

PARTICIPATION IN INTERNATIONAL CRIMINAL LAW

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SUMMARY

This article focuses on participation in international crimes. Since the early case law of the International Tribunal for the Former Yugoslavia (further: ICTY) has this topic always been extremely controversial from the national criminal law point of view, especially for the civil law systems. Namely, there has been a prevalent opinion in international criminal law that usual forms of participation, which have been developed in national criminal jurisdictions, do not suffice for international crimes.

In my opinion, the attitude of the International Criminal Court (further: ICC), to forms of participation is different to that of the ICTY and other international courts. The ICC namely deploys co-perpetration, indirect perpetration, instigation and participation in group crimes. Additionally, in some cases command responsibility is proposed and used,² but these cases represent a smaller portion, just as in national criminal jurisdictions. It could be said that the ICC does use more traditional forms of participation (co-perpetration, indirect perpetration), but in a new, reformed way (like the indirect co-perpetration and the notorious *Organisation-sherrschaft*). It will be later argued that this difference is based also on different provisions of the statutes of these courts.

99

It seems that the case law of ICC is slowly putting aside the differences between participation in “ordinary” crimes and participation in international crimes, because it is using forms of participation, which are in national jurisdictions used for “ordinary” crimes, for international crimes. This confirms my thesis that for international crimes under the ICC’s jurisdiction the forms of participation from national criminal law, which usually apply for “ordinary” crimes, could and should apply. On the other hand should other branches of law or even other forms of social control

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take notice of the collective nature of these crimes, embrace more individuals and groups and impose collective responsibility.

Key words: Participation, co-perpetration, indirect perpetration, accessories, international crime, the Rome Statute.

1. Introduction

100 This article focuses on participation in international crimes. Since the early case law of ICTY has this topic always been extremely controversial from the national criminal law point of view, especially the civil law systems, since there has been a prevalent opinion in international criminal law that usual forms of participation, which have been developed in national criminal jurisdictions, do not suffice. The reason for this is the special nature of international crimes. Usually they are not isolated acts, committed by one perpetrator. Instead, there is a major temporal, territorial and organizational distance between the physical perpetrator and senior leaders of a certain state or other organization. Consequently, new forms of participation have been developed especially by ICTY on the basis of post Second World War case law, such as joint criminal enterprise and command responsibility.

The main aim of this article is to discover, whether the usual forms of participation are really not sufficient for international crimes, since the joint criminal enterprise and command responsibility are objectionable from the viewpoint of the civil law systems' theory of criminal law, and whether more typical forms of participation have been used in the case law of ICC.

The first part of this article discusses participation theories such as these are prevalent in certain civil and common law jurisdictions. In my opinion this comparative analysis is important due to at least two reasons. First, the provisions of the Rome Statute were in most part a compromise between the regulations from these two systems, and second, after the comparative and later the international criminal law analysis it can be seen, which system influenced the international regulation the most. In the second part, a short historical overview will be given on participation in international criminal law and its codification in the Rome Statute. This should show the difference between the Rome Statute regulation of participation and its regulation before the Rome Statute. The main focus of

this article lies however on the analysis of the International Criminal Court's (further: ICC) jurisprudence on the participation, more exactly the co-perpetration and indirect perpetration.. This is now possible, since the Court got its teeth deep into the proceedings with its cases. Since the whole topic of participation in the case law of ICC would be too excessive and because co-perpetration and indirect perpetration are more civil law orientated forms of participation than JCE and command responsibility, the main questions which have been dealt with in this jurisprudence, are the distinction between the perpetrators and accessories and the appropriate definition and use of indirect perpetration.

2. Participation in Civil and Common Law

2.1. Participation in Civil Law Systems

Since the theory on participation in both legal systems is quite extensive, some limits must necessarily be introduced for the purpose of this article. Here the focus will be on (1) which forms of participation are known in the system; (2) the distinction between the perpetrator and the accessories (participation being a broader term and perpetration and accessory participation being the narrower terms) and (3) how the system defines the indirect perpetrator. Not all civil law systems will be discussed: participation law in the German, Croatian and Slovenian criminal systems will be presented as exemplary forms. The latter two are more or less based on the German system of substantive criminal law. The German legal system is chosen as it is the most influential of the civil law systems in substantive criminal law. Slovenian legal system is chosen as it is the author's home legal system and the Croatian, because there has been a co-influence between the Croatian and Slovenian legal systems after the independence of our states and even more before that.

First, in the chosen civil law systems a distinction has been developed between the theory of equivalence (also monistic) and the restrictive theory (also dualistic or differentiated). The theory of equivalence holds all participants in crimes as equal perpetrators, regardless of the significance of their contribution to the crime.³ On the other hand, the restrictive theory distinguishes between at least two forms of participation: perpetra-

³ H. H. Jescheck and Weigend and T. Weigend, *Lehrbuch des Strafrechts- Allgemeiner Teil* (1996), at 645. P. Novoselec, *Opći Dio Kaznenog Prava* (2004), at 339.

tion and accessory participation.⁴ A perpetrator must personally participate in the commission of a crime.⁵ That means that the perpetrator carries out the elements of the definition of the crime personally, participants, who do not participate personally in the commission of a crime, are accessories. This theory is accepted in Germany, Croatia and Slovenia, but as it will be discussed later, in a modified way.

