Joint Criminal Enterprise and Command Responsibility

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Abstract

The joint criminal enterprise doctrine appears more and more as the 'magic weapon' in the prosecution of international crimes. Yet, the doctrine not only gives rise to conceptual confusion and conflicts with some fundamental principles of (international) criminal law but also invades the traditional ambit of command responsibility liability. This becomes obvious if both doctrines are applied simultaneously in cases against accused with some kind of superior position. After a short introduction on both doctrines, as interpreted in modern case law, the article gives some examples of their simultaneous application and tries to develop distinguishing criteria in light of the case law and a 'dogmatic' analysis of both the doctrines. A reference to the theory of 'Organisationsherrschaft' shows that there is yet another option to impute international crimes to top perpetrators.

1. Joint Criminal Enterprise and Command Responsibility in Modern Case Law: The Basics

A. Joint Criminal Enterprise

The joint criminal enterprise (hereinafter: JCE) doctrine[1] can be traced back to the *Tadić* Appeals Chamber judgment.[2] The Chamber looked for a theory of international criminal participation that takes sufficiently into account the *collective, widespread and systematic context* of such crimes and, thus, helps to

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1 According to A.M. Danner and J.S. Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law', 93 *California Law Review* (2005) 75, at 107, 64% of the indictments submitted in the ICTY between 25 June 2001 and 1 January 2004 relied on this doctrine. On the importance of JCE, also see N. Piacente, 'Importance of the JCE Doctrine for the ICTY Prosecutorial Policy', 2 *Journal of International Criminal Justice* (2004) 446, at 448; M. Osiel, 'The Banality of the Good: Aligning Incentives against Mass Atrocity', 105 *Columbia Law Review* (2005) 1751, at 1783.

2 Judgment, *Tadić* (IT-94-1), Appeals Chamber, 15 July 1999, § 185 *et seq.* (hereinafter '*Tadić Appeals Judgment*').

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overcome the typical difficulty in proving the — sometimes hardly visible — contributions of individual participants. The Chamber correctly acknowledged that 'most of . . . these crimes . . . constitute manifestations of collective criminality: the crimes are often carried out by groups or individuals acting in pursuance of a common criminal design'.[3] While the Court saw no *explicit* basis for participation through JCE in Article 7(1) of its Statute, it found an *implicit basis* in the term 'committed' since 'the commission of crimes . . . might also occur through participation in the realization of a common design or purpose' and Article 7(1) 'does not exclude those modes of participating'.[4] The Chamber, relying on post-World War II case law, distinguished *three categories* of collective criminality:

(i) the *basic* form, where the participants act on the basis of a 'common design' or 'common enterprise' and with a common 'intention' (hereinafter JCE I);
(ii) the *systemic* form, i.e. the so-called concentration camp cases where crimes are committed by members of military or administrative units such as those running concentration or detention camps on the basis of a common plan ('common purpose') (hereinafter JCE II);
(iii) the so-called '*extended*' joint enterprise where one of the co-perpetrators actually engages in acts going beyond the common plan but his or her acts still constitute a 'natural and foreseeable consequence' of the realization of the plan (hereinafter JCE III).

The *objective elements* of this form of liability, based on a JCE, are threefold: a plurality of persons; the existence of a common plan, design or purpose; and the participation of the accused in the JCE by any 'form of assistance in, or contribution to, the execution of the common purpose'. While the objective requirements apply equally to all three categories, the *subjective requirements* vary with each category.[5] JCE I requires the shared intent of the co-perpetrators; JCE II demands the perpetrator's personal knowledge of

3 In a similar vein most recently: Judgment, *Krajišnik* (IT-00-39-T), Trial Chamber, 27 September 2006, § 876 (hereinafter: '*Krajišnik Trial Judgment*'): 'JCE is well suited to cases such as the present one, in which numerous persons are all said to be concerned with the commission of a large number of crimes.'

4 *Ibid.*, §§ 188 and 190. For commission in the sense of Art. 7(1), see also Judgment, *Krnojelac* (IT-97-25), Appeals Chamber, 17 September 2003, § 29 (hereinafter: '*Krnojelac Appeals Judgment*'); Judgment, *Vasiljević* (IT-98-32), Appeals Chamber, 24 February 2004, § 95 (hereinafter '*Vasiljević Appeals Judgment*'); Judgment, *Blaškić* (IT-95-14), Appeals Chamber, 29 July 2004, § 33 (hereinafter: '*Blaškić Appeals Judgment*'); Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – JCE, *Ojdanić* (IT-99-37), Appeals Chamber, 21 May 2003, § 20 (hereinafter: '*Ojdanić decision*'); Judgment, *Stakić* (IT-97-24), Trial Chamber, 31 July 2003, §§ 432, 438 (hereinafter: '*Stakić Trial Judgment*').

5 Cf. *Tadić Appeals Judgment*, *supra* note 2, §§ 196, 202, 220, 228; concurring *Krnojelac Appeals Judgment*, *supra* note 4, § 32; *Vasiljević Appeals Judgment*, *supra* note 4, § 101; Judgment, *Ntakirutimana & Ntakirutimana* (ICTR-96-10; ICTR-96-17), Appeals Chamber, 13 December 2004, § 467 with further references (hereinafter: '*Ntakirutimana Appeals Judgment*'); Judgment, *Stakić* (IT-97-24-A), Appeals Chamber, 22 March 2006, §§ 65, 101 (hereinafter: '*Stakić Appeals Judgment*').

the system of ill-treatment and JCE III requires the perpetrator's intention (i) to participate in the criminal purpose and further this purpose and (ii) to contribute to the commission of a crime by the group. Responsibility for a crime that was not part of the common purpose arises if the commission of this crime was foreseeable and the accused (willingly) took that risk.

The subsequent case law basically followed the *Tadić* ruling.[6] As to the new mixed tribunals, only the East Timorese Special Panel for Serious Crimes[7] has to date applied the JCE doctrine.[8]

B. Command Responsibility

Modern case law lists *three requirements*[9] for the responsibility of a superior within an organization:[10]

(i) the existence of a superior–subordinate relationship;
(ii) the superior's failure to take the necessary and reasonable measures to prevent the criminal acts of his subordinates or punish them for those actions;
(iii) that the superior knew or had reason to know that a criminal act was about to be committed or had been committed.

6 See, e.g. Judgment, *Furundžija* (IT-95-17/1), Appeals Chamber, 21 July 2000, § 117 *et seq.*; *Krnojelac Appeals Judgment*, *supra* note 4, § 29 *et seq.*; *Vasiljević Appeals Judgment*, *supra* note 4, § 95 *et seq.*; *Stakić Appeals Judgment*, *supra* note 5, §§ 64, 65. For the ICTR see *Ntakirutimana Appeals Judgment*, *supra* note 5, § 462 *et seq.*; Judgment and Sentence, *Simba* (ICTR-01-76), Trial Chamber, 13 December 2005, §§ 386–388; *Krajišnik Trial Judgment*, *supra* note 3, §§ 878 *et seq.*

7 See Judgment, *Perreira*, Special Panel for Serious Crimes, 27 April 2005, at 19–20, online: www.jsmp.minihub.org/Court%20Monitoring/spsccaseinformation2003.htm (visited 24 March 2006). Concurring also *ibid.*, Separate Opinion of Judge Phillip Rapoza, at 4–5, §§ 17–18, 25. See also Judgment, *Domingos de Deus*, Special Panel for Serious Crimes, 12 April 2005, at 13 www.jsmp.minihub.org/Court%20Monitoring/spsccaseinformation2004.htm (visited 24 March 2006); Judgment, *Cardoso*, Special Panel, 5 April 2003. www.jsmp.minihub.org/Court%20Monitoring/spsccaseinformation2001.htm (visited 24 March 2006).

8 As to the indictments before the Sierra Leone Special Court invoking JCE III see Danner and Martinez, *supra* note 1, at 155–156.

9 *Orić* (IT-03-68-T), Trial Chamber, 30 June 2006, § 294 (hereinafter: '*Orić Trial Judgment*') considers the principal crime(s) committed by the subordinates as a fourth element.

10 Judgment, *Delalić et al.* (IT-96-21), Trial Chamber, 16 November 1998, §§ 346. See also the following ICTY Judgments: *Aleksovski* (IT-95-14/1), Trial Chamber, 25 June 1999, § 69 *et seq.*; concurring Appeals Chamber, 24 March 2000, §§ 69–77; *Blaskić* (IT-95-14), Trial Chamber, 3 March 2000, § 289 *et seq.* (294); concurring *Blaskić Appeals Judgment*, supra note 4, § 484; *Kordić and Čerkez* (IT-95-14/2), Trial Chamber, 26 February 2001, § 401 *et seq.* (401); partly reversed by Appeals Chamber, 17 December 2004, but no change with regard to the requirements for superior/command responsibility, see *ibid.*, § 827; *Halilović* (IT-01-48), Trial Chamber, 16 November 2005, § 55 *et seq.*; *Limaj et al.* (IT-03-66), Trial Chamber, 30 November 2005, § 520 *et seq.* (hereinafter: '*Limaj Trial Judgment*'); *Hadzihasanović/Kubura* (IT-01-47-T), Trial Chamber, 15 March 2006, § 76 *et seq.* (hereinafter: '*Hadzihasanović Trial Judgment*'). For the ICTR: *Akayesu* (ICTR-96-4), Trial Chamber, 2 September 1998, § 486 *et seq.*; *Kayishema and Ruzindana* (ICTR-95-1; ICTR-96-10), Trial Chamber II, 21 May 1999, §§ 208–231 (hereinafter: '*Kayishema and Ruzindana Trial Judgment*'); *Rutaganda* (ICTR-96-3), Trial Chamber I, 6 December 1999, § 31 *et seq.*; *Kajelijeli* (ICTR-98-44A), Trial Chamber II, 1 December 2003, §§ 754–782 (772) (hereinafter: '*Kajelijeli Trial Judgment*'); *Semanza* (ICTR-97-20), Trial Chamber III, 15 May 2003, §§ 375–407.

