguous or obscure; or
   (b) leads to a result which is manifestly absurd or unreasonable.

As previously mentioned, treaties are a primary source of law in international law. The Vienna Convention on the Law of Treaties (VCLT) articles 31 and 32 concern
interpretation principles of treaties. As the VCLT is declaratory of international customary law, the principles apply to treaties and other written international rules as well. The statutes of the ad hoc tribunals are based on binding UN resolutions and are considered as written rules. In the case of Alekovski the ICTY refers to the VCLT and declares that the Tribunal’s Statutes must be interpreted in accordance with the principles. In Delalić et al. the ICTY Trial Chamber stated that “[i]t is well settled that an interpretation of the Articles of the Statute and provisions of the Rules should begin with resort to the general principles of interpretation as codified in Article 31 of the Vienna Convention on the Law of Treaties.” The VCLT was also referred to in the Tadić case, although implicitly. This confirms that the ICTY recognizes and make use of the VCLT in its interpretation of the Statute. VCLT article 31(1) declares that a treaty “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. The object and the purpose of a treaty is thus a relevant factor when interpreting the ICTY Statutes, and according VCLT article 32, preparatory works are considered as supplementary means of interpretation.

1.5.2 Terminology and definition of terms

Terms in international criminal law often coincide and they might have a different meaning and content in national criminal law. In this chapter, basic notions will be defined in order to explain which meaning they are given in this study.

20 Alekovski (AJ) para. 98.
21 Delalić et. al. (TJ) para. 1161.
22 Tadić (AJ) para. 300.
In penal provisions, crimes consist of an objective element and a subjective element. The objective element (*actus reus*) describes acts or omissions that will lead to criminal liability. This is also referred to as *prohibited acts or underlying offences* (for genocide).\(^{23}\) The subjective element (*mens rea*) prescribes the perpetrator’s state of (guilty) mind. This is also referred to as *culpa or intent*. The required degree of *mens rea* varies for different crimes. Even if (more or less) every international crime is made up by an objective and a subjective element, there is no definition of the subjective element in customary law. According Article 2 of the Genocide Convention the requisite *mens rea* for genocide is “intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”. The term *intent* however, is not defined in the GC. There is a definition in the Rome Statute Article 30 but the article is not considered as codifying customary law and the Rome Statute is only binding for the ICC itself. This makes international rules and case law from the international courts important as sources for interpretation. The following is based upon Cassese’s presentation of the subject in *International Criminal Law* (2008).

*Intention or intent* is described as awareness that a certain conduct will bring about a certain result, and a will to cause that result.\(^{24}\) Also referred to as *dolus directus*.

*Dolus eventualis* is the situation where “a person foresees that his or her actions is likely to produce its prohibited consequences, and nevertheless willingly takes the risk of so acting”.\(^{25}\) In other words; a person chooses to act even if he/she foresees that his/her act is likely to lead to commission of a certain crime.

*Knowledge* – the wording implies awareness of a fact or circumstance.

\(^{23}\) For the purpose of this study the terms “act” or “conduct” will be used, not “omission”.

\(^{24}\) Cassese (2008) p. 60.

\(^{25}\) Cassese (2008 p. 66.)
Special/specific intent or dolus specialis is the highest degree of mens rea, requiring both intention regarding conduct of the actus reus and in addition requiring pursuance of a specific goal when performing the prohibited act. Genocide is probably the most known crime where this mental element is required. Some refer to genocidal intent as a "double layer" of intent; meaning that if killing is the prohibited act in question – the killing of a person must be intentional, and the killing must be performed with the intent to destroy the whole or part of a group as such, not just the one individual.\(^\text{26}\)

1.5.3 Modes of participation

There are various ways of committing or participating in commission of a crime and thereby various ways for a person to be held responsible. In ICL this is often referred to as modes of liability or modes of participation. According Cassese, the differentiation of the modes of liability serves a “descriptive and classificatory purpose only” and is of no direct significance for the sentencing.\(^\text{27}\) The classification might nevertheless be of importance for the charges, and Cryer et al. states that principles of liability play a comparatively large role in international law.\(^\text{28}\) Some of the modes of liability are quite similar even if bearing different names. Since this study focuses on a particular mode of liability, namely joint criminal enterprise, it is necessary to explain some general principles of criminal liability.

Perpetration or commission is “the physical carrying out of the prohibited conduct, accompanied by the requisite psychological element”. It is a primary form of liability where the person who actually performs the prohibited act is the perpetrator (direct perpetration). To be held liable for commission of genocide, the accused must have


\(^{27}\) Cassese (2008). 188.

principal responsibility (not deriving from another person like for the accomplice). The accused must personally possess the requisite intent for the crime in question. Co-perpetration is a variant of the same, only committed by a plurality of persons.\footnote{Cassese (2008) p. 188-189.}

Complicity in genocide is a secondary form of liability, demanding for a principal perpetrator. In practise, this means that the crime is committed by a plurality of people. However, it must not be confused with co-perpetration or joint criminal enterprise, as these forms of participation is committed through “equally” responsible perpetrators, all being principals.\footnote{Joint criminal enterprise will be explained in chapter 2.1.} Complicity is a predicate offence, depending on the commission of the crime by another perpetrator. Aiding and abetting is a form of complicity, described as participating by assisting or encouraging the principal perpetrator of a crime. The aider and abettor must have knowledge that he or she is assisting commission of a crime and doing so intentionally but it is not necessary that the aider and abettor share the intent of the perpetrator. A known example of aiding and abetting is to provide a person with chemicals or weapons, knowing it will be used for a criminal purpose.\footnote{Cassese (2008) p. 214 \textit{et seq.}} The accused must have the knowledge of that his act would contribute to the omission of the crime and the intent of the accused to provide assistance thereto, or at least knowledge that his assistance would have a possible or foreseeable consequence of supporting the commission of that crime.\footnote{Kittichaisaree (2001) p. 245.}
1.6 Introduction to the crime of genocide

"Genocide is the intentional destruction, through one of five well-specified categories of conduct, of one of some groups as such (national, ethnical, racial, or religious) or of members of one of these groups as such."\textsuperscript{33}

The Convention on the Prevention and Punishment of the Crime of Genocide of 1948 (Genocide Convention) is the principal legal document for the definition of the crime of genocide. It was adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948 and is binding for the contracting parties/member states. The convention has been the legal basis for the definition of genocide in the statutes of the international ad hoc tribunals and the Statutes of the International Criminal Court. In general, crimes consist of an objective element (a prohibited act) and a subjective element (personal guilt). The objective elements describe which acts that are prohibited and are found in the Genocide Convention Article 2:\textsuperscript{34}

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

\begin{enumerate}
  \item Killing members of the group;
  \item Causing serious bodily or mental harm to members of the group;
  \item Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
  \item Imposing measures intended to prevent births within the group;
  \item Forcibly transferring children of the group to another group.
\end{enumerate}


\textsuperscript{34} The objective elements are not of significance for the present study and will not be explained unless considered necessary to give meaning to a certain context. Focus will be on what is meant by the term "committed" and the subjective element.
Article 2 paragraphs (a) – (e) is an exhaustive list over which acts that, committed with the intent as defined in the chapeau in the first section of the article, constitutes the crime of genocide. The corresponding provisions in ICTYSt., ICTRSt. and ICCSt. are mirroring the GC.\textsuperscript{35}

Article 3\textsuperscript{36} uses the word “acts” as well but paragraphs (b)-(e) regulates criminal participation of others than the principal perpetrator rather than the \textit{actus reus} of genocide.\textsuperscript{37} These acts (“other acts”) are considered to express forms of secondary liability and are dealt with in different ways in the Statutes of the ICC and the \textit{ad hoc} tribunals’ statutes.\textsuperscript{38}

The subjective elements are found in the chapeau of article 2:

[...] any of the following acts committed with \textit{intent to destroy}, in whole or in part, a national, ethnical, racial or religious group, as such.