Regarding the question, how to differentiate between the perpetrators and accessories, there are many different theories in general. Objective theories in this regard are based on a restrictive comprehension of a perpetrator. According to the formal-objective theory, a perpetrator is only he who personally committed the crime. This theory has been rejected in all three civil law criminal systems.⁶ According to the material-objective theory, a perpetrator is he whose contribution to the crime is considered to be *conditio sine qua non* or essential to the crime. The contribution of the perpetrator has to be causal to the crime and more dangerous than the contribution of an accessory. This theory has also been rejected in the chosen legal systems.⁷ The theory of contemporaneity, which is a sub-form of the material-objective theory holds that the perpetrator is a participant who was present at the place and time of the commission of the crime. Participants who are present and contribute to the commission of the crime before that time can only be considered as accessories. This theory, which is present in the common law systems,⁸ also shares the fate of other two objective theories.⁹

Subjective theories on the other hand are based on extensive comprehension of the perpetrator. A perpetrator is any participant, who contributes to the commission of the crime and co-causes the consequence, irrelevant of whether or not he performs an *actus reus*. That is why the distinction between the perpetration and accessory participation lies in the subjective element (*mens rea*): does the participant have the *mens rea* of the accessory (*Teilnehmerwille*) or of perpetrator (*Täterwille*). The theory of

⁴ Participant in crime being a broader term and perpetrator a narrower term, which content depends on different theories, which define the perpetration.

⁵ Jescheck and Weigend, *supra* note 2, at 646. Novoselec, *supra* note 2, at 339.

⁶ Jescheck and Weigend, *supra* note 2, at 648. Novoselec, *supra* note 2, at 642.

⁷ Jescheck and Weigend, *supra* note 2, at 648. Novoselec, *supra* note 2, at 342.

⁸ See the chapter on participation in the chosen common law systems.

⁹ Novoselec, *supra* note 2, at 343.

dolus (Animustheorie) holds the participant, who acts *cum animo auctoris*, for a perpetrator. Namely, he holds the crime for his own. On the other hand, an accessory is a participant, who acts *cum animo socii*; he submits his will to the will of the principal and the decisions with regards to the commission of the crime to this principal. This theory is also rejected.¹⁰ The theory of interest, which supports the theory of *dolus (Animustheorie)* and is also rejected in these legal systems, holds that the participant who acts in his own interest, should be considered a perpetrator and the one, who does not act in his own interest, but in interest of another person, only as an accessory.¹¹

As with many other questions in the theory of substantive criminal law, the participation theory that is predominantly accepted in these three legal systems is the mixed, subjective-objective theory. This theory is based on the control over the crime approach (*Tatherrschaft*). Although this theory is based on a restrictive comprehension of the perpetrator, it includes not only the physical perpetrator,¹² but also the indirect perpetrator and the co-perpetrator, because they both have control over the crime. Co-perpetrators divide between themselves the actions, necessary for the commission of crime. The acts of the co-perpetrators are also geographically and temporarily harmonised, restricted to a certain limited area and time zone. The control over the crime approach is apparent in different aspects of these forms of perpetration. The acts of each co-perpetrator, must be *condition sine qua non* for the commission of the crime, whilst each co-perpetrator must have control over the crime (or, functional control over crime, *funktionale Tatherrschaft*). Each co-perpetrator must also share the will of the perpetrator and understand the crime as his own (*cum animo auctoris*).¹³ In indirect perpetration, the control over the

¹⁰ Novoselec, *supra* note 2, at 344. Jescheck and Weigend, *supra* note 2, at 650.

¹¹ Novoselec, *supra* note 2, at 344. See also H. Olasolo, *The Criminal Responsibility of Senior Political and Military Leaders as Principals to International Crimes* (2009) at 30-33.

¹² According to the true restrictive approach only the physical perpetrator, who himself commits acts of a crime, can be considered a perpetrator and every other participant to the crime only an accessory.