Possibly the most important (objective) requirement is implicit in the first requirement, namely the actual ability to exercise sufficient *control* over the subordinates so as to prevent them from committing crimes. In *Kayishema/Ruzindana* this ability was called 'the touchstone' of the doctrine, 'inherently linked with the factual situation' in the specific case.[11] The third requirement, the *mens rea*, can be divided into two *subjective thresholds*: either the superior must have actual *knowledge* with regard to the crimes; or he must possess *information* putting him on notice of the risk of such crimes, which indicates a need for additional investigation to determine whether crimes were committed or were about to be committed. It follows that ignorance regarding the commission of a subordinate's crimes cannot be held against the superior if they have properly fulfilled their duties of supervision (in particular, they did not ignore information that indicated the commission of crimes) but still did not learn of the crimes committed by subordinates.

2. The Simultaneous Application of JCE and Command Responsibility

A closer look at some recent cases where both JCE and command responsibility have been applied may help identify the problems of delineation and set forth distinguishing criteria.

In *Krstić*, the JCE doctrine was applied to the 'ethnic cleansing' of Srebrenica.[12] A Trial Chamber held that the accused, a general of the Bosnian-Serb Army and commander of the Drina Corps, played a central role in the 'genocidal JCE', first, forcibly transferring Muslim civilians out of Srebrenica and, further, by killing all Bosnian Muslim men of military age.[13] As to the *mens rea* requirement, the Chamber invoked the *Talić* decision[14] in distinguishing between crimes that fell within the object or goal of the JCE and ones which went beyond that.[15] The former required that the accused shared the intent of the actual perpetrators, and the latter that they were 'natural and foreseeable consequences of the ethnic cleansing campaign' and, as such, the accused was aware of their inevitable occurrence. In the Chamber's view these requirements were fulfilled by Krstić.[16] He also

11 *Kayishema and Ruzindana Trial Judgment*, *supra* note 10, § 229 *et seq.* Concurring Danner and Martinez, *supra* note 1, at 122, 130.

12 Judgment, *Krstić* (IT-98-33), Trial Chamber, 2 August 2001, § 610 *et seq.* (hereinafter: '*Krstić Trial Judgment*').

13 *Ibid.*, §§ 610, 612, 615 and 619 *et seq.*

14 Decision on Form of Further Amended Indictment and Prosecution Application to Amend, *Brdjanin & Talić* (IT-99-36), Trial Chamber, 26 June 2001, § 31 (hereinafter: '*Brdjanin & Talić decision*').

15 *Krstić Trial Judgment*, *supra* note 12, § 613.

16 *Ibid.*, §§ 615–616. Concurring Judgment, *Krstić* (IT-98-33-A), Appeals Chamber, 19 April 2004, § 145 *et seq* (hereinafter: '*Krstić Appeals Judgment*').

participated in the 'escalated'[17] JCE to kill the Bosnian Muslim men and 'shared the genocidal intent to kill the men.'[18] Thus, the accused incurred responsibility 'as a *co-participant' in a JCE* to commit genocide'[19] since participation 'of an extremely significant nature and at the leadership level' gives rise to responsibility as a co-perpetrator, not merely as an aider and abettor.[20] Besides, the Chamber invoked the *command responsibility* doctrine to attribute the killings to Krstić since they were, in part, committed by troops under his effective control and he was aware of them but failed to prevent them or to punish his subordinates.[21] Yet, in the end, the Trial Chamber did not convict Krstić under Article 7(3) since it considered that his guilt was sufficiently expressed by the conviction(s) under Article 7(1).[22] The Chamber apparently resolved the conflict between JCE and command responsibility by drawing an analogy to the rules on concurrence of offences (*concours d'infractions*), looking to the rules of 'false' or 'apparent' concurrence whereby the larger crime prevails over and 'absorbs' the smaller crime (*Konsumtion*).[23] In the case of JCE and command responsibility, the broader rule of attribution of responsibility [Article 7(1)] 'subsumes' the more narrow rule [Article 7(3)]. If, according to the Chamber, *'any* responsibility under Article 7(3) is subsumed under Article 7(1)'[24] this includes JCE, and, indeed, Krstić was convicted only on this basis.

The Chamber's statement that 'the same applies to the commander who incurs criminal responsibility under the JCE doctrine'[25] gives rise to doubts as to the status of JCE. The Chamber seems to differentiate between the explicit forms of participation contained in Article 7(1) and the implicit participation of the JCE. Otherwise, if JCE responsibility were contained in the first sentence referring to Article 7(1), a separate reference to JCE in the following sentence would be superfluous. This separate reference seems to imply a special status of JCE, standing between the explicit forms of participation of Article 7(1) and command responsibility of Article 7(3). Such a special status, however, goes against the settled case law considering JCE as implicitly contained in Article 7(1) (see *supra* 1.A.) and it is difficult to reconcile the second sentence with that case law. Against this background, the sentence can hardly mean that 'the same' refers to the pre-eminence of Article 7(1) over 7(3) with the consequence that this 'same' rule shall apply to JCE, i.e. this form of responsibility is also 'subsumed' in the explicit forms of participation under Article 7(1). In fact, the reference to Article 7(1) in the first sentence

17 *Krstić Trial Judgment*, *supra* note 12, § 620.
18 *Ibid.*, § 633.
19 *Ibid.*, § 636.
20 *Ibid.*, § 642. See also § 644: 'principal perpetrator'.
21 *Ibid.*, § 624 *et seq.*; 647 *et seq.*
22 *Ibid.*, § 652.
23 On the general rules see K. Ambos and S. Wirth, 'Commentary', in A. Klip and G. Sluiter (eds), *Annotated Leading Cases of International Criminal Tribunals, Vol. II: The ICTR 1994–1999* (Antwerpen et al.: Intersentia, 2001), 701–703.
24 *Krstić Trial Judgment*, *supra* note 12, § 605 (emphasis added).
25 *Ibid.*, § 605.

includes, as has been said before, JCE and, therefore, the explicit reference to JCE in the second sentence can reasonably only mean that the same rule applies *between JCE and Article 7(3)*, i.e. that *JCE prevails* over command responsibility, where both might be found.

While Krstić, a general, can be considered a high, albeit not top-level accused, the simultaneous application of JCE and command responsibility is by no means limited to this hierarchical level as the following cases show. In *Kvočka et al.*, the JCE doctrine was applied for the first time to crimes committed in the prison camp Omarska (Prijedor, Bosnia Herzegovina), a concentration camp case in the sense of *Tadić*'s second category.[26] The Trial Chamber, while interpreting the enterprise broadly,[27] restricted liability by requiring a significant and substantial contribution of a participant in a JCE,[28] departing in this regard from *Tadić*. The five accused were responsible for security and the keeping of the detainees in the camp.[29] They were all convicted as *co-perpetrators of the JCE*, instead of mere aiders and abettors.[30] Four of them were also charged with *command responsibility*,[31] but the Chamber found only in the case of *Radić* the 'substantial credible evidence' of a superior–subordinate relationship and the commission of crimes by the subordinates.[32] Yet, given his responsibility for participation in a JCE the Chamber left the question open as 'there is no need . . . as his liability for those crimes is already covered'.[33] Similarly, the Chamber stated, *obiter*, with regard to Kvočka, that his responsibility for JCE 'arguably makes [Article] 7(3) duplicative.'[34] Thus, the Chamber apparently gives JCE ascendancy over command responsibility and thus confirms the *Krstić* Trial Judgment. While the Appeals Chamber rejected the Trial Chamber's restrictive interpretation of JCE with regard to the necessary contribution,[35] the command responsibility doctrine was not the object of the Appeal. The Chamber nevertheless considered, *obiter*, that JCE and superior responsibility are 'distinct categories' of individual responsibility. Where the legal requirements of both are met, a conviction should be based on JCE only, and the superior position should be taken into account as an aggravating factor in sentencing.[36]

26 Judgment, *Kvočka et al.* (IT-98-30/1), Trial Chamber, 2 November 2001, §§ 265 *et seq.*, 319–320 (hereinafter: '*Kvočka Trial Judgment*').

27 *Ibid.*, § 307: 'continuum from two persons conspiring to rob a bank to the systematic slaughter of millions'.

28 *Ibid.*, §§ 306, 309, 310 and 312.

29 *Ibid.*, §§ 289, 325.

30 *Ibid.*, § 398 *et seq.* (414) [Kvočka], § 459 *et seq.* (469) [Prčac]; § 497 *et seq.* (504) [Kos]; § 562 *et seq.* (575) [Radić]; § 682 *et seq.* (682, 688) [Zigić].

31 The accused Zigić was not charged, *ibid.*, § 683.

32 *Ibid.*, §§ 568–570. As to the other accused such evidence was lacking: §§ 410–412 [Kvočka], §§ 466–467 [Prčac], § 502 [Kos].

33 *Ibid.*, § 570.

34 *Ibid.*, § 412.

35 Judgment, *Kvočka et al.* (IT-98-30/1), Appeals Chamber, 28 February 2005, §§ 97, 104 (hereinafter: '*Kvočka Appeals Judgment*').

36 *Ibid.*, § 104.