Personal guilt, or \textit{culpa}, is a requisite for establishing criminal responsibility. \textit{Mens rea} describes the criminal will or state of mind that a perpetrator must possess to be held liable. The crime of genocide is composed of several elements. The ICTR interpreted

\textsuperscript{35} ICTYSt. article 4(2), ICTRSt. article 2(2) and ICCSt. article 6.

\textsuperscript{36} “The following acts shall be punishable:

(a) Genocide;
(b) Conspiracy to commit genocide;
(c) Direct and public incitement to commit genocide;
(d) Attempt to commit genocide;
(e) Complicity in genocide.”


\textsuperscript{38} Schabas (2009) pp. 307 \textit{et seq.}
ICTRSt. article 6(1) in the case of Akayesu, where the mental element for the crime of genocide is well explained: “[g]enocide is distinct from other crimes inasmuch as it embodies a special intent or dolus specialis. Special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged. Thus, the special intent in the crime of genocide lies in “the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. [...] With regard to the crime of genocide, the offender is culpable only when he has committed one of the offences charged under article 2(2) of the Statute with the clear intent to destroy, in whole or in part, a particular group. The offender is culpable because he knew or should have known that the act committed would destroy, in whole or in part, a group.”

One of the underlying offences must be conducted with the required mens rea and the offence must be directed against one of the protected groups. In addition, the conduct must be committed with genocidal intent; “to destroy the group, as such”, with knowledge that it will lead to such result. Genocide is therefore said to have two layers of mens rea.

2 Individual Criminal Responsibility – the Ad hoc Tribunals

The starting point for individual criminal responsibility is the principle of personal culpability, expressed in the Latin term nulla poena sine culpa – “no punishment without personal guilt”. It follows from this principle that “nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some

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39 Akayesu (TJ) paras. 498, 520. See also paras. 517-518.
other way participated”. Criminal liability is nonetheless not limited to the person who physically or actually performs the underlying offence but includes persons whom in some way participate in the commission of a crime. As presented in chapter 1.5.2, there are several ways of committing the crime and thus several grounds for an individual to be held criminally liable. In other words, there are different modes of liability or forms of participation.\textsuperscript{42}

International crimes, such as genocide, are often committed by a plurality of persons collaborating within a common criminal plan. The sum of the participant’s acts form the commission of the specific crime in question. This collaboration makes it difficult to identify and prove each participant’s contribution. The participants might have different roles and varying degrees of mens rea, and most likely there will be a principal perpetrator “pulling the trigger” while others are not performing the crime itself but still acting blameworthy.\textsuperscript{43} Before the International Criminal Court was established, there was no explicit provision in international criminal law for how to deal with this way of committing crimes.\textsuperscript{44} In the following section the ad hoc tribunals’ interpretation of the term commission will be presented.

The ad hoc tribunals have taken a broad approach when it comes to interpreting the term “committed” in ICTYSt. article 7(1) and ICTRSt. article 6(1). In the case of Gacumbitsi, under reference to the before-mentioned case of Tadić, the ICTR stated the following about commission: "As the Trial Chamber observed, the term “committed” in article 6(1) of the Statute has been held to refer "generally to the direct and physical perpetration of

\textsuperscript{41} Tadić (AJ) para. 186. See also chapter 1.5.3.
\textsuperscript{42} Provisions for individual criminal liability are found in the GC article IV, ICCSt. article 25, ICTYSt. article 7(1) and ICTRSt. article 6(1). See also chapter 1.5.2.
\textsuperscript{44} Tadić (AJ) para. 194.
the crime by the offender himself.” In the context of genocide, however, “direct and physical perpetration” need not mean physical killing; other acts can constitute direct participation in the actus reus of the crime.” The ICTR confirmed these findings in Seromba: “The jurisprudence makes clear that “committing” is not limited to direct and physical perpetration and that other acts can constitute direct participation in the actus reus of the crime. The question of whether an accused acts with his own hands, e.g. when killing people, is not the only relevant criterion.” The question of which other forms of participation that can “constitute direct participation in the actus reus of the crime” is still left unanswered. Taking a step back to the Tadić case might shed some light on the matter.

2.1 The joint criminal enterprise doctrine

The ICTY interpreted ICTYSt. article 7(1) for the first time in the Tadić case. The Trial Chamber convicted the accused, Duško Tadić, for persecution as a crime against humanity but acquitted him on two counts of murder, as the Trial Chamber did not find it proven “beyond reasonable doubt that the Appellant had any part in the killing of the five men [...]”. The Appeals Chamber asked whether acts of one person (under certain circumstances) could lead to criminal liability of another, and then launched the doctrine of joint criminal enterprise as a mode of participation under ICTYSt. article 7(1). Thereafter, the AC found Tadić liable on the basis of this doctrine. One of the subjects for this thesis is the legality of the doctrine and whether it was possible to introduce this mode of liability based on an interpretation of the Statutes and customary international law.

45 Gacumbitsi (AJ) para. 60.
46 Seromba (AJ) para. 161.
47 Tadić (AJ) para. 233.
In the *Tadić* case the Court took a teleological approach and argued that the object and purpose of the Statute as indicated in article 1\(^{48}\) infer responsibility for “all those” committing crimes in the former Yugoslavia: “it [the Statute] does not exclude those modes of participating in the commission of crimes which occur where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons. *Whoever* contributes to the commission of crimes by the group of persons or some members of the group, in execution of a common criminal purpose, may be held to be criminally liable, subject to certain conditions, which are specified below”.\(^{49}\) The Appeals Chamber supported this reasoning with referring to the Report of the UN Secretary-General, saying that “[t]he Secretary-General believes that *all persons who participate* in the planning, preparation or execution of serious violations of international humanitarian law in the former Yugoslavia are individually responsible for such violations.”\(^{50}\) The Chamber argued that these considerations, seen in the context of the collective nature of the crime, spoke for an interpretation of article 7(1) not excluding other forms of participations in addition to those listed in the provision.\(^{51}\) The legality of the doctrine will be further explored in chapter 2.2.

\(^{48}\) “The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.”

\(^{49}\) *Tadić* (AJ) paras. 188-191. Emphasis added.


\(^{51}\) *Tadić* (AJ) paras. 191-193.
2.1.1 Development of the doctrine

The Tadić case was, as previously mentioned, the first case where the ICTY relied upon the joint criminal enterprise doctrine for establishing criminal responsibility. While the Court interpreted the Statute to embrace this mode of liability, the elements of the doctrine were not specified in the Statute. The Court identified the elements in customary international law, by analysing post-World War II cases - after stating that many of these cases “proceed upon the principle that when two or more persons act together to further a common criminal purpose, offences perpetrated by any of them may entail the criminal liability of all the members of the group”. Through its analysis of several cases, the Court found three categories within the notion of common purpose.

2.1.2 The categories: basic, systemic and extended

In the Tadić case the ICTY found that three categories of collective criminality within the notion of common purpose or the joint criminal enterprise doctrine was firmly established in customary law. These categories are referred to as basic, systemic and extended JCE. The objective elements are common for all categories, while the subjective element differ.

To make the “notion of common criminal purpose” less abstract, a simple example might prove useful. Imagine a group of people decides to commit a crime, e.g. to rob a casino. This is their common criminal purpose. The security at the casino is of such a kind that planning is necessary, and it demands for each and every participant to have designated tasks that must be performed in order to succeed with the robbery. All participants have

[^52]: Tadić (AJ) paras. 193-194.
[^53]: Tadić (AJ) para. 195.
[^54]: Tadić (AJ) para. 220.
[^55]: Tadić (AJ) para. 227.
equal “responsibility” when it comes to committing the crime. This is in essence what the first category within the joint criminal enterprise doctrine, so-called basic JCE, is about. Basic JCE entails responsibility for acts agreed upon when making the common plan or design. The persons involved share the same intent, and all participants are responsible whatever their role and position.