¹³ C. Roxin, *Täterschaft und Tatherrschaft* (1994), at 275. Jescheck and Weigend, *supra* note 2, at 651. L. Bavcon, *Kazensko Pravo Splošni Del* (2009), at 324. Novoselec, *supra* note 2, at 344.

crime lies in the control over the direct perpetrator (*Willenherrschaft*) In perpetration, the control is over the act or omission.¹⁴

On the basis of the mixed theory, the following forms of participation are recognized in the aforementioned systems: physical perpetration, indirect perpetration (*mittelbare Täterschaft*), co-perpetration (*Mittäterschaft*) (all considered perpetration), aiding and abetting (*Beihilfe*) and instigation (*Anstiftung*) (all considered as accessory participation or *Teilnahme*).¹⁵

104 — Also, in all three criminal jurisdictions, indirect perpetration is considered perpetration and as commission of crime through another person, who was used as a tool for the crime. This form of participation was developed for cases, where abetting did not suffice. In such cases, the physical perpetrator cannot be criminally liable for the crime because he did not fulfil the demanded *actus reus* of the crime, did not possess the necessary intent and his act was not unlawful (*rechtmäßige handlung*), he suffered under the mistake of fact or law, his act was excusable (*entschuldbar*) due to other reasons or did not possess the necessary qualities to be able to commit the crime. A case of indirect perpetration is also, when the indirect perpetrator uses a whole organization or some apparatus to commit the crime.¹⁶ According to the Jescheck and Weigend, indirect perpetration is not possible where the physical perpetrator is criminally liable.¹⁷

However, Roxin introduced one exemption to the irresponsibility of the person used as a ‘tool’ to commit the offence by the indirect perpetrator,

¹⁴ Roxin, *supra* note 12, at 127 and 142.

¹⁵ Compare also the Criminal Code of Slovenia (of 4 June 2008, OJ 55/2008) and the Criminal Code of Croatia (of 21 October 1997, OJ 110/1997, last amended 15 July 2003 OJ 111/2003). According to Novoselec, physical and indirect perpetrators are perpetrators whilst aiders and abettors, procurers and co-perpetrators (!) are accessories. Slovenian theory follows the German theory, according to which physical, indirect and co-perpetrator are all considered perpetrators.

¹⁶ Jescheck and Weigend, *supra* note 2, at 665-670. Roxin, *supra* note 12, at 142. Bavcon, *supra* note 12, at 326-327. Novoselec, *supra* note 2, at 349-353.

¹⁷ Jescheck and Weigend, *supra* note 2, at 664. This applies also to Croatia. Novoselec, *supra* note 2, at 350. In Slovenia however the legislation does not limit indirect perpetration to innocent tools. The theory has so far made no comment on this subject and focuses mainly on the distinction between procurement, indirect perpetration and aiding and abetting. However another aspect of this question is whether principle of legality allows such an interpretation.

namely the theory of the perpetrator behind the perpetrator (*Täter hinter dem Täter*) or more specifically, *Organisationsherrschaft* doctrine.¹⁸ This theory was conceived on the sample of Nazi state apparatus. In *Organisationsherrschaft* doctrine, both the physical perpetrator and the indirect perpetrator have control over the crime; the physical perpetrator because he physically committed it and the indirect perpetrator, because he had control over the organization, the members of which committed the crime. The basic characteristics of *Organisationsherrschaft* are that:

- the indirect perpetrator has full control over the crime, because he has effective control over the organization (due to its hierarchy and his position within that hierarchy?);
- there is an automatic implementation of the order to commit crime due to the exchangeability of members of the organization;
- the indirect perpetrator has the will to control the commission of crime;
- the indirect perpetrator has the *mens rea*, required for the crime;
- the indirect perpetrator possesses the personal qualifications that are required by the law for the perpetrator.¹⁹

Organisationsherrschaft theory is disputed in Germany, in other national jurisdictions and in international criminal law generally. Namely, with indirect perpetration the physical perpetrator is not criminally responsible due to many possible reasons. On the other hand, with the *Organisationsherrschaft* theory, the physical perpetrator is also held criminally responsible and not only the indirect perpetrator. Consequently, it is one of basic preconditions for this theory that the criminal system allows indirect perpetration with the fully responsible direct (physical) perpetrator.²⁰ This is also its most disputable characteristic. The direct (physical) perpetrator is considered as a tool used by the indirect perpetrator, which is the

¹⁸ Roxin, *supra* note 12, at 242.

¹⁹ Roxin, *supra* note 12, at 245.

²⁰ In Germany was this doctrine used for the prosecution of East German border killings. In Croatian theory this doctrine is mentioned, but it is also mentioned that it represents an exemption to the indirect perpetration theory. Croatian legislation (as also the Slovenian) does not limit indirect perpetration to innocent tools, so the use of *Organisationsherrschaft* is not *a priori* prohibited. However, to my knowledge, it has not yet been used neither in Croatian nor in Slovenian case law.

basis for the indirect perpetrator's criminal responsibility, and at the same time as a physical perpetrator, who has control over the crime. Is this compatible? In regard to this Roxin argues that for effective control over the direct perpetrator his or her freedom and own criminal responsibility is irrelevant. Namely, from the indirect perpetrator's point of view, he is considered just a replaceable tool.²¹ But I am not sure that we can divide these two aspects of the crime and these two forms of participation entirely. We are still dealing with only one crime, committed by the direct perpetrator and influenced by the indirect perpetrator, for which And for both perpetrators we claim that they have absolute control over the crime. This is *contradictio in adiecto*. At least, what we should say, is, that they share the control over crime.