In *Obrenović*, JCE I, understood as 'co-perpetratorship', and command responsibility were simultaneously applied to a mid-level superior, a deputy commander of a military brigade, for his participation in the persecution and execution of civilians.[37] The Chamber neither clearly distinguished between the two doctrines nor explicitly opted for any of them. It only stated that Obrenović's liability 'stems primarily from his responsibilities as a commander' and 'from his failure to act'.[38] Thus, apparently, the Chamber mainly relied on Article 7(3), though more for factual than legal reasons. In *Blagojević & Jokić* only the accused Blagojević, an army Colonel and brigade commander, was charged with both JCE and command responsibility.[39] The Trial Chamber first decided whether Blagojević was responsible for participation in a JCE 'with the objective of forcibly transferring women and children from Srebrenica'.[40] The Chamber found that Blagojević lacked the necessary *mens rea*, that he did not share the intent of the other participants in the JCE, and therefore, only convicted him of aiding and abetting, *inter alia*, the forcible transfer.[41] The Chamber apparently considered that JCE requires co-perpetration, while aiding and abetting is only possible with reference to single crimes.[42]

The most famous example of a simultaneous application of JCE and command responsibility against a top civilian leader is the *Milošević* case. The Pre-Trial Chamber — applying the lower standard of proof of Rule 98*bis* of the Rules of Procedure and Evidence[43] — invoked, first, the JCE doctrine to impute to Slobodan Milošević the genocide committed by Serb forces in Bosnia-Hercegovina.[44] The Chamber distinguishes, albeit not explicitly, between JCE I (the basic form, consisting of a common plan) and III (the extended form, consisting of responsibility for natural and foreseeable consequences). The Chamber raised the question of whether Milošević was a participant in a JCE I, whose intention was to destroy, in whole or in part, the Bosnian Muslims as a group. The Chamber answered in the affirmative, holding that there existed a JCE 'which included members of the Bosnian Serb leadership, whose aim and intention was to destroy a part of the Bosnian Muslim population';[45] and that the accused was a participant in this JCE and

37 Sentencing Judgment, *Obrenović* (IT-02-60/2), Trial Chamber, 10 December 2003, §§ 79–80, 85 *et seq.*

38 *Ibid.*, § 88; also § 99.

39 Judgment, *Blagojević & Jokić* (IT-02-60), Trial Chamber, 17 January 2005, §§ 687, 692 (hereinafter: '*Blagojević Trial Judgment*').

40 *Ibid.*, § 705.

41 *Ibid.*, §§ 712–714, 729, 760.

42 The Chamber did not need to address the relationship between JCE and command responsibility since it could not establish command responsibility of Blagojević (*ibid.*, §§ 794–796).

43 The test is whether there is evidence upon which a reasonable tribunal of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused (Judgment, *Jelisić* (IT-95-10), Appeals Chamber, 5 July 2001, § 37).

44 Decision on Motion for Judgment of Acquittal, *Milošević* (IT-02-54), Trial Chamber, 16 June 2004, § 143 *et seq.* (hereinafter: '*Milošević decision*'). See K. Ambos, 'Zwischenbilanz im Milosevic-Verfahren', 59 *Juristenzeitung* (2004) 965, at 966.

45 *Milošević decision*, *supra* note 44, § 246.

'shared with the participants the aim and intention to destroy a part of the Bosnian Muslims as a group'.[46] As to JCE III, the Chamber inquired whether Milošević was a participant in a JCE 'to commit a particular crime and that it was reasonably foreseeable to him that, as a consequence . . . a different crime, namely genocide . . . would be committed by other participants in the JCE'.[47] It also answered this question in the affirmative, referring to the *Brdjanin* Appeals Chamber decision, according to which a participant in a JCE III to commit genocide need not himself possess the specific genocidal intent but the commission of this crime must be only 'reasonably foreseeable' to him.[48] Thus, the Chamber distinguished between JCE I and III with regard to the specific intent of a crime to be pursued by the enterprise: while such a specific intent must be 'shared' by all participants in a JCE I, in the case of a JCE III, mere foreseeability by a participant who does not directly commit the specific intent crime is sufficient. Although this is a highly questionable assumption,[49] there is no disagreement in the Chamber in this regard. Judge O-Gon Kwon only dissents regarding the existence of a specific genocidal intent of the accused implicit in the application of JCE I; however, he agrees with the finding on JCE III, thereby accepting the lower foreseeability standard with regard to a specific intent crime.[50] The Chamber also held the accused liable for genocide on the basis of the *command responsibility* doctrine, considering Milošević a superior with effective control and knowledge.[51] The Chamber did not see a conflict between the different *mens rea* standards of Article 7(3) and genocide but simply regarded this submission, in light of the already mentioned *Brjdanin* Decision, as 'unmeritorious'.[52] In sum, the Chamber deems JCE I, JCE III and command responsibility simultaneously applicable, without pronouncing on their relationship.

Summing up the case law, the following conclusions can be drawn. First, the simultaneous application of JCE and command responsibility is not limited to cases involving top or high-level accused (Milošević, Krstić) but also extends to mid- or even low-level participants (Kvočka, Obrenović, Blagojević and Jokić). Secondly, for (factual) reasons of proof only in a few situations could both doctrines be applied simultaneously. In these cases (*Krstić*, *Kvočka et al.*), the final result the Trial Chambers concerned have opted for the *prevalence of JCE* over command responsibility based upon the rules of concurrence of offences (*concours d'infractions*), thereby, in fact, following the case law on the relationship between ordering a crime [Article 7(1)] and command responsibility according to which the former constitutes

46 *Ibid.*, § 288.
47 *Ibid.*, § 289.
48 Decision on interlocutory Appeals, *Brdjanin* (IT-99-36-A), Appeals Chamber, 19 March 2004, § 6 (hereinafter: '*Brdjanin Appeals decision*'); *Milošević decision*, *supra* note 44, §§ 291, 292.
49 See more detailed *infra* note 110 and 144 *et seq.* with main text.
50 Dissenting opinion Judge O-Gon Kwon, § 1.
51 *Milošević decision*, *supra* note 44, § 300 *et seq.* (309).
52 *Ibid.*, § 300.

a *lex specialis*.[53] The case law, however, has not developed explicit criteria to delimitate the two doctrines.[54]

3. Theoretical Considerations on JCE and Command Responsibility

A. JCE

The JCE doctrine serves to impute certain criminal acts or results to persons for their participation in a *collective* ('joint') criminal enterprise. The 'criminal enterprise' is defined by a common — explicit or tacit — agreement or understanding to commit certain criminal acts for an *ultimate* criminal *objective* or *goal*,[55] e.g. in the case of a genocidal enterprise, the ultimate destruction of the targeted group. Such a global or broad enterprise normally consists of various smaller ('subsidiary') sub-enterprises,[56] e.g. the running of concentration or prison camps for the members of the targeted group, the local or regional organized persecution of members of the group, etc.[57] The participants in the enterprise are bound together by their *common will* to achieve the ultimate goal by all necessary means, that is by the crimes that must be committed on the road to the ultimate criminal goal by way of their joint action.[58] The underlying rationale of a JCE, its core feature, is the combined, associated or *common criminal purpose*[59] of the participants in the enterprise. The *common* purpose is the *collective* element of the JCE doctrine and turns it into a theory of collective responsibility based on an institutional-participatory[60] or systemic[61]

53 See Judgment, *Kordić & Čerkez* (IT-95-14/2), Appeals Chamber, 17 December 2004, §§ 33–35; for East Timor see Judgment, *Lelan Sufa*, Special Panel for Serious Crimes, 25 November 2004, www.jsmp.minihub.org/Court%20Monitoring/spsccaseinformation2003.htm (visited 24 March), § 18.

54 Critical also E. van Sliedregt, *The Criminal Responsibility of Individuals for Violation of International Humanitarian Law* (The Hague: TMC Asser Press, 2003), at 195; Osiel, *supra* note 1, 1760.

55 See most recently *Krajišnik Trial Judgment*, *supra* note 3, §§ 883, 884: 'common objective'.

56 Cf. *Kvočka Trial Judgment*, *supra* note 26, § 307.

57 Critical on such broad interpretations Danner and Martinez, *supra* note 1, at 135 *et seq.*; critical also Osiel, *supra* note 1, at 1796 *et seq.*, 1802 *et seq.* and *idem*, 'Modes of Participation in Mass Atrocity', 39 *Cornell International Law Journal* (2005) 793, at 799–800.

58 *Krajišnik Trial Judgment*, *supra* note 3, § 884: '. . . interaction or cooperation among persons — their joint action — in addition to their common objective, that makes those persons a group. The persons in a criminal enterprise must be shown to act together, or in concert with each other. . .' (footnote omitted).

59 J. Vogel, 'Individuelle Verantwortlichkeit im Völkerstrafrecht', 114 *Zeitschrift für die gesamte Strafrechtswissenschaft* (ZStW) (2002) 403, at 421.

60 Cf. H. Jung, 'Begründung, Abbruch und Modifikation der Zurechnung beim Verhalten mehrerer' in A. Eser, B. Huber, K. Cornils (eds), *Einzelverantwortung und Mitverantwortung im Strafrecht* (Freiburg i. Br.: Max Planck Institute, 1998) 175, at 183 *et seq.*

61 Cf. Vogel, *supra* note 59, at 420 *et seq.*; see for a systemic imputation ('global approach') also Piacente, *supra* note 1, 446 *et seq.*

model of responsibility. The doctrine resembles the law of conspiracy[62] and the membership or organizational liability applied in Nuremberg.[63] The similarity is most obvious in JCE III since in this case a participant in a JCE can even be responsible for crimes of other participants not explicitly agreed upon beforehand if they are merely foreseeable. Thus, his liability is essentially based on his membership in the group pursuing the JCE.