In the case of Stakić the ICTY Appeals Chamber summed up the findings in Tadić and found the following to constitute the actus reus of joint criminal enterprise: “[f]irst, a plurality of persons is required. They need not be organised in a military, political or administrative structure. Second, the existence of a common purpose which amounts to or involves the commission of a crime provided for in the Statute is required. There is no need for this purpose to have been previously arranged or formulated. It may materialise extemporaneously and be inferred from the facts. Third, the participation of the accused in the common purpose is required. This participation need not involve the commission of a specific crime under one of the provisions (for example murder, extermination, torture or rape), but may take the form of assistance in, or contribution to, the execution of the common purpose.” In Kvočka, the ICTY found that a participant in a joint criminal enterprise does not “have to physically participate in any element of any crime, so long as the requirements of joint criminal enterprise responsibility are met”. In a recent judgement from the ICTR, the Court found that an accused’s contribution to the crime “need not be necessary or substantial” but should at least be significant.

Returning to Tadić, where the Appeals Chamber questioned if Tadić could be held criminally responsible without evidence to prove that he personally (physically) killed any of the victims. The central issue was “whether the acts of one person can give rise to the

56 Stakić (AJ) para. 64.
57 Kvočka (AJ) para. 99.
58 Kanyarugika (TJ) para. 624; referring to Simba (AJ) para. 303, citing Brđanin (AJ) para. 430.
criminal culpability of another where both participate in the execution of a common
criminal plan”, and if so; “what degree of mens rea is required”.59 The Chamber found that
where the common purpose was to kill, “the accused must voluntarily participate in one
aspect of the common design” and “even if not personally effecting the killing, [the
accused] must nevertheless intend the result”.60 In Kanyarugika, the ICTR stated that
where the joint criminal enterprise is the commission of a special intent crime, all
participants must share the special intent with the principle perpetrator.61

The second category, systemic JCE, is often referred to as “concentration camp” cases,
clearly influenced by the post-World War II trials.62 Three basic requirements for this
category were identified in the post war cases; “i) [t]he existence of an organised system
to ill-treat the detainees and commit the various crimes alleged, ii) the accused’s
awareness of the nature of the system and iii) the fact that the accused in some way
actively participated in enforcing the system, i.e., encouraged, aided and abetted or in
any case participated in the realisation of the common criminal design.”63 These
requirements have been confirmed in several cases. What is interesting with this
category is the potentially extensive circle of participators, as these systems (e.g.
detention camps) are depending on “employees” who participate in enforcing the system
but not physically participating in the commission of crimes. Will the cleaner, the cook
and the bookkeeper be held liable as participants in a joint criminal enterprise? It can be
argued that these positions are necessary acts in order to realize the common criminal
design and that it is impossible not to be aware of the nature of the system. However,

59 Tadić (AJ) para. 185.
60 Tadić (AJ) para. 196.
61 Kanyarugika (TJ) para. 625.
62 Cassese refers to this category with the more neutral label “participation in a common criminal
pure membership in a system for ill-treatment will not be sufficient to be considered a participant in a JCE. The accused must have knowledge of the system and the intent to further the criminal purpose of that system.\footnote{Kvočka (AJ) para. 82. Tadić (AJ) para. 203.} In Kvočka the Trial Chamber found that the participation had to be significant, making the enterprise efficient or effective and advancing the goal of the enterprise.\footnote{Kvočka (TJ) para. 309.} The Appeals Chamber noted that this was no legal requirement but that in some cases a substantial contribution could be necessary in order to determine that the accused had participated in a joint criminal enterprise.\footnote{Kvočka (AJ) para. 97.} In the same case the Tribunal found that for special intent crimes such as genocide, participants in basic and systemic JCE must be shown to share the required intent of the principal (physical) perpetrator.\footnote{Kvočka (AJ) 109-110.}

The third category is the \textit{extended} version of joint criminal enterprise, where one of the participants commits a crime beyond what was included in the original agreement. The question is whether all participants may be held liable for this act. Extended joint criminal enterprise is the most controversial category of the doctrine and has been subject for vast discussions in legal literature. As mentioned in the problem statement, the extended version is particularly interesting in the context of the crime of genocide because of the \textit{mens rea} requirements. Concerns have been made that this modality brings forth “guilt by association” and that the threshold for being convicted for genocide has been lowered.\footnote{E.g. Cassese \textit{et al.} (2011) p. 334.}

To illustrate the character of extended JCE, a modification of the casino example may be helpful. The common purpose is still robbery of a casino, only this time as an armed
robbbery. The participants agree that weapons could be more persuasive and help them succeed with the robbery – but they do not plan to use the weapons for killing. If one of the participants finds it necessary to shoot and kill someone, will the other members be held liable for murder? To be able to answer this question, a closer examination of the Tadić case is necessary.

The requisite actus reus is the same for extended JCE as for the two other categories, meaning that a joint criminal enterprise must exist. With regard to the mens rea requirements, the accused must possess “the intention to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group”.69 What separates this form of JCE from the basic and systemic form is that criminal responsibility might arise for acts committed outside the common purpose. However, criminal responsibility 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”70, and the members of the group must have been able to predict the result.71 There has been some debate with respect to whether the foresight is subjective (did the accused actually foresee the consequence) or objective (ought to have foreseen).72 In Martić, the Appeals Chamber found that this foreseeability is subjective; meaning that occurrence of the extra crime must have been foreseeable to the accused.73

Tadić was found guilty on the basis of this category after the Appeals Chamber found that he had “the intention to further the criminal purpose [of an armed group]” and that

69 Tadić (AJ) para. 228.
70 Tadić (AJ) para. 228.
71 Tadić (AJ) para. 220.
73 Martic (AJ) para. 83.
killing was a foreseeable result in order to effecting the common aim of the enterprise. Further it found that he was aware that such result was likely to occur, but “nevertheless willingly took that risk”.\textsuperscript{74} Thus, the requisite mens rea for extended JCE is dolus eventualis.\textsuperscript{75} Dolus eventualis is, as explained in chapter 1.5.2, the situation where a person chooses to act even if he/she foresees that his/her act is likely to lead to commission of a certain crime. In other words, if the other members of the casino-enterprise foresaw that killings could be the result of the armed robbery but nevertheless willingly took the risk, the requirements for criminal responsibility are met.

2.1.3 Application of extended JCE to the crime of genocide

A central discussion in this study is whether the third category of joint criminal enterprise is applicable as a mode of liability for the crime of genocide. If the subjective element required for participation in an extended joint criminal enterprise is dolus eventualis, is it possible to be convicted for genocide under this mode of liability? Expressed more precisely: can a person be convicted for committing genocide when acting without genocidal intent? This question has caused great debate, both internally in the ad hoc tribunals and in the sphere of legal literature. As will be demonstrated below, the internal debate might stem from a misunderstanding (or disagreement) regarding the nature of extended joint criminal enterprise. The discussion has been going back and forth between the ICTY Chambers. Decisions from the Appeals Chamber are binding on the Trial Chamber, but are not binding from case to case, thereby resulting in inconsequent jurisprudence.

The Trial Chamber addressed the question in Stakić, as the Prosecution argued that “in the “narrow case of joint criminal enterprise liability under the third variant”, proof of the

\textsuperscript{74} Tadić (AJ) paras. 230-232.