2.2. Participation in Common Law Systems

106
— British criminal law distinguishes between participants who are principals (the common law term for the physical perpetrators) and other participants. These latter forms consist of aiding and abetting, counselling and procurement.²² British criminal law has known the distinction between monistic and dualistic systems, but finally opted for the first one.²³ All participants are tried, indicted and punished as the perpetrator, no matter what the significance of their contribution to the crime, so they are all treated equally in consequences. However, the legal distinction is relevant in the case law, because other forms of participation are only accessorial to the principal liability and because there are different conditions for different forms of participation.²⁴ As compared to many civil law systems, no extensive theory exists on the distinction between perpetrators other participants in crime in the United Kingdom.²⁵ The different forms are regulated in criminal legislation and have been discussed in case law and British law theory however does provide a scheme of different forms of participation.²⁶ These consist of:

²¹ Roxin, *supra* note 12, at 245.

²² F. McAuley and J. P. McCutcheon, *Criminal Liability* (2000), at 453. M. Molan, *Sourcebook on Criminal Law* (2001), at 303. Compare also Criminal Law Act 1997.

²³ M. Allen, *Textbook on Criminal Law* (2009), at 222.

²⁴ G. P. Fletcher, *Rethinking Criminal Law* (2000), at 636, Allen, *supra* note 22, at 222.

²⁵ Compare Allen, *supra* note 22, at 220 and J. C. Smith, *Criminal Law* (2003), at 140 with for example Jescheck, Weigend, *supra* note 2, at 641.

²⁶ This scheme has developed in common law, former legislation and theory.

- the principal in the first degree, **or, the** primary perpetrator, who personally commits the crimes and perpetrator by means (in civil law systems' terminology: the indirect perpetrator);
- the principal in the second degree, which refers to co-perpetration as a joint execution of more participants in the execution of common plan;
- the accessory before the fact, who are procurers and aiders and abettors;
- the accessory after the fact (for example covering up the crime), which constitutes a special crime;²⁷
- conspiratorial liability, according to which a person is held responsible, because he is a party to a conspiracy, for acts of his "partners".²⁸

Indirect perpetration or perpetration by means (using a physical perpetrator to commit a crime of which the latter is totally unaware)²⁹ is also recognised and regulated also in British common law, but it is strictly limited to the innocent agent theory. This means that in the British regulation the indirect perpetration is limited to cases, where the physical perpetrator is an innocent agent, unaware of the crime. An agent is innocent, if he cannot be held criminally liable due to the fact that he is not of legal age or due to insanity or absence of *mens rea*.³⁰ Because the *Organisationsherrschaft* doctrine signifies the expansion of the indirect perpetration to the cases, where the physical perpetrator is not an innocent agent, such British regulation, which is limited to innocent agent doctrine, precludes the use of the *Organisationsherrschaft* doctrine in common law.

As in the British legal system,³¹ is also in the American legal system the responsibility of the accessories derivative.³² This means that the criminal responsibility of an accessory derives from the criminal responsibility of

²⁷ Fletcher, *supra* note 23, at 645.

²⁸ J. Dressler, *Understanding Criminal Law* (2009), at 493.

²⁹ Fletcher, *supra* note 23, at 639.

³⁰ McAuley and McCutcheon, *supra* note 21, at 460. Fletcher, *supra* note 23, at 645.

³¹ Allen, *supra* note 22, at 222.

³² Dressler, *supra* note 27, at 466.

a physical perpetrator (principal) and the accessory's act is not independent crime,³³ "only" a contribution to the act of a principal.

The American regulation also follows the aforementioned British scheme of participation. The scheme is the same as is also the terminology and the restriction of the perpetration by means (indirect perpetration) to the innocent agent doctrine.³⁴

From the comparison of schemes of participation' forms and theoretical approach to this subject in common and civil law systems it can be seen that these two legal families have different approach to this. The chosen civil law systems focus on the theoretical approach to the distinction between the perpetrators and accessories, while the British and American legal systems try to distinguish this in the case law on practical basis. Main forms of participation are basically the same, even though the terminology and schemes differ a bit. At this point it still remains open, which approach the Rome Statute and the ICC took.

3. Historical Overview on Regulation of Participation in International Criminal Law

108 — Already the Nuremberg Charter³⁵ includes some general provisions on participation, but these are mostly incorporated in the definitions of (some, though not all) crimes. In par. 3 of article 6 of the Charter, we can find a general provision on participation, although the definition of crimes against peace includes also additional participation forms especially for these crimes.³⁶ The definitions of war crimes in article 6, par. 2 and that of crimes against humanity in the same paragraph in the Charter on the other hand, do not provide any additional clues as to relevant participation forms for these two groups of crimes. Thus, it may be said that, in the Nuremberg Charter, provisions on participation are scattered and

³³ Dressler, *supra* note 27, at 466.