While the case law finds an implicit legal basis for JCE in Article 7(1) ICTY Statute (*supra* 1.A.), it fails to clarify whether the doctrine belongs to the traditional *law of participation* or constitutes a new and autonomous form of criminal imputation. Clearly, traditional doctrine cannot be transposed without more to international criminal law since it focuses on the role and contribution of perpetrators in an individual context, rather than a collective or systemic context. Yet, traditional doctrine still helps to understand and systematize the forms of imputation and participation in international criminal law. It also provides forms of collective participation, as shown by the examples of conspiracy and membership liability. In fact, the JCE doctrine can be traced back to the English common purpose theory.[64] From the perspective of a differentiating concept of participation, the delimitation between co-perpetration and mere complicity (aiding and abetting) is crucial and runs along the lines of the degree of the (objective) participation in the (subjective) criminal plan. In other words, with a decreasing degree of participation, co-perpetration comes closer to mere aiding and abetting and the delimitation between them becomes blurred. In any case, the imputation of an act as a 'foreseeable consequence' that was not agreed upon beforehand and consequently not intended by all participants cannot constitute a form of co-perpetration or of perpetration at all. Perpetration requires that the perpetrator themselves fulfil all objective and subjective elements of the offence. If one or more of element is missing and is only imputed to the person by *vicarious liability* (*responsabilité du fait d'autrui*), by making a 'non-actor' responsible for the conduct of another actor, as done by JCE III,

62 Cf. G.P. Fletcher and J.D. Ohlin, 'Reclaiming Fundamental Principle of Criminal Law in the Darfur Case', 3 *Journal of International Criminal Justice (JICJ)* (2005) 539, at 548; van Sliedregt, *supra* note 54, at 355; S. Powles, 'Joint Criminal Enterprise: Criminal Lability by Prosecutorial Ingenuity and Judicial Creativity?', 2 *JICJ* (2004) 606, at 613; Piacente, *supra* note 1, at 451; Danner and Martinez, *supra* note 1, at 118–119; Osiel, *supra* note 1, at 1785, 1791–1792.

63 See for a detailed analysis van Sliedregt, *supra* note 54, 17 *et seq.*, 20 *et seq.*; Danner and Martinez, *supra* note 1, at 113–114; recently S. Römer, *Mitglieder verbrecherischer Organisationen nach 1945* (Frankfurt am Main et al.: Peter Lang, 2005), 28 *et seq.*; van Sliedregt, *supra* note 54, at 352 *et seq.* regards JCE as 'membership responsibility' distinguishing between 'institutionalised' and 'collateral' membership responsibility; Osiel, *supra* note 1, at 1799–1800. Yet, Piacente, *supra* note 1, at 452 argues in favour of the Nuremberg 'judicial recognition of the common illegal purpose'.

64 It goes back to the 14th century when liability was based on a 'common consent' (A.T.H. Smith, *A Modern Treatise on the Law of Criminal Complicity* (Oxford: Clarendon Press, 1991), at 209 note 1). Later, in the 17th century, the private law concept of 'acting in concert' or 'conspiracy' was used to punish specific agreements to commit unlawful acts (see Ordinance of Conspirators, 1305, 33 Edw. 1; generally 'Developments in the Law. Criminal Conspiracy', 72 *Harvard Law Review* (1959) 920, 922–923).

the non-actor can only be considered an aider or abettor to the crime in question. Interestingly, traditional English doctrine has long held that participants in a common criminal purpose are principals in the second degree, in respect of every crime committed by any of them in the execution of that purpose.[65]

Some judgments have acknowledged the problem of the *correct form of participation* and opted for a subjective solution. In *Kvočka et al.*, the Trial Chamber, in this respect critical of the *Tadić* Appeals Judgment, considered that aiding and abetting in its traditional form may also be applied in relation to a JCE and the difference between co-perpetration and aiding and abetting is a subjective one: if 'the participant shares the intent of the criminal enterprise', he is a co-perpetrator; if he 'only' possesses knowledge, an aider and abettor to the JCE.[66] A few paragraphs later, however, the Chamber recognized that there is also an objective side to the distinction. An aider or abettor may graduate to a co-perpetrator if his participation 'lasts for an extensive period or [he] becomes more involved (. . .)',[67] the kind of participation depends on 'the position in the organizational hierarchy and the degree of (. . .) participation.'[68] A co-perpetrator performs a more active role, 'either through committing violations of human rights in his own right or through the pervasiveness of his influence (. . .)'; an aider and abettor plays a more limited role, basically doing his job discreetly.[69] In any case, 'liability for foreseeable crimes flows to aiders and abettors as well as co-perpetrators' of the JCE.[70] The Appeals Chamber did not see an objective difference between aiding and abetting a single crime or a JCE. In both cases a 'substantial contribution' is necessary.[71] The difference is a subjective one: where the accused knows he is aiding and abetting a single crime, he is liable with regard to that crime, even if the principal perpetrator belongs to a JCE; where the accused knows that he helps a group crime, part of a JCE and shares the group's intent, he is liable for furthering that JCE as a co-perpetrator.[72] In any case, 'aiding and abetting a JCE' is not possible.[73] In *Ojdanić*, the Appeals Chamber states that JCE is a form of commission 'insofar as a participant shares the purpose of the JCE (. . .) as opposed to merely knowing about it' and, therefore, 'cannot be regarded as a mere aider and abettor (. . .)';[74] this means in turn that if the participant has only knowledge he can only be liable as an aider and abettor.

65 See J.C. Smith, B. Hogan, D. Ormerod, *Criminal Law* (11th edn., Oxford: OUP, 2005), at 169, quoting Stephen, Digest, Art. 38. See also *ibid.*, at 190–191 (JCE as cases of secondary participation, parties to JCE as accessories).

66 *Kvočka Trial Judgment*, *supra* note 26, § 273.

67 *Ibid.*, § 284.

68 *Ibid.*, § 306.

69 *Ibid.*, § 328.

70 *Ibid.*, § 327.

71 *Kvočka Appeals Judgment*, *supra* note 35, § 90.

72 *Ibid.*; concurring *Limaj Trial Judgment*, *supra* note 10, § 510.

73 *Kvočka Appeals Judgment*, *supra* note 35, § 91; concurring *Krajišnik Trial Judgment*, *supra* note 3, § 886.

74 *Ojdanić decision*, *supra* note 4, § 20; *Stakić Trial Judgment*, *supra* note 4, § 432.

It follows from these considerations that the question of the correct form of participation is linked to the question of whether *aiding and abetting* a JCE is possible at all. While the *Kvočka* Trial Chamber took the view that it is possible to aid and abet a JCE, the Appeals Chamber only applied aiding and abetting to the single crime object of the complicity. While this restrictive view may be based on the wording of Article 7(1) ICTY Statute — since it makes a distinction between JCE, included in the term 'committed', and 'otherwise aided and abetted' — it is not necessary from a doctrinal perspective. On the contrary, as follows from the *Kvočka* Trial Chamber's concrete application and from the English law on common purpose, different forms of participation in a JCE are perfectly possible. The aider and abettor to a single crime committed within the framework of a JCE is still an aider and abettor to the JCE as such unless that single crime is completely unrelated to the JCE. As to the difference between co-perpetration and aiding and abetting, the most convincing criteria are offered by the German doctrine of the functional domination of the act (*funktionelle Tatherrschaftslehre*) according to which co-perpetration presupposes a functional cooperation of various persons (objective element) on the basis of a common plan or agreement (subjective element).[75] These requirements are only fulfilled by JCE I. In fact, the *Tadić* Appeals Chamber acknowledged the identity between co-perpetration and JCE I, at least terminologically, by calling JCE I 'co-perpetratorship'[76] and comparing it with co-perpetration as invoked in the German and Italian post-World War II cases.[77] In substance, JCE I requires, in the words of various unanimous Appeals Chambers decisions, that the participant 'performs [objective] acts that in some way are directed to the furthering of the [subjective] common plan or purpose'.[78] Thus, *JCE I* is a form of participation modelled on civil law co-perpetration[79] and common law common purpose/design. As to the *lex lata*, this means that JCE I is the only category of JCE that can be considered, without difficulty,

75 See for a detailed analysis C. Roxin, *Strafrecht. Allgemeiner Teil*, Vol. II (München: C.H. Beck, 2003), at 77 *et seq.*

76 *Tadić Appeals Judgment*, *supra* note 2, § 198. This terminology is settled, see recently Judgment on Sentencing Appeals, *Babić* (IT-03-72), Appeals Chamber, 18 July 2005, § 38 (hereinafter: '*Babić Appeals Judgment*').

77 *Tadić Appeals Judgment*, *supra* note 2, § 201.

78 *Ibid.*, § 229; *Krnojelac Appeals Judgment*, *supra* note 4, § 33; *Vasiljević Appeals Judgment*, *supra* note 4, § 102; *Kvočka Appeals Judgment*, *supra* note 35, § 89; *Babić Appeals Judgment*, *supra* note 76, § 38.

79 Cf. *Stakić Trial Judgment*, *supra* note 4, § 439. Against this background and the universal recognition of co-perpetration as a form of participation (see Art. 25(3)(a) ICC Statute) it is more than surprising that the Appeals Chamber states that, on the one hand, 'this mode of liability . . . does not have support in customary international law' yet, on the other, JCE liability is 'firmly established' (*Stakić Appeals Judgment*, *supra* note 5, § 62). This demonstrates such a blatant ignorance of basic principles of criminal law that even principled supporters of the International Criminal Tribunals, as this writer, are forced to reconsider their support.

as 'commission' within the meaning of Article 7(1) ICTY Statute[80] and as 'co-perpetration' within the meaning of Article 25(3)(a) 2nd alternative of the ICC Statute.

The hard issue is determining what *(objective) acts* are required for JCE I. The *Kvočka* Trial Chamber correctly says that the 'precise threshold of participation in JCE has not been settled'.[81] The famous *Tadić* ruling, adopted without modification by most subsequent cases, held that 'participation' in the common design (read 'JCE') 'may take the form of assistance in, or contribution to, the execution of the common plan or purpose'.[82] This blurs the line between JCE I, understood as co-perpetration and the other forms of JCE, especially JCE III, which constitutes only a form of aiding and abetting the JCE. The *Tadić* Appeals Chamber's attempt to distinguish co-perpetration versus aiding and abetting fails since it addresses only the relationship between the principal and the aider and abettor and the substance of the subjective requirement of the agreement. The reasoning leaves aside the difference between the objective contribution of a person acting on the basis of a common purpose (read: 'co-perpetrator') and the mere aider and abettor.[83] In fact, if one takes the objective distinction of the Appeals Chamber literally, an aider and abettor would do more than a co-perpetrator: the aider and abeter carries out substantial acts 'specifically directed' to assist in the perpetration of the (main) crime, while the co-perpetrator must only perform acts (of any kind) that 'in some way' are directed to the furthering of the common plan or purpose.[84] This turns the traditional distinction between co-perpetration and aiding and abetting (the distinction as to the weight of the contribution, which must be more substantial in the case of co-perpetration) on its head.