\textsuperscript{75} Tadić (AJ) para. 220.
dolus specialis is not required”.76 The Trial Chamber refused to accept this argument, claiming that the Prosecution confused joint criminal enterprise as a mode of liability with the crime itself, and that by taking this approach the dolus specialis of genocide would be “so watered down that it is extinguished”. The Chamber further stated that any special intent requirements must be met, and that the “notions of “escalation” to genocide, or genocide as a “natural and foreseeable consequence” of an enterprise not aimed specifically at genocide are not compatible with the definition of genocide under Article 4(3)(a).”77 While this is (partially) the correct approach (that any dolus specialis requirements must be met), these findings might be the source for the following uncertainty regarding application of extended JCE to the crime of genocide.78

In the subsequent Brđanin decision of 28 Nov 2003 the Trial Chamber found that extended JCE was inapplicable to the crime of genocide, as the “specific intent cannot be reconciled with the mens rea required for a conviction pursuant to the third category of JCE”, and that the mens rea for extended JCE fell short of the needed threshold for genocide.79 In the Brđanin decision of 19 March 2004 the Appeals Chamber reversed the Trial Chamber’s findings, stating that as long as the elements for joint criminal enterprise were met, “criminal liability can attach to an accused for any crime that falls outside of an agreed upon joint criminal enterprise”.80

The Appeals Chamber of Stakić brought up the discussion again, reversing the Trial Chamber’s findings with reference to the Brđanin decision of 19 March 2004, expressed by the following paragraph: “…the Appeals Chamber notes that in its analysis the Trial

76 Stakić (TJ) para. 529.
77 Stakić (TJ) para. 529-530.
78 For further explanation of this view, see pages 30-32 below.
79 Brđanin (TC) Decision on motion for acquittal pursuant to rule 98bis para 57.
80 Brđanin (AC) Decision on interlocutory appeal paras. 9-10. Emphasis added.
Chamber took the view that the third category of joint criminal enterprise was inapplicable to the crime of genocide. The Appeals Chamber notes that this view was subsequently clarified by the Appeals Chamber in another case, such that it is now clear that the third category of joint criminal enterprise and the crime of genocide are indeed compatible.81

What remains unclear is why the extended joint criminal enterprise is applicable to the crime of genocide. The separate opinion of Judge Shahabuddeen in the Brdanić decision of 19 March 2004 adds clarifying views on the matter.

“The third category of Tadić does not, because it cannot, vary the elements of the crime; it is not directed to the elements of the crime; it leaves them untouched. The requirement that the accused be shown to have possessed a specific intent to commit genocide is an element of that crime. The result is that that specific intent always has to be shown; if it is not shown, the case has to be dismissed. The case, as I appreciate it, concerned not the principle of having to show intent, but a method of doing so. It is only the method that is being referred to when it is said that the case established a mode of liability.

[...]

In Tadić, the Appeals Chamber did use the word “aware” but its judgment shows that it was speaking of more than awareness. It was referring to a case in which the accused, when committing the original crime, was able to “predict” that a further crime could be committed by his colleagues as the “natural and foreseeable consequence of the effecting of [the] common purpose” of the parties – and not the consequence of “negligence” – and that he nevertheless “willingly” took the “risk” of that further crime being committed. [...] any uncertainty in his mind went to the question whether it would in fact be committed, not to acceptance by him of it (if and when it was committed) as something which he could “predict” as the “natural and foreseeable consequence” of the activities of the joint criminal enterprise to which he was a willing party. In that important sense and for the purposes of determining such a submission, he contributed to

81 Stakić (AJ) para. 38.
the commission of the genocide even though it did not form part of the joint criminal enterprise. Putting it another way, his intent to commit the original crime included the specific intent to commit genocide also if and when genocide should be committed. To recapitulate, the Appeals Chamber in Tadić was not of the view that intent did not have to be shown; what it considered was that intent was shown by the particular circumstances of the third category of joint criminal enterprise."82

This separate opinion confirms that any special intent requirements must be met, where it is prescribed. This is not groundbreaking. What I find it to clarify is that Tadić did not alter the elements of the crime of genocide but established a method for showing genocidal intent. The dolus eventualis requirement of extended JCE is not referring to the elements of genocide but to the threshold applied to JCE participants for foreseeing genocide as a consequence of their acts. An accused can be held liable for genocide as his “intent to commit the original crime included the specific intent to commit genocide also if and when genocide should be committed."83 The critique regarding application of extended JCE as a mode of liability to the crime of genocide seems to be based upon the view that the requisite mental element of genocide is altered. This criticism might have been avoided if the ad hoc tribunals had sought to clarify the issue.

The origin of these varying points of view regarding the third category of joint criminal enterprise might stem from the Tadić case itself. The Appeals Chamber referred to JCE both as a form of “commission”, which is distinct from aiding and abetting, and as a “form of accomplice liability”, which is not included in the term committed.84

82 Brđanin (AC) Decision on interlocutory appeal, Separate opinion of Judge Shahabuddeen paras. 4, 5, 7-8.
83 Brđanin (AC) Decision on interlocutory appeal, Separate opinion of Judge Shahabuddeen paras. 8.
84 Tadić (AJ) paras. 220, 223, 229.
After this analysis, it is clear that the question is not whether a person can be convicted for committing genocide when acting without genocidal intent – because that is not possible.\(^85\) The question is where to draw the line between principal and accessory perpetrators of genocide – those who commit the crime and those who assist to the crime - and whether extended JCE fall in the first or latter category.

The first clear statement regarding the line between principal and accomplice liability was given in the case of \textit{Ojdanić} \(^86\). In this decision the Appeals Chamber stated that joint criminal enterprise is to be regarded as a form of commission and not as a form of accomplice liability.\(^87\) This view was upheld in the \textit{Krstić} case, where a central question was whether the accused was to be considered as a principal or an accessory to the crime of genocide. In this case the Trial Chamber convicted the accused, General Krstić, for participating in a joint criminal enterprise (ethnical cleansing of Srebrenica and forcible transfer of Bosnian Muslims) and an “escalated joint criminal enterprise” (to kill all military-aged Bosnian Muslim men).\(^88\) The Chamber found that Krstić shared the genocidal intent of the escalated enterprise.\(^89\) Further, he was found liable for crimes\(^90\)

\[^85\] It is possible to be convicted for \textit{aiding and abetting} the crime of genocide without sharing the requisite special intent, but this is because aiding and abetting is a form of accomplice liability, where the principal perpetrator has the special intent - and the aider and abettor acts with knowledge of this and intent regarding own acts.


\[^87\] Ojdanić (AC) \textit{Decision on Dragoljub Ojdanić’s motion challenging jurisdiction – joint criminal enterprise} para. 31.

\[^88\] Krstić (TJ) para. 619.

\[^89\] Krstić (TJ) para. 634.

\[^90\] See Krstić (TJ) para. 635: “While the agreed objective of the joint criminal enterprise in which General Krstić participated was the actual killing of the military aged Bosnian Muslim men of
beyond the enterprise on the basis of extended JCE – as this was a natural and foreseeable consequence of the enterprise.\textsuperscript{91} The Appeals Chamber reversed the Trial Chamber’s findings as it did not find it proven that Krstić shared the genocidal intent and “[c]onvictions for genocide can be entered only where that intent has been unequivocally established”.\textsuperscript{92} The Appeals Chamber found that Krstić could not be found guilty as a principal but found that he had knowledge of the principal perpetrator’s genocidal intent and found him liable as an aider and abettor.\textsuperscript{93}

2.2 The legality of the doctrine

The evaluation of the legality of the joint criminal enterprise doctrine will be based upon the Appeals Chamber’s reasoning in the \textit{Tadić} judgement and the framework for international criminal law as laid out in chapter 1.5.1. The essential facts of the case have been introduced above.\textsuperscript{94}

2.2.1 The \textit{Tadić} case: source of law analysis

The Appeals Chamber starts off by questioning whether the appellant (Tadić) can be held criminally responsible under international criminal law for the killings.\textsuperscript{95} It finds the principle of personal culpability expressed in ICCSt. article 7(1) by the notion “…shall be individually responsible for the crime”, and states that a person can be held criminally

Srebrenica, the terrible bodily and mental suffering of the few survivors clearly was a natural and foreseeable consequence of the enterprise.”