³⁴ Dressler, *supra* note 27, at 468-473.

³⁵ This charter is mentioned, because it is the first charter of any international or internationalized criminal court and in this capacity important for the development of international criminal law.

³⁶ Article 6 section a of the Nuremberg Charter holds as follows: "(a) Crimes against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing."

unsystematic. Generally, it is accepted that the monistic system lies at the basis of the Nuremberg charter, which thus does not distinguish between perpetrators and accessories, notwithstanding the contributions of any of the participants.³⁷

In Control Council Law No. 10³⁸ the legislation technique is quite similar. Article 2 includes definitions of crimes within the war tribunals' jurisdiction. Crimes against peace again include special rules on participation (in article 2, par. 1) which include the same forms as those that are included in article 6 of the Nuremberg Charter also designed especially for crimes against peace. For war crimes and crimes against humanity only general provisions on participation from article 2, par. 2 apply. According to this paragraph, any person is deemed to have committed a crime, if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission or (e) was a member of any organization or group connected with the commission of any such crime or (f) with reference (again!) to crimes against peace if he held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or satellites or held high position in the financial, industrial or economic life of any such country.³⁹ Again, these provisions are based on the monistic theory.⁴⁰

More precise and detailed provisions on participation can be found in the Statute of International Criminal Tribunal for Former Yugoslavia (ICTY). Article 7 of the Statute carries the title individual criminal responsibility. Even though the title of this article suggests a broader regulation of all conditions for individual criminal responsibility, it does not include all its condition, however, it does regulate almost all rules on participation,

³⁷ K. Ambos, *Der Allgemeine Teil des Völkerstrafrechts* (2002), at 90. G. Werle, *Principles of International Criminal Law* (2005), at 117-118. A. Eser, 'Individual Criminal Responsibility', in A. Cassese, P. Gaeta, J. R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002), at 784. The same applies to Tokyo Charter.

³⁸ It was enacted in Germany after the official end of the Second World War by the Control Council of the occupying forces. It could be said that by this law the law of the Nuremberg Charter was transformed into the national German law.

³⁹ Article 2, par. 2 of the law.

⁴⁰ Ambos, *Der Allgemeine Teil*, *supra* note 36, at 90.

including command responsibility.⁴¹ Additional rules on participation are also contained in the Statute in relation to the crime of genocide.⁴² These latter rules correspond exactly to the rules on participation in genocide in the Genocide Convention,⁴³ which was transferred into the Statute not only with the definition of the crime of genocide, but also with its additional forms of participation. The rules on participation in the ICTY Statute are clearly not as systematic as the participation rules in the Rome Statute⁴⁴ and there are still additional rules on participation in genocide. However contrary to the Nuremberg case law, the dualistic system, which differentiates between perpetrators and accessories, has prevailed in the case law of ICTY, at least with sentencing.⁴⁵ The same scheme of participation forms and additional rules on genocide apply also for the statutes of International Criminal Tribunal for Rwanda (ICTR) and Special Court for Sierra Leone.

The Statute of the Iraqi Special Tribunal⁴⁶ and UNTAET Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences⁴⁷ in East Timor contain provisions, identical to the ones in the Rome Statute and therefore include the same forms of participation as those contained in the Rome Statute. They also differentiate between different forms of participation. However, what differentiates the Iraqi statute from the Rome Statute, is again the additional use of special rules on participation in genocide, like in the ICTY Statute.

⁴¹ Compare with the opinion of Eser, *supra* note 36, at 768.

⁴² In article 4 of the Statute.

⁴³ "Article 3 of the Statute reads as follows: 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."

⁴⁴ The international treaty that established the first permanent International criminal court, which seat is in the Hague. It is named the Rome Statute, because it was finalised on a conference in Rome in 1998. It came into force on 1st July 2002.

⁴⁵ Olasolo, *supra* note 10, at 21-27. However, this view is not shared with the whole theory. Eser, *supra* note 36, at 788.

⁴⁶ <http://www.hrcr.org/hottopics/statute/> (11.9.2009).

⁴⁷ <http://www.un.org/peace/etimor/untaetR/Reg0015E.pdf> (14.8.2009).

The Draft Code of Crimes against the Peace and Security of Mankind 1996, which have been drafted by the International Law Commissions almost since the end of the Second World War and which should serve as a model penal code, includes quite elaborate provisions on forms of participation, which apply to all listed crimes. There are no separate and additional rules on participation⁴⁸ and the code clearly distinguishes between perpetrators and accessories,⁴⁹ therefore choosing the differentiated system instead of the monistic.