Interestingly enough, the *Vasiljević* Appeals Chamber, albeit following the *Tadić* distinction, takes the view, in the same paragraph, that the participant in a JCE is liable as a co-perpetrator and as such incurs a higher degree of responsibility than an aider and abettor who, in any case, would always be an accessory to the co-perpetrators of a JCE.[85] While this correctly describes the distinction between co-perpetration and complicity, it is imprecise with regard to the specific form of JCE — only JCE I constitutes, as a rule, co-perpetration. This reading also contradicts the *Tadić* Appeals Chamber's position which, as we have seen, attributes more weight to the contribution of the accomplice.

80 Cf. Powles, *supra* note 62, at 610–611; V. Haan, 'The Development of the Concept of JCE at the ICTY', 5 *International Criminal Law Review* (ICLR) (2005) 167, at 201. See also, albeit more radically, Separate and Partly Dissenting Opinion of Judge Lindholm, Trial Judgment, *Simić* (IT-95-9/2), Trial Chamber, 17 October 2003, § 2 *et seq.* dissociating himself from JCE.

81 *Kvočka Trial Judgment*, *supra* note 26, § 289.

82 *Tadić Appeals Judgment*, *supra* note 2, § 227; concurring *Krnojelac Appeals Judgment*, *supra* note 4, § 31; *Vasiljević Appeals Judgment*, *supra* note 4, § 100; *Babić Appeals Judgment*, *supra* note 76, § 38; *Ntakirutimana Appeals Judgment*, *supra* note 5, § 467.

83 Cf. *Tadić Appeals Judgment*, *supra* note 2, § 229.

84 *Ibid.*, § 229; concurring *Krnojelac Appeals Judgment*, *supra* note 4, § 33; *Vasiljević Appeals Judgment*, *supra* note 4, § 102; *Kvočka Appeals Judgment*, *supra* note 35, § 89.

85 *Vasiljević Appeals Judgment*, *supra* note 4, § 102.

Yet, one cannot have it both ways. Either JCE I is — in my view correctly — equated with co-perpetration and the corresponding rules apply, especially with regard to the delimitation to aiding and abetting, or the form of participation is left open at the level of attribution and differences are only, at best, taken into account at the sentencing level.[86]

In the case of *JCE II*, the situation is not clear and depends on the understanding of this category. If one characterizes JCE II as a 'variant' of JCE I[87] with the same requirements, it can certainly be treated alike. If, however, following the *Kvočka* Appeals Chamber, a 'substantial contribution' to the enterprise is not necessary, but membership and foreseeability alone give rise to criminal responsibility, JCE II more closely follows *JCE III*[88] than JCE I. As such, JCE II cannot be considered a commission or co-perpetration pursuant to Article 7(1) ICTY or Article 25(3)(a) 2nd alternative ICC Statute. Yet, while both JCE II (in the broad sense) and JCE III can *structurally* be classified as forms of aiding and abetting a criminal enterprise, they are not directly encompassed by Article 7(1) ICTY Statute and Article 25(3) ICC Statute. As to those provisions, JCE II and III may only be subsumed under the 'otherwise aided and abetted' formula if one construes the 'otherwise'[89] as including any complicity in the collective criminal commission. Aiding and abetting, however, as understood in Article 7(1) ICTY Statute and also Article 25(3)(c) ICC Statute differs in its *mens rea* from JCE II and III; it requires, on the one hand, knowledge[90] or intent within the meaning of Article 30 ICC Statute and, on the other, an act 'for the purpose of facilitating the commission of such a crime'. Thus, the only form of participation comparable with JCE II or III is that of collective responsibility as laid forth in Article 25(3)(d) ICC Statute.

In fact, the *Tadić* Appeals Chamber determined that Article 23(3)(d) ICC Statute contains a 'substantially similar notion' and 'upholds' the JCE doctrine,[91] yet, this view suffers from a lack of differentiation among the categories of JCE created by the same decision. While JCE I constitutes, as shown above, a form of co-perpetration within the meaning of Article 25(3)(a) 2nd alternative ICC Statute, JCE II and III are not included in Article 25(3)(d) at least for two reasons.[92] First, Article 25(3)(d)(ii) requires 'knowledge' with

86 See *infra* note 99 and text. Critical Danner and Martinez, *supra* note 1, at 141–142.

87 *Tadić Appeals Judgment*, *supra* note 2, § 203, 228.

88 Consequently, Powles, *supra* note 62, at 610 considers that for many of the so-called camp cases the basis for liability is JCE III instead of II.

89 Contrary to the *'Ojdanić Decision'*, *supra* note 4, § 19 the term 'otherwise' does not suggest that the modes of liability set out in Art. 7(1) are not exhaustive; correctly Powles, *supra* note 62, at 611.

90 See also Powles, *supra* note 62, at 612–613 seeing an incompatibility of aiding and abetting and JCE III.

91 *Tadić Appeals Judgment*, *supra* note 2, § 222. For a general similarity also Archbold, *International Criminal Courts: Practice, Procedure and Evidence* (2nd edn., London: Sweet and Maxwell, 2005), §§ 10–25; K. Kittichaisaree, *International Criminal Law* (Oxford: OUP, 2002), 236 *et seq.*; W. Schabas, *An Introduction to the ICC* (2nd edn., Cambridge: CUP, 2004), at 103–104.

92 Critical also Powles, *supra* note 62, at 617–618. For a different view van Sliedregt, *supra* note 54, at 107–108.

regard to the criminal intent of the group, i.e. more than the mere foreseeability required by JCE II and III.[93] Second, since the JCE doctrine resembles the law of conspiracy,[94] its inclusion in the ICC Statute would conflict with the intent of the Rome Statute's drafters, who explicitly rejected conspiracy and drafted Article 25(3)(d) as a compromise formula. Against this background, Article 25(3)(d) can rightly be seen as a 'statutory surrogate of JCE'.[95] For the future case law of the ICC this means that the application of the JCE doctrine *on the basis of Article 25* — and this is the only basis JCE could possibly have — is not possible.[96] To do otherwise would ultimately mean to introduce the law of conspiracy through the backdoor, ignoring the will of the drafters and violating the *principle of legality*. Only an explicit codification could reconcile JCE II and III with this principle's requirement of, *inter alia*, strict and precise construction of criminal law provisions (namely, Article 22(2) ICC Statute).[97] All this leads to the conclusion that JCE II and III constitute new and autonomous (systemic) concepts of imputation without an explicit basis in written international criminal law.

Last but not least, the JCE doctrine also conflicts with the *principle of culpability*. While some judgments (see *supra* 2) try to take into account the *role* and *function* of the accused in the enterprise, there still exists a tendency to render all participants equal on the level of attribution.[98] In fact, this approach corresponds to the unitarian concept of perpetration, which itself does not violate the principle of culpability as long as the difference in the *contribution* to the JCE is taken into account on the sentencing level and a less important contribution results in a mitigation of punishment (on the basis of the general rule that an accomplice deserves a lower sentence than a co-perpetrator).[99] Thus, the real issue is not so much at what stage the factors determining culpability are taken into account, but that they are taken into account at all. In this regard, the key word is *personal conduct* rather than organizational role, function or position. Culpability implies personal conduct, which finds expression in individual contributions to the enterprise, contributions that do not necessarily correspond to the function assigned to the

93 Cf. van Sliedregt, *supra* note 54, 108. As to JCE II, however, she argues that it can be brought under subpara. (d)(ii) as to mid-level participants if they had knowledge of the system of ill-treatment; but see her position in *infra* note 96 with main text.

94 *Supra* note 62 and main text.

95 Fletcher and Ohlin, *supra* note 62, at 546, 549.

96 In the same vein, van Sliedregt, *supra* note 54, at 354.

97 See also *Stakić Trial Judgment*, *supra* note 4, § 433.

98 Cf. Judgment, *Vasiljević* (IT-98-32), Trial Chamber, 29 November 2002, § 67; concurring *Vasiljević Appeals Judgment*, *supra* note 4, § 111; *Blagojević Trial Judgment*, *supra* note 39, § 702. Critical Fletcher and Ohlin, *supra* note 62, at 550; Osiel, *supra* note 57, at 798.

99 *Kajelijeli Trial Judgment*, *supra* note 10, § 963; *Vasiljević Appeals Judgment*, *supra* note 4, § 182; *Krstić Trial Judgment*, *supra* note 12, § 268; *Babić Appeals Judgment*, *supra* note 76, § 40. Critical Danner and Martinez, *supra* note 1, at 141–142. For a comparative analysis K. Ambos, 'Is the Development of a Common Substantive Criminal Law for Europe Possible? Some Preliminary Reflections', 12 *Maastricht Journal of European and Comparative Law* (2005), 173, at 182 *et seq.*

accused in the enterprise. With this in mind, it is to be regretted that the *Kvočka* Trial Chamber's approach to distinguish among defendants according to the weight of each defendant's contribution was rejected by the Appeals Chamber.[100]

Still, the conflict of JCE III with the principle of culpability is more fundamental. If *all* members of a group are held accountable for the criminal conduct of *some* members, even if their acts were not agreed upon beforehand but are merely foreseeable, the previous agreement or plan of the participants becomes the basis for reciprocal attribution and, thus, a general principle in the law of co-perpetration is abolished.[101] In addition, the foreseeability standard is neither precise nor reliable.[102] Quite ironically, one may say that the foreseeability standard applied in this way makes the punishability of the accused *un*foreseeable. Ultimately, under this standard, the doctrine introduces a form of strict liability.[103] This may be the reason for the attractiveness of the doctrine for the Prosecution, raising the possibility of elegantly overcoming typical evidentiary problems in international criminal law prosecutions, especially where proof of direct participation is lacking.[104] This, however, is the doctrine's main disadvantage from a defence perspective. Some of the Judges also seem to have concerns with the *foreseeability standard*. They either downgrade co-perpetration in a JCE to aiding and abetting (either aiding and abeting a JCE or a single crime)[105] or they try to increase or modify the subjective threshold by requiring knowledge together with foreseeability. According to the Appeals Chamber, 'this question must be assessed in relation to the knowledge of a particular accused'. The Prosecution must prove 'that the accused had sufficient knowledge such that the additional crimes were a natural and foreseeable consequence to him'.[106] While proof of knowledge requires more than the *Tadić dolus eventualis* or recklessness standard,[107] the linkage between knowledge and foreseeability is by no means clear. If one gives both standards a subjective meaning, by referring to the *mens rea* of the concrete participant who shall be held

100 See *supra* note 26 *et seq.* and main text. Critical also van Sliedregt, *supra* note 54, at 353–354; Danner and Martinez, *supra* note 1, at 134, 150.