\textsuperscript{91} Krstić (TJ) para. 635.

\textsuperscript{92} Krstić (AJ) para. 134.

\textsuperscript{93} Krstić (AJ) paras. 137-144.

\textsuperscript{94} E.g. chapter 2, 2.1.

\textsuperscript{95} Tadić (AJ) para. 185.
liable for any act falling under the provision.\textsuperscript{96} The Court continues to ask whether article 7(1) includes “criminal responsibility for participating in a common criminal purpose”. The starting point for the ICTY’s reasoning is the Statute itself, which is a traditional approach and in accordance with ICJ article 38(1).

As discussed in chapter 2.1, the Chamber finds that the term “committed” in article 7(1) covers “first and foremost the physical perpetration of a crime” but that commission might occur through participation in the “realisation of a common design or purpose”.\textsuperscript{97} It does so by interpreting article 7(1) of the Statute based on its object and purpose, supported by the UN Secretary-General’s Report notion regarding the matter.\textsuperscript{98} The report is a comment to Security Council Resolution 808, where the Security Council decided that an international tribunal should be established, thus the report is a form of preparatory works to the ICTY Statutes.\textsuperscript{99} The Appeals Chamber further argues that this interpretation of the Statute is supported by the nature of “many international crimes”, and given these considerations, the Statute allows for criminal liability for acts perpetrated by a plurality of persons.\textsuperscript{100} This teleological interpretation of the Statute is in accordance with the VCLT principles of interpretation.

The Court acknowledges that even if the basis for this mode of liability is found in the Statute, neither its objective nor subjective elements are specified in the Statute. The Court turns to what they declare to be customary international law to identify the elements.\textsuperscript{101} Customary law is, as given account for in chapter 1.5.1, “international

\textsuperscript{96} Tadić (AJ) para. 186.
\textsuperscript{97} Tadić (AJ) para. 188.
\textsuperscript{98} Tadić (AJ) para. 190.
\textsuperscript{99} UN Security Council Resolution 808 (S/RES 808), 22 February 1993.
\textsuperscript{100} Tadić (AJ) paras. 191-193.
\textsuperscript{101} Tadić (AJ). paras. 191-194.
custom, as evidence of a general practice accepted as law” and is a recognized source of law.\textsuperscript{102} For something to be considered as customary law, the existence of state practice and \textit{opinio juris} are required elements.

Through a detailed analysis of several post-World War II cases and domestic cases from various countries, the Appeals Chamber reveals the different categories within the notion of common criminal purpose.\textsuperscript{103} The Chamber also refers to other international conventions where similar modes of liability are included and finds that the notion of common purpose is “well-established in international law”.\textsuperscript{104} The Chamber’s conclusion is “that the notion of common design as a form of accomplice liability is firmly established in customary law and in addition is upheld, albeit implicitly, in the Statute of the International Tribunal.”\textsuperscript{105} It emphasizes that “national legislation and case law cannot be relied upon as a source of international principles or rules”, but that “consistency and cogency of the case law and treaties referred to above, as well as their consonance with the general principled on criminal responsibility laid down both in the Statute and general international criminal law and in national legislation, warrant the conclusion that \textit{case law reflects customary rules of international criminal law}.\textsuperscript{106}

While it is beyond the scope of this thesis to determine whether the ICTY’s findings in the \textit{Tadić} case actually fulfil the requirements for customary law, the issue has been discussed in subsequent case law, as will be demonstrated below.

\begin{itemize}
\item \textsuperscript{102} ICJSt. article 38(1).
\item \textsuperscript{103} Tadić (AJ) paras. 195-220.
\item \textsuperscript{104} Tadić (AJ) paras. 221-223.
\item \textsuperscript{105} Tadić (AJ) para. 220. Emphasis added.
\item \textsuperscript{106} Tadić (AJ) paras. 225-226.
\end{itemize}
2.2.2 Legality - the *nullum crimen sine lege* principle

The principle of legality is explained in chapter 1.5.1. The *nullum crimen sine lege* principle demands for criminal responsibility to be prescribed by law and existing at the time when the crime was committed. The principle is not mentioned in the *ad hoc* tribunals’ provisions but as it is recognized as a general principle of law and an internationally recognized human rights standard it still applies. The situation for the *ad hoc* tribunals is special regarding the prohibition of retroactive legislation, as they were established after the crimes were committed.\(^{107}\) In the UN Secretary-General’s Report, the Secretary-General states that the *nullum crimen sine lege* principle requires that the ICTY must apply rules that are “beyond any doubt part of customary law”.\(^{108}\) The purpose of the tribunals was not to make new law but to follow what already was considered international law. This is why the Statutes are reflecting customary law, as it would be violating the principle of legality to create new legislation for the crimes committed.

*Nullum crimen sine lege* as a principle of interpretation limits a broad interpretation of the Statute. However, as the ICTY stated in the case of *Alekovski*: "[t]hat principle [*nullum crimen sine lege*] does not prevent a court, either at the national or international level, from determining an issue through a process of *interpretation and clarification* as to the elements of a particular crime; nor does it prevent a court from relying on previous decisions which reflect an interpretation as to the meaning to be ascribed to particular ingredients of a crime."\(^{109}\)

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\(^{108}\) Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993) para. 34.

\(^{109}\) Alekovski (AJ) para. 127. Emphasis added.
In Stakić, the Trial Chamber acknowledged the Appeals Chamber’s findings in the Ojdanić decision\textsuperscript{110} where the Tribunal found that four pre-conditions must be satisfied for any form of liability to be within the tribunal’s jurisdiction: “(i) the liability must be provided for, explicitly or implicitly, in the Statute; (ii) it must have existed under customary international law at the relevant time; (iii) the law providing for that form of liability must have been sufficiently accessible at the relevant time to anyone who acted in such a way; and (iv) such person must have been able to foresee that he could be held criminally liable for his actions if apprehended.”\textsuperscript{111} The Appeals Chamber found the conditions to be met and the elements of joint criminal enterprise to be customary law.\textsuperscript{112} The Appeals Chamber of Stakić confirms these findings: “[a] basis in customary law having been established, the Appeals Chamber in that case [Ojdanić] came to the conclusion that the notion of joint criminal enterprise did not violate the principle \textit{nullem crimen sine lege}. As the concept of \textit{dolus eventualis} (or “advertent recklessness”) is clearly “required for the third form of joint criminal enterprise”, the same conclusion is applicable in the instant case. As joint criminal enterprise does not violate the principle of legality, its individual component parts do not violate the principle either.”\textsuperscript{113}

The ICTY clearly postulates that the joint criminal enterprise doctrine does not violate the \textit{nullem crimen sine lege} principle.

\begin{footnotesize}
\begin{enumerate}
\item[$\textsuperscript{110}$] Milutinović et al., \textit{Decision on Dragoljub Ojdanić’s motion challenging jurisdiction – joint criminal enterprise} (AC) para 21.
\item[$\textsuperscript{111}$] Stakić (AJ) para. 101.
\item[$\textsuperscript{112}$] Milutinović et al., \textit{Decision on Dragoljub Ojdanić’s motion challenging jurisdiction – joint criminal enterprise} (AC) (AC) para. 41.
\item[$\textsuperscript{113}$] Stakić (AJ) para. 101. Underlining added.
\end{enumerate}
\end{footnotesize}
2.3 The development - discussion