The historical development shows the evolution from rare and scarce provisions on participation in international criminal law, which were very often designed for special crimes and in a limited scope applied for all listed crimes. This system was based on the monistic theory. The evolution led to a more systematic regulation, which however very often still included special rules on participation in genocide, copied from the Genocide Convention. Until the Rome Statute the Draft Code of Crimes against the Peace and Security of Mankind from 1996 shows the most

⁴⁸ "Article 2 (Individual responsibility):

1. A crime against the peace and security of mankind entails individual responsibility.
2. An individual shall be responsible for the crime of aggression in accordance with article 16.
3. An individual shall be responsible for a crime set out in article 17, 18, 19 or 20 if that individual:
 - (a) Intentionally commits such a crime;
 - (b) Orders the commission of such a crime which in fact occurs or is attempted;
 - (c) Fails to prevent or repress the commission of such a crime in the circumstances set out in article 6;
 - (d) Knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission;
 - (e) Directly participates in planning or conspiring to commit such a crime which in fact occurs;
 - (f) Directly and publicly incites another individual to commit such a crime which in fact occurs;
 - (g) Attempts to commit such a crime by taking action commencing the execution of a crime which does not in fact occur because of circumstances independent of his intentions."

⁴⁹ Eser, *supra* note 36, at 785.

detailed provisions on participation. This course of development was continued in the regulation of the Rome Statute.

4. Regulation of Participation in the Rome Statute

In the Rome Statute, forms of participation in crime are regulated in article 25, paragraph 3.⁵⁰ Even though the title of this article (individual criminal responsibility)⁵¹ implies that it regulates all rules and preconditions for criminal responsibility, not just participation forms, in actual fact, it does not. As Eser states, it “raises higher hopes, than it is, in the end, able to fulfil.”⁵² However, it does systematically regulate different forms of participation in crime.

Subparagraph a of article 25, paragraph 3 regulates three different kinds of perpetration: direct perpetration, co-perpetration (perpetration jointly with another) and indirect perpetration (or perpetration by means).⁵³ Indirect perpetration is possible regardless of whether or not the other person (used by the indirect perpetrator to commit the crime) is criminally responsible. This introduces the possibility to use *Organisationsherrschaft* doctrine.⁵⁴ Co-perpetration is defined in the same way as in the German *Strafgesetzbuch*,⁵⁵ but in less detail than in Croatian and Slovenian criminal law.⁵⁶

112

Subparagraph b of article 25, paragraph 3 regulates instigation, or in common law terms, the participation form of the accessory before the fact. In comparison to the civil law legal systems described above, the wording of this subparagraph is loquacious.⁵⁷ It does not include the simple term instigation, although as a wider term, instigation would cover all three terms that are actually used, namely: “ordering, soliciting or in-

⁵⁰ Command responsibility is regulated in article 28, which will not be a part of this article, although it is a form of participation.

⁵¹ As already the aforementioned article 7 of the ICTY Statute.

⁵² Eser, *supra* note 36, at 768.

⁵³ Guliyeva, ‘The Concept of Joint Criminal Enterprise and ICC Jurisdiction’, 5 *Eyes on the ICC* (2008-2009), at 67.

⁵⁴ Eser, *supra* note 36, at 789.

⁵⁵ Article 25.

⁵⁶ Compare with article 20 of the Slovenian Criminal Code and article 35 of the Croatian Criminal Code..

⁵⁷ Also Eser, *supra* note 36, at 795, 787.

ducing the commission of a crime.” These terms refer to the difference in intensity of the instigator’s influence on the direct perpetrator.⁵⁸ In contrast to other statutes, the Rome Statute is narrower with regards to instigation, in the sense that the crime must indeed have occurred or have been attempted. Previous statutes of other international or internationalised criminal courts did not include this additional condition.⁵⁹ Such additional condition is typical for legal systems which are based on the accessory theory. According to this theory, an accessories’ criminal responsibility is derivative to that of the perpetrator, which means that if the perpetrator does not at least attempt to commit the crime, the accessory cannot be convicted for his contribution either. The Rome Statute includes the condition that the crime is at least attempted, but says nothing on the question, whether it should be at least unlawful or not. Therefore it remains open, whether the instigator is held criminally responsible, if physical (direct) perpetrator acts in self-defence or under the mistake of law.

The Rome Statute also regulates direct and public incitement in connection to the crime of genocide. Unlike the ICTY Statute and other statutes, mentioned in the chapter on the historical analysis of participation in international crime, the Rome Statute does not include any additional provisions on participation in genocide, except for incitement. Because incitement is not criminalised in relation to other crimes, but instigation is, the distinction between incitement and instigation becomes very important. Namely, with genocide, incitement *and* instigation are relevant, whereas with other listed crimes only instigation is relevant. Incitement is a broader term than instigation and the act of incitement is less strong and intense than the act of instigation. This means that the contribution to the crimes is lesser with the incitement than with the instigation.

The next subparagraph of article 25, paragraph 3 includes the criminalization of aiding and abetting the commission of crime.⁶⁰ Here again, the

⁵⁸ Eser, *supra* note 36, at 796. K. Ambos, ‘Individual Criminal Responsibility’, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2008), at 756.

⁵⁹ Eser, *supra* note 36, at 787.