101 See K. Ambos, *Der Allgemeine Teil des Völkerstrafrechts* (Berlin: Duncker und Humboldt, reprint 2004), at 557 *et seq.*; *idem*, *La Parte General del Derecho Penal Internacional* (reprint Bogotá: Temis, 2006), 185 *et seq.*

102 Cf. Fletcher and Ohlin, *supra* note 62, at 550. See also the examples given by Haan, *supra* note 80, at 191–192.

103 See also van Sliedregt, *supra* note 54, 106 *et seq.*, 357 *et seq.*; Schabas, *supra* note 91, at 104–105; G. Mettraux, *International Crimes and the Ad Hoc Tribunals* (Oxford: OUP, 2005), 292–293; Haan, *supra* note 80, at 200; Fletcher and Ohlin, *supra* note 62, at 550.

104 Cf. Vogel, *supra* note 59, at 421; Haan, *supra* note 80, 172 *et seq.*; Danner and Martinez, *supra* note 1, at 134.

105 See e.g. *Blagojević Trial Judgment*, *supra* note 42 and main text; *Kvočka Trial Judgment*, *supra* note 26 and main text.

106 *Kvočka Appeals Judgment*, *supra* note 35, § 86; concurring *Limaj Trial Judgment*, *supra* note 10, § 512; *Krajišnik Trial Judgment*, *supra* note 3, § 882.

107 See *supra* after note 5 in main text: the accused (willingly) took that risk.

responsible for acts beyond the scope of the enterprise, the combination of the two standards is like trying to square a circle. Either an accused knows that a certain result will occur or this result is foreseeable to him; both at once are logically impossible. In fact, knowledge is a standard for intent crimes (see Article 30 ICC Statute), while foreseeability belongs to the theories of recklessness or negligence. The only way out of this impasse is to construe foreseeability as an objective requirement (in the sense of a reasonable man standard), leaving the knowledge standard as the (only) subjective or mental requirement of liability.[108]

As a consequence, JCE III responsibility presupposes, first, the objective foreseeability of crimes that went beyond the object of the enterprise (since normally such crimes occur in the ordinary course of events pursued by such an enterprise) and, second, the knowledge of the concrete participant with regard to this (objective) foreseeability.[109] To put it more simply: the participant must know that the crimes in question normally occur in the given enterprise. Yet, while this interpretation may integrate the otherwise illogical combination of knowledge and foreseeability and may bring JCE III into line with the principle of culpability, it does not help in cases where the accused credibly pleads a lack of knowledge with regard to the foreseeability. For example, the accused may argue that he was factually not aware of the foreseeability of the excessive crimes, although a reasonable person in the accused's position would have been aware of the risk. In this case he would plead an error or mistake and the question would arise what type of mistake — of fact or law — would be applicable and what legal consequences this mistake would entail. The opposite tendency is the expansion of the foreseeability standard to *specific intent crimes*. As was already mentioned,[110] the *Brdjanin* Appeals Chamber downgraded the specific genocidal intent in case of a JCE III to mere foreseeability, by passing the specific intent requirement and overcoming well-known evidentiary problems. The *Milošević* Chamber merely followed this approach.[111] Yet, this approach is by no means settled in the case law. Unlike the Appeals Chamber, the *Stakić* and *Brdjanin* Rule 98 Trial Chambers held that the specific (genocidal) intent must be met.[112] In addition, in the

108 This view was indeed taken recently — after having finalized this paper — by the *Krajišnik Trial Judgment*, *supra* note 3, § 882.

109 Although the case law is not clear, such an objective–subjective interpretation may be read into various statements requiring awareness with regard to possible (unintended) crimes, see e.g. *Brdjanin & Talić decision*, *supra* note 14, § 31; *Blaškić Appeals Judgment*, *supra* note 4, § 33. See also Powles, *supra* note 62, at 609.

110 See *supra* note 48 and main text.

111 See *supra* note 52 and text.

112 *Stakić Trial Judgment*, *supra* note 4, § 530; Decision on Motion for Acquittal pursuant to Rule 98*bis*, *Brdjanin* (IT-99-36), Trial Chamber, 28 November 2003, § 30. See also, albeit not clear, the separate opinion of Judge Shahabuddeen to the *Brdjanin Appeals decision*, *supra* note 48, requiring, on the one hand, specific intent 'always' (§ 4), but, on the other hand, stating that it is shown by JCE III (§ 5). For specific intent also the doctrine, e.g. Mettraux, *supra* note 103, at 215, 264–265, 289; Haan, *supra* note 80, at 198–199, 200; Danner and Martinez, *supra* note 1, at 151.

posterior *Krstić* Appeal, JCE responsibility of the accused for the genocidal killings in Srebrenica was dismissed because of the lack of genocidal intent[113] and JCE III was not invoked to overcome the *mens rea* problem.

B. Command Responsibility

Article 28 ICC Statute, the most advanced codification of the command responsibility doctrine, can be characterized as a genuine offence or *separate crime of omission* (*echtes Unterlassungsdelikt*).[114] Although, in structural terms, the superior is to be blamed for his improper supervision, he is not only punished for this reason, but also for the crimes of the subordinates.[115] As a result, the concept creates, on the one hand, *direct* liability for the lack of supervision, and, on the other, *indirect* liability for the criminal acts of others (the subordinates), thereby producing a kind of *vicarious liability*.[116] Liability for the failure to intervene is put on an equal footing with (accomplice) liability for not adequately supervising the subordinates and not reporting their crimes. This is but one of the problems of the doctrine with regard to the principle of culpability.[117]

Responsibility for omission presupposes a *duty to act* on the part of a person with the specific position of a 'guarantor' (*Garantenstellung und -pflicht*). This duty justifies the moral equivalence between the failure to prevent harm and the active causation of harm. Command responsibility is supported by case law, scholarly writings and now, with Article 28 of the ICC Statute, regulated by Statute. In substance, the status of the superior as a guarantor flows from his responsibility for a certain area of competence and certain subordinates (see Article 1 Hague Convention of 1907 and Article 4(A)(2) Geneva Convention III of 1949). The superior possesses the status of a *supervising guarantor* with duties of observation and control vis-à-vis

113 *Krstić Appeals Judgment*, *supra* note 16, § 134, 135 *et seq.*; therefore, the Chamber convicted Krstić 'only' for aiding and abetting genocide.

114 See for an explanation K. Ambos, 'Superior responsibility', in A. Cassese, P. Gaeta and J. Jones (eds), *The Rome Statute of the ICC: A Commentary*, Vol. I (Oxford: OUP, 2002) 828, at 850–851.

115 See most recently *Orić Trial Judgment*, *supra* note 9, § 293: 'neglect of duty'.

116 For the similarity to the employer's criminal responsibility see Ambos, *supra* note 114, 844 *et seq.*; also van Sliedregt, *supra* note 54, at 352. On the 'objet de la responsabilité du supérieur' see also the recent *Hadzihasanović Trial Judgment*, *supra* note 10, § 67 *et seq.*

117 For this reason the German International Criminal Law Code (*Völkerstrafgesetzbuch*, Bundesgesetzblatt 2002 I 2254; for an English translation see http://jura.uni-goettingen.de/k.ambos/Forschung/laufende.Projekte.Translation.html, visited 24 March 2006) distinguishes between liability as a *perpetrator* (principal) for the failure to prevent the subordinates' crimes (sect. 4) and *accomplice liability* for the (intentional or negligent) failure to properly supervise the subordinates (sect. 13) and to report the crimes (sect. 14); concurring A. Cassese, *International Criminal Law* (Oxford: OUP, 2003), 206–207.

his subordinates who constitute a potential source of danger or risk.[118] These duties are defined in Article 87 Additional Protocol I to the Geneva Conventions of 1977 ('AP I') in relation with Article 43(1) AP I. Accordingly, military commanders are obliged to prevent, suppress and report breaches of the Conventions and AP I by members of their armed forces and other persons under their control [Article 87(1) AP I]. In a way, one can speak of a legal or positive duty to act since the duty to act is based on a positive norm of treaty law that has attained the status of customary law. This general duty to act is complemented by the various specific rules of positive conduct as laid down in the AP I.[119] Although these rules were initially addressed only to State Parties, they are now considered the basis of rules of responsibility for an individual's failure to act since the doctrine of superior responsibility and the major part of the offences established by the Geneva law (including AP I) have been 'individualized' by the ICC Statute and by national implementation laws.