The concept and substance of JCE as introduced by the ICTY in the Tadić case has, as presented above, been confirmed in several cases before the ICTY as well as the ICTR.\textsuperscript{114} In the case of Brđanin, the ICTY Trial Chamber endorsed the Tadić judgement saying that “[a]lthough Article 7 (1) of the Statute does not make explicit reference to JCE, the Trial Chamber is satisfied that, in line with the jurisprudence of the Tribunal, persons who contribute to the commission of crimes in execution of a common criminal purpose are subject to criminal liability as a form of “commission” of a crime pursuant to Article 7 (1) of the Statute, subject to certain conditions.”\textsuperscript{115} In the case of Martić the Court referred to joint criminal enterprise as “established as a form of liability within the meaning of “commission” under Article 7(1) of the Statute”, under reference to the Tadić case.\textsuperscript{116} Even if the tribunals discuss details within the doctrine, the interpretation of “commission” to include participation in a joint criminal enterprise has through a number of cases been accepted in these tribunals’ jurisprudence. In cases where the legality of the doctrine has been brought up for discussion, the Chambers have for the most part referred to the Tadić case without performing independent analyses. The Tadić case is well reasoned but does not solve all questions regarding joint criminal enterprise. Several commentators have described the post-World War II cases to have a dubious or ambiguous value as foundation for the findings of joint criminal enterprise to be clearly established in customary law.\textsuperscript{117} Other point out that by interpreting “commission” to include JCE as a mode of liability under reference to the object and purpose of the

\textsuperscript{114} The ICTR did not embrace the doctrine as quickly as the ICTY did but has applied it to several cases.

\textsuperscript{115} Brđanin (TJ) para. 258.

\textsuperscript{116} Martić (TJ) para. 435.

Statute (to hold perpetrators responsible\textsuperscript{118}) and the nature of the crimes, is to start in the wrong end.\textsuperscript{119} If critical examinations of the background for the doctrine had been carried out in cases following Tadić, some of the criticism might have been avoided.

An exception is found in Simić \textit{et al.}, where dissenting Judge Lindholm dissociated from the concept of JCE and argued that the doctrine had no substance of its own, as it in his opinion materially is the same as co-perpetration – and questions whether JCE can be included in the term “commission” in ICTY article 7(1) if co-perpetration is excluded (as it was in the Stakić Appeal Judgement).\textsuperscript{120} Judge Lindholm rather harshly refers to the concept of joint criminal enterprise as a source of confusion and a “waste of time”.\textsuperscript{121}

An appealing approach for dealing with some of the conceptual challenges of extended joint criminal enterprise is presented by Sliedregt. Her recommendation is that this mode of liability is seen as a form of derivative liability, which in her opinion would reflect the actual level of culpability, however still “higher on the scale of culpability than aiding and abetting genocide.”\textsuperscript{122} This approach reflects the view of the Tadić Appeals Chamber, which found joint criminal enterprise to be distinct from aiding and abetting, as holding a joint criminal enterprise participant liable “only as aiders and abettors might understate the degree of their culpability”.\textsuperscript{123} Sliedregt also proposes further exploration of “indirect perpetration” as encapsulated in ICCSt. article 25(3)(a) third alternative as an option.\textsuperscript{124}

\textsuperscript{118} See chapter 2.1.
\textsuperscript{119} E.g. Ohlin (2007) p. 72.
\textsuperscript{120} Simić \textit{et al.} (TJ), dissenting opinion of Judge Lindholm, para. 2.
\textsuperscript{121} Simić \textit{et al.} (TJ), dissenting opinion of Judge Lindholm, para. 5.
\textsuperscript{122} Sliedregt (2005) p. 205.
\textsuperscript{123} Tadić (AJ) para. 192.
\textsuperscript{124} See chapter 3.2 for this discussion.
When studying case law, what is striking is that the focus is on the subjective element rather than the objective element. What separates one mode of participation is not necessarily the act itself but the perpetrator’s state of mind. This is illustrated well in the *Kvočka* case, where the acts of the accused could belong both to the category of an accomplice (aider and abettor) or as a co-perpetrator in a joint criminal enterprise (basically he is doing “nothing”). The ICTY refers to the accused’s position and states that not only did he have knowledge about what was going on (in the camp), but also shared the intent with the actual perpetrators. Thus, he is convicted as a participant in a joint criminal enterprise, which is considered to be a more serious crime than that of aiding and abetting. This demonstrates how important the *mens rea* is for categorizing and determining an accused’s criminal responsibility, which is questionable when considering the principle of *nullum crimen sine lege*. This “subjective approach” has been addressed by the International Criminal Court, which will be explored in chapter 3.1.

### 3 Individual criminal responsibility – the International Criminal Court

Having explored the substance and the legality for the joint criminal enterprise doctrine in the ICTY and ICTR, the next objective for this thesis is to investigate the International Criminal Court’s position regarding joint criminal enterprise. At the time of this writing, there have been no final judgements from the ICC. However, the Pre-Trial Chambers (PTC) have delivered several decisions where the Rome Statute has been interpreted. These decisions will form basis for the following discussion.

#### 3.1 Mental element – ICCSt. Article 30
The Rome Statute provides a general definition of the subjective element required for establishing criminal liability. No other treaty within international criminal law contains
such a definition, thus the Rome Statute is a positive development, especially in relation to the nullum crimen sine lege principle.

Article 30:
1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
   (a) In relation to conduct, that person means to engage in the conduct;
   (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, ‘knowledge’ means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. ‘Know’ and ‘knowingly’ shall be construed accordingly.

The first paragraph establishes that a person can be held liable if the actus reus of a crime within the Court’s jurisdiction, are committed with intent and knowledge. “Intent and knowledge” is interpreted as a cumulative reference, meaning that both must be present to entail criminal responsibility.\(^\text{125}\)

The notion “[u]nless otherwise provided” establishes that the minimum or standard mens rea requirements are those of intent and knowledge. As such it serves as a default rule, however opening for deviations from the standard if the Statute or the Elements of Crimes require something else for the respective crime.\(^\text{126}\) Schabas refers to this as “built-in mens rea requirements”, which can be found for most of the crimes in the Statute. This

\(^{125}\) Lubanga (PTC I) Decision on the confirmation of charges para. 351.

\(^{126}\) Bemba (PTC II) Decision on the confirmation of charges para. 353.
is the case for the crime of genocide\textsuperscript{127} where “a punishable act must be committed with the intent to destroy”, thus requiring an additional element to be proven.\textsuperscript{128}

“Intent” is defined in article 30(2) and “knowledge” is defined in article 30(3). The PTC II explained the relationship between intent and knowledge in \textit{Bemba}: “[t]he Chamber recalls that, according to article 30 of the Statute, the general mental element of a crime is fulfilled (a) where the suspect means to engage in the particular conduct with the will (intent) of causing the desired consequence, or is at least aware that a consequence (undesired) "will occur in the ordinary course of events" (article 30(2) of the Statute); and (b) where the suspect is aware "that a circumstance exists or a consequence will occur in the ordinary course of events" (article 30(3) of the Statute).”\textsuperscript{129}

The separation of conduct and consequence in article 30(2)(a) and (b) is a result of the definition of crimes, as some crimes prohibit conduct, others consequences, or a combination of the two.\textsuperscript{130} The phrase “aware that it will occur in the ordinary course of events” in subparagraph (b) has been subject for discussion as it appears to open for \textit{dolus eventualis}.\textsuperscript{131} The ICC Pre-Trial Chambers have addressed the question in its decisions in the cases of \textit{Lubanga} and \textit{Bemba}.