⁶⁰ The definition of aiding and abetting in the Rome Statute is as follows: “ In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person... (d) for the purpose of facilitating the commission of such a crime, aids, abets or otherwise as-

same remarks can be made as those made above with regards to instigation. While the simple terms of aiding and abetting would have been sufficient, this subparagraph instead uses a more detailed definition. The Statute even names one typical example of aiding and abetting (providing the means for the commission). For aiding and abetting, the Statute again demands that the act is committed or at least attempted.

Herewith, all traditional forms of participation in crime from both, the civil and common law systems, are regulated in the Rome Statute. Furthermore, subparagraph d of what article 25, paragraph 3 introduces participation in group crimes. This form of participation is also accessorial and consequently demands that the crime is at least attempted.⁶¹ *Actus reus* of this form of participation is contribution to the crimes in any other way. This must be interpreted as in any other way other than aiding and abetting and instigation.⁶² It is generally accepted that this provision does not introduce conspiracy, but rather a compromise between the conspiracy and its nonexistence, as the conspiracy was explicitly discluded.⁶³

114 I can conclude that the regulation of participation in crime in the Rome
— statute of an international or internationalised⁶⁴ court.⁶⁵ Also, where the
participation forms for which at least an attempted commission of crime
is demanded are concerned, the Rome Statute's provisions are narrower
than the provisions of statutes of other international or internationalised
courts, which did not contain such limitations.⁶⁶ The Rome Statute also

sists in its commission or its attempted commission, including providing the means for its commission.”

⁶¹ Eser, *supra* note 36, at 802.

⁶² Eser, *supra* note 36, at 802. Werle, *supra* note 36, at 127.

⁶³ Eser, *supra* note 36, at 803. Werle, *supra* note 36, at 127. Ambos, *supra* note 58, at 760. This form of participation is used in the cases of Ahmad Muhammad Harun ("Ahmad Harun") and Ali Kushayb from situation Sudan.

⁶⁴ The main difference between the international and international criminal court is in the composition of the court. In the internationalised (or also mixed) court there are national (these being the judges, who belong to the national system, where the court is located and on which territory the supposed crimes have been committed) and international judges, in the international court there are international judges only.

⁶⁵ Eser, *supra* note 36, at 786. Werle, *supra* note 36, at 119.

⁶⁶ Eser, *supra* note 36, at 787.

does not include special provisions on participation in genocide, barring public and direct incitement to commit genocide, which is regulated in the general article on participation.

Another significant characteristic of this article is the development from a monistic to a differentiated (dualistic) system with regard to forms of participation in crime. In the case of ICTY this development appeared only in its case law, however here, it is already apparent in the Statute itself. In article 25 of the Rome Statute, different forms are separately and systematically regulated and perpetration is separated from other forms of participation. The Rules of Procedure and Evidence of ICC additionally impose on the trial chamber the duty to consider, in sentencing, the degree of participation of the convicted person. The door is open to acknowledging the influence of participation form on sentencing, but there are no specific instructions in the Rules of Procedure and Evidence or Rome Statute, for determining the ratio between sentences for different forms of participation. Thus, differentiation in sentencing for different forms of participation is left to the discretion of the chamber.⁶⁷

The article 25 of the Rome Statute regulates all traditional forms of participation, known in civil and also in common law, additionally with participation in group crimes, which is a compromise instead of common law conspiracy. With direct perpetration, the drafters decided to decline the innocent agent theory, which is typical for common law system. Also, the choice for dualistic system follows the regulations of the chosen civil law systems. The only common law influence lies in my opinion in the subparagraph d, which regulates the participation in group crimes, however even this represents a compromise and not a clear case of conspiratorial responsibility.

5. Some Forms of Participation in the Case Law of the ICC

To date, only one trial has commenced at the ICC, two more have gone beyond the confirmation of charges phase and others are still in the arrest warrant phase. Consequently, there are no trial judgements, but the deci-

⁶⁷ Werle, *supra* note 36, at 120. Olasolo, *supra* note 10, at 27. Eser, *supra* note 36, at 787, 788. Ambos, *supra* note 58, at 746. Article 78, par. 1 of the Rome Statute, article 145, par. 1 c of the Rules of Procedure and Evidence. Compare also *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, 29 January 2007, ICC-01/04-10/06-803, par. 334 (Lubanga).

sions on the confirmation of charges and the decisions to issue an arrest warrant can be helpful in analyzing the forms of participation in crime the prosecutor and the court will use.