The minimum requirement of command responsibility is that the superior concerned has command.[120] A superior with command and authority normally *controls* his subordinates and has the capacity to issue orders. The control (command, authority) has to be '*effective*'.[121] This is not a mechanical, naturalistic but highly normative standard.[122] In fact, the superior's liability for omission stands and falls — on an objective level — with his effective authority and control; the possibility of control forms the legal and legitimate basis of the superior's responsibility; it justifies his duty of intervention, though the form of control may differ according to the position of the superior.[123] The fine points are controversial, for example, whether a direct control of subordinates is necessary or whether this control can be mediated by other superiors/subordinates and to what extent the superior must be able to identify the subordinates.[124] Article 28 ICC Statute

118 Cf. T. Weigend, 'Bemerkungen zur Vorgesetzenverantwortlichkeit im Völkerstrafrecht', 116 *ZStW* (2004) 999, at 1004, 1013. According to O. Triffterer, '"Command responsibility" – *crimen sui generis* or participation 'as otherwise provided' in Art. 28 Rome Statute', in J. Arnold et al. (eds), *Festschrift für Albin Eser* (München: C.H. Beck, 2005), 910 the duty is based on the requirement of effective control.

119 J. de Preux, 'Commentary on Articles 86 and 87 of Protocol Additional I', in Y. Sandoz, Ch. Swinarski, B. Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1988 to the Geneva Conventions of 12 August 1949* (Geneva: Nijhoff, 1986), marginal note 3536.

120 On the sources of *de iure* command, see I. Bantekas, 'The Contemporary Law of Superior Responsibility', 93 *American Journal of International Law* (1999) 573, at 578–579.

121 See also Bantekas, *supra* note 113, at 580; Osiel, *supra* note 54, 795–796; *ibid.*, 1774 *et seq.*

122 See also Osiel, *supra* note 1, 1779. In a way, this is a consequence of the fact that the control requirement is an element of the objective imputation of the crimes to the superior and modern theories understand this imputation normatively [see for the development from *imputatio facti* to normative imputation, Ambos, *supra* note 96, 518 *et seq.* (*Allgemeiner Teil*), 143 *et seq.* (*Parte General*)].

123 See Osiel, *supra* note 54, 796.

124 For a broad interpretation on both points *Orić Trial Judgment*, *supra* note 9, § 311. The defence in this case required the 'identification of the person(s) who committed the crimes' (quoted in *ibid.*, § 315).

requires that the crimes of the subordinates be 'a *result*' of the superior's 'failure to exercise control properly', i.e. that — contrary to the ICTY case law[125] — a *causal relationship* must exist between the superior's failure and the subordinate's commission of crimes. The causality requirement also follows from the fact that the underlying crimes of the subordinates are 'caused' by the failure of supervision.[126]

The nature or scope of the *crimes of the subordinates* is controversial. The *Orić* Trial Chamber, relying on a former decision,[127] recently argued for a broad liability of the superior with regard to all acts or omissions of the subordinates, be it direct acts (e.g. torture, maltreatment), forms of participation (instigating, aiding or abetting) or omissions[128] with regard to inchoate or completed crimes.[129] The Chamber, in essence, justifies this broad liability with the purpose of superior responsibility which is to impose on commanders an affirmative duty 'to ensure that subordinates do not violate international humanitarian law, either by harmful acts or by omitting a protective duty.'[130] Yet, the Chamber's extensive interpretation conflicts with the principle of legality, in particular in its form of *nullum crimen sine lege stricta* (prohibition of analogy), since it entails a broadening of the scope of the liability of the superior which cannot be based on the wording of Article 7(3) (or, *mutatis mutandis*, Article 28 ICC Statute). A closer look at the meaning of the term 'committed' as a form of individual criminal responsibility shows that it is understood as a form of direct perpetration besides other forms of participation listed as 'planned, instigated, ordered . . . or *otherwise* aided and abetted' in Article 7(1); from this wording clearly follows that, in particular, aiding and abetting cannot be included in the meaning of committed. Similarly, Article 25(3) of the ICC Statute conceives committing a crime as a form of direct (co)perpetration or perpetration through another person (subpara. (a)) to be distinguished from other forms of participation such as 'orders, solicits or induces' (subpara. (b)) or 'aids, abets or otherwise assists' (subpara. (c)). In addition, in the ICTY's case law, the term 'committing' has been construed as to mean 'physically perpetrating a crime or engendering a culpable omission . . .'.[131] This literal interpretation cannot be outweighed by a teleological interpretation, invoking an allegedly broad purpose of the command responsibility doctrine. Even if one admitted the Chamber's purpose argument assuming that the literal interpretation just outlined is inconclusive,

125 See recently with further references *Orić Trial Judgment*, *supra* note 9, § 338.

126 Osiel, *supra* note 57, 796.

127 Decision on Prosecution's motion to amend the indictment, *Boskoski and Tarculovski* (IT-04-82-PT), 26 May 2006, §§ 18 *et seq.*

128 *Orić Trial Judgment*, *supra* note 9, § 298 *et seq.*

129 *Ibid.*, §§ 328, 334 with further references to the inconsistent case law.

130 *Ibid.*, § 300.

131 *Tadić Appeals Judgment*, *supra* note 2, § 188; Judgment, *Kunarac/Kovac* (IT-96-23-T & IT-96-23/1-T), Trial Chamber, 22 February 2001, § 390; *Krstić Trial Judgment*, *supra* note 12, § 601; *Kvočka Trial Judgment*, *supra* note 26, § 243.

it is highly dubious if such a broad purpose can be read into the command responsibility doctrine. For it would convert a military commander into a quasi-policeman with a general responsibility for law and order in the zone under his command and find little support in state practice. Ultimately, such a broad liability would be counterproductive since states, especially the ones engaged in armed conflicts all over the world, would refrain from applying the command responsibility doctrine in their military law and practice. It remains to be seen how the Appeals Chamber deals with this question.[132]

Article 28 has a peculiar structure in that it extends the superior's *mens rea*, beyond his or her own failure to supervise, to the concrete acts of the subordinates.[133] The degree of *mens rea* required is, apart from awareness of the effective control[134] and knowledge explicitly mentioned in Article 7(3) ICTY, Article 6(3) ICTR and Article 28(a)(i), (b)(i) ICC Statute, *conscious negligence or recklessness*. This already follows from the wording of Article 86(2) AP I (that the superior 'had information which should have enabled them to conclude . . .'), which correctly has been interpreted as *conscious ignorance* in the sense of *wilful blindness*.[135] Similarly, the 'should have known' and 'consciously disregarded' standards of Article 28(1)(a) and (2)(a) do not require awareness, nor do they require the imputation of knowledge on the basis of purely objective facts. In essence, the superior must possess *information* that enables them to conclude that the subordinates are committing crimes.[136] There is certainly a difference between the standards applicable to a military and a civilian superior but it is only one of degree. While the military superior must take any information seriously, the civilian one must only react to information that 'clearly' indicates the commission of crimes; this latter standard is certainly one of conscious negligence or recklessness,[137] yet, the former one requires less — any form of negligence, including an unconscious one will suffice, contrary to the interpretation given by the case law.[138]

4. Final Considerations: JCE, Command Responsibility and *Organisationsherrschaft*

As the analysis of JCE and command responsibility shows, the two doctrines differ fundamentally in their conceptual structure. The most striking difference

132 For the critique of the Defence see the Appeals Brief by V. Vidovic and J. Jones, filed on 16 October 2006, § 340 *et seq.*

133 On the issue of the commission of (subordinates') crimes of intent by negligence see already Ambos, *supra* note 114, at 852–853.

134 For this additional requirement correctly *Orić Trial Judgment*, *supra* note 9, § 316.

135 De Preux, *supra* note 119, marginal note. 3545–3546.

136 See Ambos, *supra* note 114, 868–867, 870 with further references.

137 For a detailed analysis see Ambos, *supra* note 114, at 863 *et seq.*

138 Judgment (Reasons), *Bagilishema*, Appeals Chamber, 3 July 2002, § 35; concurring *Blaskić Appeals Judgement*, *supra* note 10, § 63.

is possibly that JCE requires a *positive act* or contribution to the enterprise while for command responsibility an *omission* suffices. From this perspective the doctrines are mutually exclusive: a person either contributes to a criminal result by a positive act or omits to prevent a criminal result from happening. Both at the same time seem to be logically impossible. Another important difference lies in the fact that superior responsibility requires, *per definitionem*, a superior and subordinates, i.e. a *hierarchical, vertical relationship* between the person whose duty it is to supervise and those who directly commit the crimes that are to be prevented in the supervisor. In contrast, the members of a JCE, at least of a JCE I understood as co-perpetration, normally belong to the same hierarchical level and operate in a *coordinated, horizontal way*.[139] In this sense, neither 'any showing of superior responsibility'[140] nor the 'position of a political leader' is required.[141] As a rule, JCE requires 'a minimum of coordination' and this minimum is 'represented as a horizontal expression of will' that binds the participants together.[142] However, the amplitude and elasticity of the doctrine allows for informal networks and loose relationships and as such stretches well beyond command responsibility.[143] A third difference refers to the *mental object* of JCE and command responsibility. By JCE I, the participant shares the intent of the other participants, i.e. the common *mens rea* refers to the commission of specific crimes and to the ultimate objective or goal of the enterprise. In the other categories, especially JCE III, the participant must, at least, be aware of the common objective or purpose and of the (objective) foreseeability of the commission of certain crimes. In contrast, in the case of command responsibility, the main object of the offence is the superior's failure properly to supervise and, consequently, their *mens rea* needs to extend to this failure but not to the crimes committed by the subordinates.

Despite these (and other) conceptual differences, the two doctrines are quite often *simultaneously applied* (*supra* 2). A prerequisite for this simultaneous application is that the accused possesses a certain rank in the hierarchy of the criminal apparatus. In other words, the simultaneous application of both doctrines presupposes that *hierarchical differences* between members of a given criminal enterprise exist. Thus, the structural difference between JCE and command responsibility aforementioned — hierarchy versus coordination — loses importance. In fact, this difference is only valid with regard to JCE I, understood as a form of co-perpetration and as such typically characterized by a horizontal relationship between the co-perpetrators. In contrast, in cases of JCE II or III, a middle or high ranking superior may support or further a criminal enterprise and at the same time

139 See on this structural difference also Osiel, *supra* note 57, at 797; *idem*, *supra* note 1, at 1769 *et seq.*

140 *Kvočka Appeals Judgment*, *supra* note 35, § 104.