\textsuperscript{127} ICCSt. article 6.
\textsuperscript{128} Schabas (2011) p. 236.
\textsuperscript{129} Bemba (PTC II) para. 356.
\textsuperscript{130} \textit{Commentary on the Rome Statute of the International Criminal Court} p. 859.
In *Lubanga* the PTC I recognized three forms of *dolus* included in article 30; namely *dolus directus* of the first and second degree, and also *dolus eventualis*. The latter is considered to be included under the condition that the "risk for bringing out the objective elements of the crime is substantial" or, if it is not, that the suspect has "clearly or expressly accepted the idea that such objective elements may result from his or her acts or omissions". In *Bemba*, the PTC II arrives at a different conclusion, accepting only *dolus directus* of the first and second degree, thus rejecting the concepts of *dolus eventualis*, recklessness or "any lower form of culpability". The PCT II's reasoning for this result is the "express" wording of the Statute itself; "[...] the phrase "will occur in the ordinary course of events", [...] does not accommodate a lower standard than the one required by *dolus directus* in the second degree (oblique intention)." After a literal interpretation of the Statute, the Chamber found that the phrase "will occur" clearly indicates that the required standard is "close to certainty", and further states that this is "undoubtedly higher" than the standard of *dolus eventualis*, in which the consequences are foreseen as a likelihood or possibility. The Chamber further argues that had the drafters intended to include *dolus eventualis*, they would have chosen the words "may occur", and supports this by analyzing the preparatory works. The Chamber's conclusion on the issue is that "[t]he Chamber's finding that the text of article 30 of the Statute does not encompass *dolus eventualis*, recklessness or any lower form of culpability aims to ensure that any interpretation given to the definition of crimes is in harmony with the rule of strict construction set out in article 22(2) of the Statute [*nullum crimen sine lege*]. It also ensures that the Chamber is not substituting the concept of de

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132 About *dolus directus* of the first and second degree, see Lubanga (PTC I) paras. 351-352 and Bemba (PTC II) paras. 358-359, where ICCSt. article 30(2)(a) is said to represent *dolus directus* of the first degree and (b) of the second degree.

133 Lubanga (PTC I) paras. 352-353.

134 Bemba (PTC II) para. 360.

135 Bemba (PTC II) paras. 362-368.
lege lata with the concept of de lege ferenda only for the sake of widening the scope of article 30 of the Statute and capturing a broader range of perpetrators.”

3.2 Modes of liability – ICCSt. Article 25(3)

As the Tadić case was passed before the Rome Statute of the International Criminal Court came into force, the ICTY Appeals Chamber made an attempt to predict whether the ICC would continue to make use of the doctrine. The Appeals Chamber rather boldly stated that the joint criminal enterprise doctrine was upheld in ICCSt. article 25(3)(d).

The modes of liability for individual criminal responsibility are found in article 25(3)(a)-(d):

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.
3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
   (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
   (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
   (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
   (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

\[\text{\footnotesize \textsuperscript{136} Bemba (PTC II) para 369.}\]

\[\text{\footnotesize \textsuperscript{137} Tadić (AJ) para. 222.}\]
(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;

[...]

According ICCSt. article 25(2), read in conjunction with 21(1), a person can only be held liable on basis of individual responsibility found in the wording of the Statute itself.\textsuperscript{139} When interpreting the Statute, the Pre-Trial Chamber have applied a strict textual approach. This approach ensures non-violation of the nullum crimen sine lege principle.

Unlike the Statutes of the ICTY and ICTR, the Rome Statute provides a systematic and detailed overview over the modalities commission, ordering/instigating, aiding and abetting and contribution to a crime committed by a group of persons. The provision leaves less room for broad interpretations (in comparison with the Statutes of the ad hoc tribunals), however still containing terms demanding for further clarification. In 2007 the ICC Pre-Trial Chamber I gave its first interpretation of article 25(3) in the Decision on the confirmation of charges in the case of Lubanga.\textsuperscript{140}

In this decision the Chamber briefly stated that criminal responsibility within article 25(3)(a) covers direct perpetration, co-perpetration and indirect perpetration.\textsuperscript{141} Direct perpetration is found in article 25(3)(a) first alternative; “[c]ommits such a crime ... as an

\textsuperscript{138} ICCSt. article 25 (3) sub-paragraphs (e), (f) and paragraph 4. are not of relevance for the discussion and thus omitted.

\textsuperscript{139} Katanga/Chui (PTC I) Decision on the confirmation of charges para. 487.

\textsuperscript{140} Lubanga (PTC I) Decision on the confirmation of charges.

\textsuperscript{141} Lubanga (PTC I) para. 318.
individual”, which refers to the situation where a person fulfils the objective and subjective elements of a crime.\footnote{142} Article 25(3)(a) second alternative, “jointly with another”, regulates co-perpetration. Indirect perpetration is read from article 25(3)(a) third alternative; [c]ommits such a crime... through another person, regardless of whether that other person is criminally responsible”. This is the situation when a person uses another person as a tool, often referred to as “the perpetrator behind the perpetrator”.

Lubanga was charged as co-perpetrator of war crimes for enlisting and conscripting children under the age of 15; hence the main focus for the Chamber’s discussion was what is meant by the notion co-perpetration, found in article 25(3)(a) second alternative, “jointly with another”. The Chamber expressed their view upon co-perpetration to be the situation “when the sum of the co-ordinated individual contributions of a plurality of persons results in the realisation of all the objective elements of a crime, any person making a contribution can be held vicariously responsible for the contributions of all the others and, as a result, can be considered as a principal to the whole crime”.\footnote{143} This view confirms that co-perpetration is seen as a principal form of liability. Through its analysis of article 25(3)(a) the PTC defined three approaches for distinguishing between principals and accomplices; the objective and subjective approach and the concept of “control over the crime”. The Chamber describes the objective approach as a method to distinguish between principals and accomplices through focusing on the realisation of objective elements of a certain crime, meaning that only perpetrators who physically commit the actus reus can be held as principals.\footnote{144} The Chamber dismisses this approach since it is

\footnote{142 See chapter 1.5.2.}
\footnote{143 Lubanga (PTC I) para. 326.}
\footnote{144 Lubanga (PTC I) para. 328.}
incompatible with the notion of indirect perpetration embodied in article 25(3)(a) third alternative.\textsuperscript{145}

The Pre-Trial Chamber states that the subjective approach is focusing on the state of mind following the contribution to the commission of the crime, and “[a]s a result, only those who make their contribution with the shared intent to commit the offence can be considered principals to the crime, regardless of their level of contribution to its commission”. The subjective approach is dismissed as the Chamber interprets the relationship between article 25 (3)(a) and (d) to mean that the drafters of the Rome Statute did not intend for a subjective approach.\textsuperscript{146}

The Chamber explains the concept of “control over the crime” as a contrary approach to the objective one, as a person, even if not physically contributing, is still perceived as principal perpetrator when he or she is in control or masterminds the commission of a crime. The Chamber’s reason for this view is that those who are in control over the crime decide whether and how the offence will be committed. It also sees this from another point of view; that only persons who in fact have control over the crime and are aware of this fact can be considered principals. This combines an objective element (“the appropriate factual circumstances for exercising control over the crime”) and a subjective element (“the awareness of such circumstances”).\textsuperscript{147}

The first objective element for co-perpetration based upon joint control over the crime is the existence of an agreement or common plan between two or more persons, in which the plan includes an element of criminality. The second element is “the coordinated essential contribution by each co-perpetrator resulting in the realization of the objective

\textsuperscript{145} Lubanga (PTC I) para. 333.

\textsuperscript{146} Lubanga (PTC I) paras. 334-337.