141 Sentencing Judgment, *Babić* (IT-03-72), Trial Chamber, 29 June 2004, § 60.

142 *Perreira* Judgment, *supra* note 7, at 19–20.

143 Osiel, *supra* note 1, at 1786 *et seq.*

fail to control his criminal subordinates. This also shows that the antagonism between a positive act and an omission, indicated above, only applies, strictly speaking, to single crimes, not to collective commissions.

Collective JCE (II or III) is characterized by the interaction of various persons at different hierarchical levels.[144] The Prosecution benefits from the *evidentiary advantages* of both doctrines: instead of proving a direct commission of crimes by the superior, it suffices to prove a crime base or pattern of commission and link the superior to it. The structural similarity between JCE III and command responsibility becomes obvious with regard to the *mental state* necessary for conviction: both doctrines enable the Prosecution to downgrade the specific intent (in genocide) to a lower mental state, either foreseeability (JCE III) or negligence (command responsibility). The *Milošević* Trial Chamber extended this approach, developed by the *Brdjanin* Appeals Chamber with regard to JCE III, to command responsibility.[145] Similarly, the *Krstić* Trial Chamber, with regard to command responsibility, only required that the accused 'had been aware of the genocidal objectives' of the main perpetrators.[146] This means that both a participant in a JCE III and a commander in the sense of Article 7(3) ICTY Statute can be held responsible for genocide without having the specific genocidal intent themselves; mere knowledge of the *dolus specialis* of the actual *genocidaires* would be sufficient. This, again, shows that the common ground of JCE and command responsibility is the need or desire to overcome evidentiary problems,[147] in the case of genocide typically represented by the high specific intent threshold. Yet, such an approach, in the final result, means that a superior is, on the basis of JCE or command responsibility, no longer punished as a (co-) perpetrator but only as a mere aider or abettor since only in this case can knowledge regarding a specific intent crime — as opposed to specific intent on the part of the perpetrator himself — be considered sufficient.[148]

In any case, distinct from JCE and command responsibility, the theory of *control of the act by virtue of a hierarchical organisation*, the so-called doctrine of *Organisationsherrschaft*,[149] pursues the same objective of linking superiors to crimes committed on their behalf. This theory is a form of perpetration

144 Similarly Haan, *supra* note 80, at 196 considering that most cases before the ICTY are of this nature.

145 See *supra* notes 48, 52, 110 above and text.

146 *Krstić Trial Judgment*, *supra* note 12, § 648; contrary the Appeals Chamber, *supra* note 16, §§ 134, 135 *et seq.* (140) convicting Krstić only for aiding and abetting genocide.

147 In a similar vein Danner and Martinez, *supra* note 1, at 152.

148 See K. Ambos, 'Some Preliminary Reflections on the *Mens Rea* Requirements of the Crimes of the ICC Statute and of the Elements of Crimes' in L.C. Vohrah et al. (eds), *Man's Inhumanity to Man. Essays in Honour of Antonio Cassese* (The Hague: Kluwer, 2003) 11, at 23–24.

149 See the fundamental work of C. Roxin, *Täterschaft und Tatherrschaft* (8th edn, Berlin: De Gruyter, 2006), 242–252, 704–717; see also Ambos, *supra* note 101, 590 *et seq.* (*Allgemeiner Teil*), 216 *et seq.* (*Parte General*) with references on the recent (critical) discussion more recently, C. Kress and Radtke, 153 *Goltdammer's Archiv für Strafrecht* (GA) (2006) 304 *et seq.*, 350 *et seq.* For a good explanation in English see Osiel, *supra* note 1, at 1829 *et seq.*

by means, recognized in Article 25(3)(a) 3rd alternative ('through another person'),[150] according to which the 'man in the background' dominates the direct perpetrators by means of an organizational apparatus of hierarchical power. It has been applied in various national proceedings (*Eichmann*, *Argentinean Generals* and *East German border killings*)[151] and may be identified in the Nuremberg Justice case.[152] In fact, unlike JCE, it finds a solid legal basis in the term 'committed' in Article 7(1) ICTY Statute since 'commission' in this sense means that a person 'participated, physically or otherwise directly or *indirectly*, in the material elements of the crime charged through positive acts or, based on a duty to act, omissions, whether individually or jointly with others'.[153] This includes, as indirect commission, perpetration by means[154] and is as such *Organisationsherrschaft*. Clearly, the key issue of this doctrine is whether the mastermind or 'man in the background' is able to exercise effective *control* over the direct perpetrators by means of the organizational apparatus created and dominated by him.

While the 'man in the background' will hardly be able to completely control the responsible perpetrators, this lack of control may be compensated by the control of the apparatus, which produces an unlimited number of potential willing executors. In other words, although direct perpetrators acting with full criminal responsibility cannot be considered mere 'interchangeable mediators of the act' (*fungible Tatmittler*) as such, the 'system' provides for a practically unlimited number of replacements and thereby for a high degree of flexibility as far as the personnel necessary to commit the crimes is concerned. While such a concept of control rests on the assumption that the apparatus functions hierarchically from top to bottom, and one may question the applicability of this assumption to all kinds of criminal organizations,[155] a too naturalistic or mechanical perspective distorts the *normative foundations* of this theory.[156] Nevertheless, very few persons possess the control necessary immediately to replace one (failing) executor by another, namely only those who belong to

150 Concurring G. Werle, *Principles of International Criminal Law* (The Hague: TMC Asser Press, 2005), at 124 with note 196.

151 See for references K. Ambos, in O. Triffterer (ed.), *Commentary of the Rome Statute of the ICC* (1999), Art. 25 marginal note 10. Crit. kreß, *supra* note 149, 306.

152 Judgment, *U.S. v. Altstoetter et al.* (*Justice Trial*), US Military Tribunal sitting at Nuremberg, 4 December 1947, in: Trials of War Criminals (US-GPO, 1947), 954, at 985: 'conscious participation in a nationwide government-*organized system* of cruelty and injustice' (emphasis added).

153 *Stakić Trial Judgment*, *supra* note 4, § 439 (emphasis added).

154 *Ibid.*, § 439 with note 942, § 741. See on *Stakić*, Haan, *supra* note 80, at 197; H. Olásolo and C. Pérez, 'The Notion of Control of the Crime and its Application by the ICTY in the Stakic Case', 4 *ICLR* (2004), 475 *et seq.* (478–479).

155 Critical Osiel, *supra* note 1, at 1833 *et seq.*, 1861, arguing for an application of *Organisationsherrschaft* only to relax the effective control requirement of command responsibility.

156 Due to space constraints I cannot elaborate on this more; fundamentally, it comes down to the question of liberty of the direct perpetrator operating in a hierarchical organization vis à vis the top executive(s) of this organization, see Ambos, *supra* note 101, 594 *et seq.* (*Allgemeiner Teil*), 220 *et seq.* (*Parte General*).

the leadership of the criminal organization or who at least control a part of the organization and are, therefore, able to dominate the unfolding of the criminal plan undisturbed by other members of the organization. Although these persons are generally far away from the actual execution of the criminal acts and are, therefore, normally considered indirect perpetrators or even accessories,[157] they are in fact, from a normative perspective, the main perpetrators while the executors are merely accessories or accomplices in the implementation of the criminal enterprise.[158]

Thus, ultimately, the doctrine of *Organisationsherrschaft* confirms the underlying rationales of JCE and command responsibility. First, the traditional system of individual attribution of responsibility, as applied to ordinary criminality characterized by the individual commission of single crimes, must be adapted to the needs of international criminal law aimed at the development of a *mixed system of individual-collective responsibility* in which the criminal enterprise or organization as a whole serves as the entity upon which attribution of criminal responsibility is based. The doctrine has called this a *Zurechnungsprinzip Gesamttat*,[159] i.e. a principle or theory of attribution according to which the 'global act' (the criminal enterprise) constitutes the central object of attribution. In a way, such a doctrine brings together all the theories discussed in this article and proves the central point of the JCE doctrine, to take the *criminal enterprise as the starting point of attribution* in international criminal law. Second, all the doctrines discussed here have the common aim of attributing individual crimes committed within the framework of the system, organization or enterprise to its *leadership*, to its 'masterminds', leaving the destiny of low-level executors and mid-level officials in the hands of national criminal justice systems. Last but not least, the criminal responsibility of leaders presupposes a kind of (*normative) control* over the acts imputed to them and a mental state linking them to these acts, thereby complying with the principle of *culpability*.

157 See e.g. Osiel, *supra* note 57, at 807 who, however, apparently fails to grasp the different forms of participation provided for by the differentiated concept of perpetration according to which *Organisationsherrschaft* is more than mere accessorship. Further, it is misleading to state that prosecutors in Latin America (*ibid.*, at 808) 'rely heavily on . . . superior responsibility'. The truth is that most prosecutors invoke Roxin's theory, especially the *Organisationsherrschaftslehre*, since it can be based on the general rules of perpetration by means (*autoría mediata*) which are — unlike the command responsibility doctrine — well recognized in civil law systems (as in Latin American). Finally, the fine distinctions between modes of participation discussed in a differentiated system of perpetration as the German or Spanish one demonstrate that 'simplicity' is not, as suggested by Osiel, *supra* note 1, at 1753, the preferred option for criminal law doctrine, at least not for that of the core civil law countries.

158 Cf. H. Vest, *Genozid durch organisatorische Machtapparate* (Baden-Baden: Nomos, 2002), at 220, 249.

159 On this new concept of attribution for collective criminality see the fundamental work of F. Dencker, *Kausalität und Gesamttat* (Berlin: Duncker und Humblot, 1996), 125 *et seq.*, 152 *et seq.*, 229, 253 *et seq.* and *passim*. The concept was further elaborated by Vest, *supra* note 158, at 214 *et seq.*, 236 *et seq.*, 303, 304 *et seq.*, 359 *et seq.*