\textsuperscript{147} Lubanga (PTC I) paras. 330 et seq.
elements of the crime”. In order to be considered to have control over the crime, the participant must have an essential task and thus be in position to frustrate the commission of the crime by refusing to perform his or her task.\(^{148}\)

The subjective element required for co-perpetration based upon joint control over the crime is first and foremost that the suspect must fulfil the requisite mens rea for the crime in question, “including any requisite dolus specialis”. Further, the suspect and the other co-perpetrators must all be mutually aware of the risk that implementation of their common plan will result in the realization of the objective elements of the crime and all participants must mutually accept such a result “by reconciling themselves with it or consenting to it.”\(^{149}\)

For co-perpetration through another person (indirect co-perpetration) there is an additional element, as stated by PTC I in Katanga and Chui, that “the suspects are aware of the factual circumstances enabling them to exercise control over the crime through another person.”\(^{150}\)

3.3 Co-perpetration or joint criminal enterprise?

In the Lubanga decision, legal representatives for some of the victims argued that co-perpetration in article 25(3)(a) is related to the joint criminal enterprise doctrine, and the PTC was given the opportunity to discuss its position on the matter.\(^{151}\) Previously in this study, a presentation of the joint criminal enterprise doctrine has been given, which to some extent appears to have some common features to co-perpetration. Both modalities concern crimes committed of a plurality of persons, pursuing a common criminal

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\(^{148}\) Lubanga (PTC I) paras. 343-349.

\(^{149}\) Lubanga (PTC I) para. 349. Also supra, note 139 para. 527.

\(^{150}\) Katanga/Chui (PTC I) para. 534.

\(^{151}\) Lubanga (PTC II) para. 325.
purpose. Co-perpetration was subject for discussion in the ICTY case of Stakić, where the Trial Chamber found the accused liable as a co-perpetrator while the Appeals Chamber rejected this mode of liability as it was not considered to be part of customary law and applied joint criminal enterprise instead, which implies that these modes of liability are related.\textsuperscript{152}

The delineation of the legal differences between principal and accomplice liability has been central in the development of the doctrine made by the \textit{ad hoc} tribunals, and in the \textit{Lubanga} decision the ICC Pre-Trial Chamber elaborates the notion of co-perpetration by linking it to the differentiation of responsibility for principals and accomplices when a crime is committed by a plurality of persons.\textsuperscript{153} In the \textit{Lubanga} decision the PTC addressed the question of whether the Court would embrace the joint criminal enterprise doctrine or not. It did so in conjunction with describing approaches for distinguishing between principals and accomplices. Joint criminal enterprise is, as explained above, \textit{de lege lata} considered as a principal form of liability. The ICTY interpreted ICCSt. article 25(3)(d) to include joint criminal enterprise as a mode of liability.\textsuperscript{154} While article 25(3)(a) establishes modes for principal liability, the ICC interprets article 25(3)(d) to define the concept of “contribution to the commission or attempted commission of a crime by a group of persons acting with a common purpose, […] with the aim of furthering the criminal activity of the group or in the knowledge of the criminal purpose".\textsuperscript{155} The subjective element in article 25(3)(d) sub-paragraph ii) requires knowledge regarding the criminal intent of the group, which is more than foreseeability, or \textit{dolus eventualis}, thereby excluding the extended version of joint criminal enterprise.\textsuperscript{156}

\textsuperscript{152} Stakić (TJ) paras 468-498, Stakić (AJ) para. 62.
\textsuperscript{153} Lubanga (PTC I) para. 327.
\textsuperscript{154} Tadić (AJ) para. 222.
\textsuperscript{155} Lubanga (PTC I) para. 334.
\textsuperscript{156} Manacorda and Meloni (2011) p. 176.
Article 25(3)(d) provides a “residual form of accessory liability”, meant to cover contribution to crimes which fall outside the scope of ICCSt. article 25(3)(b) and (c).\textsuperscript{157} This approach clarifies that article 25(3)(d) is meant to cover accessories to a crime, not principals, thus excluding the joint criminal enterprise doctrine from being included in article 25(3)(d).

In \textit{Lubanga} the Pre-Trial Chamber stated that the notion of joint criminal enterprise in the ICTY’s jurisprudence is “closely akin” to the mode of liability in article 25(3)(d).\textsuperscript{158} However, as the PTC declares, the ICTY has taken the subjective approach through the joint criminal enterprise doctrine, as the focus is on the accused’s “state of mind in which the contribution to the crime was made”.\textsuperscript{159} The PTC interprets the opening phrase of article 25(3)(d) “in any other way \textit{contributes to the commission} or attempted commission of such a crime” to reject the subjective approach.\textsuperscript{160} When the Chamber dissociates from this approach by elaborating and adopting the concept of control over the crime, the question of whether the ICC will embrace the JCE doctrine appears to be answered negatively.

\begin{flushleft}
\textsuperscript{157} Lubanga (PTC I) para. 337.
\textsuperscript{158} Lubanga (PTC I) para. 335.
\textsuperscript{159} Lubanga (PTC I) para. 329.
\textsuperscript{160} Lubanga (PTC I) para. 336, Katanga and Chui (PTC I) para. 483.
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4 Concluding observations

The scope of this study was to perform a survey of the joint criminal enterprise doctrine’s position as a mode of liability in international criminal law, both concerning the substance and legality of the doctrine. Furthermore, the question whether the International Criminal Court would embrace joint criminal enterprise has been investigated. The crime of genocide has been used as a reference in order to pinpoint principal issues for the discussion.

This thesis has demonstrated that criminal responsibility in international criminal law is a fragmented area of law, and that the various modes for establishing criminal liability are subject for debate. As highlighted in chapter 2.2, the joint criminal enterprise doctrine is considered to be a firmly established mode of liability within the ad hoc tribunals’ jurisprudence - even if not mentioned in the Statute for the International Criminal Tribunal for the former Yugoslavia and for Rwanda. The introduction of the doctrine incorporated a mode of criminal responsibility tailored for international crimes such as genocide, where the crime more often than not is committed by persons acting together pursuing a common purpose. The doctrine has proven to be flexible when it comes to establishing criminal responsibility for crimes committed by a plurality of persons. As discussed in chapter 2.3, there are reasons to question whether it has become too flexible.

As suggested in chapter 2.3, the lack of internal criticism within the tribunals leaves questions unsolved, particularly regarding the status of the post-World War II cases forming the background material for the JCE doctrine – and especially in relation to the extended version of the doctrine. The critique regarding application of the extended version to the crime of genocide might stem from the divergent jurisprudence within the tribunals. As discussed in chapter 2.1.3, the view of Judge Shahabudden in the Brđanin
decision clarifies that the *dolus eventualis* requirement for extended JCE does not alter the elements of genocide, but is a method for showing genocidal intent. Unfortunately, the ICTY’s statements regarding the matter differ substantially.

The tendency in international criminal law is said to shift from focusing on the protection of society against crimes to a human rights oriented perspective. The teleological interpretation of ICTYSt. article 7(1) (as given account for in chapter 2.1 and 2.3) seems to emphasize the importance of punishing all perpetrators. The ICTY’s reasoning in the *Tadić* case appears to be closer to the doctrine of *subjective justice* than that of *strict legality*.

Unlike the *ad hoc* tribunals, the Statute of the International Criminal Court is equipped with a detailed set of rules, both concerning mental requirements to the crimes within the Court’s jurisdiction and the different modes of liability. The *nullum crimen sine lege* principle is embodied in the Rome Statute, and the Pre-Trial Chambers have (so far) put forth a strict textual approach when interpreting the Statute. Through examining current Pre-Trial Chambers decisions, the ICC’s standpoint to the joint criminal enterprise doctrine has been revealed. By rejecting the *ad hoc* tribunals’ subjective approach for establishing criminal liability, the ICC appears to move away from the JCE doctrine. The rejection of the subjective approach might prove to be a wise strategy, as notion of control over the crime is a more balanced approach towards establishing criminal liability, and closer to the doctrine of strict legality.

While it is important to have legal instruments for holding perpetrators criminally responsible, it is equally important (if not of greater importance) to avoid violation of human rights. Thus the doctrine of strict legality is the appropriate approach for establishing criminal liability.
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## ABBREVIATIONS/ACRONYMS

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<th>Abbreviation</th>
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<tr>
<td>AC</td>
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