Based on these decisions, the following forms of participation in crime are currently deployed in ICC proceedings:

- co-perpetration;
- indirect-perpetration (including *Organisationsherrschaft* doctrine);
- instigation;
- command responsibility, and
- participation in group crimes.⁶⁸

5.1. Co-perpetration

In *Lubanga, Katanga and Chui, Bemba and Bahr Idriss Abu Garda*, the prosecutor used in the indictment or in the latter case in his request to summon a defendant and the pre-trial chamber accepted co-perpetration as an adequate form of participation in the decision on the confirmation of charges or in the latter case in the decision to summon a defendant. It was first used in *Lubanga* and later confirmed in other decisions on confirmations of charges.⁶⁹

116

Even though The Legal Representative of Victims⁷⁰ proposed JCE as a basis for criminal responsibility, the pre-trial chamber refused to do so and used co-perpetration instead, thereby citing professor Ambos's definition in Triffterer's commentary.⁷¹ As in civil law systems, the chamber

⁶⁸ For the purpose of this article, only co-perpetration and indirect perpetration will be analysed, since the whole topic of participation in the case law of ICC would be too excessive and because co-perpetration and indirect perpetration are more civil law orientated forms of participation,

⁶⁹ The case of Abu Garda is still at the phase of decision to summon the suspect. In that decision the court alternatively wrote: "Pre-Trial Chamber I is of the opinion that there are reasonable grounds to believe that Abu Garda is criminally responsible as a co-perpetrator or as an indirect co-perpetrator for three war crimes under article 25(3)(a) of the Rome Statute/.../."

⁷⁰ Participation of victims in the legal proceedings at ICC is a great novelty in the Rome Statute. The Office of Public Counsel for Victims operates in the framework of the ICC registry and can also be a legal representative of the victims. However, victims can freely choose their legal representatives.

⁷¹ Compare Ambos, *supra* note 58, at 748 and *Lubanga*, par. 327.

focuses mainly on criteria for the distinction between perpetrators (principals in common law terms) and accessories. The chamber declined the objective and subjective theory and chose for a synthesis thereof - the control over crime concept.⁷² This concept is wider than the objective one, as it includes not only the direct perpetrator, but also those, who, in spite of being absent during the crime, control or mastermind its commission, because they decide whether and how the offence will be committed (thus, the indirect perpetrator and the co-perpetrator).⁷³ It consists of objective and subjective elements. The first regards appropriate factual circumstances for exercising control over crime and the second awareness of such circumstances.

(a) Control over Crime

The control over crime approach means that co-perpetrators divide essential tasks between themselves, act in a concerted manner and hence share the control over the crime, because each of them could hinder the commission of crime by not carrying out his task.⁷⁴ Co-perpetrators must make an agreement or common plan between them, but it does not have to include a plan to commit a certain crime. This requirement causes that the co-perpetrators' activity is coordinated. Nevertheless, it suffices

117

- i. that the co-perpetrators have agreed (a) to start the implementation of the common plan to achieve a non-criminal goal and (b) to only commit the crime if certain conditions are met; or
- ii. that the co-perpetrators (a) are aware of the risk that implementing the common plan (which is specifically directed at the achievement of a non-criminal goal) will result in the commission of the crime, and (b) accept such an outcome.

⁷² Lubanga, par. 327-330 and 338. The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the Confirmation of Charges, 26 September 2008, par. 484 (Katanga and Chui). Van der Wilt, 'The Continuous Quest for Proper Modes of Criminal Responsibility', 7 *Journal of International Criminal Justice* (2009) 2, at 4. Guliyeva, *supra* note 53, at 68. The Prosecutor v. Jean Pierre Bemba, Decision on the Confirmation of Charges, 15 June 2009, par. 348 (Bemba). This case is important, because different pre-trial chamber dealt with it than with the previous two so it could show on some sort of unified opinion of the pre-trial chambers on this question.

⁷³ Lubanga, par. 330-332.

⁷⁴ Lubanga, par. 342. Guliyeva, *supra* note 53, at 71.

Also, the agreement does not need to be explicit and can be inferred from the subsequent concerted action of the co-perpetrators.⁷⁵ That expands the possibility of co-perpetration and consequently quite substantially lowers its standard.

The second objective requirement (the first being a common plan between the co-perpetrators) for co-perpetration on the basis of the control over crime theory is a co-ordinated essential contribution by each co-perpetrator resulting in the realisation of the objective elements of the crime. Each of the perpetrators must carry out a task which is essential to the commission of the crime, whilst the non-execution of this task would have frustrated the commission of the crime. This requirement suits the general civil law theory of co-perpetration⁷⁶ and is also what creates a distinction between co-perpetration and aiding and abetting.⁷⁷

(b) Subjective element

118

The chamber demands that each co-perpetrator also fulfils subjective elements of the crime in question. The general rules of article 30 of the Rome Statute apply here. This again corresponds to the theory of co-perpetration from the chosen civil law systems, according to which each co-perpetrator must fulfil the subjective element of the crime. However, the chosen civil law systems demand further that the co-perpetrators have also necessary characteristics required by law, to be held responsible for this crime. Slovenian criminal law theory for example recognizes the possibility of co-perpetration on the basis of negligence, but Slovenian legislation only allows for the prosecution of co-perpetration on the basis of intent.⁷⁸ Croatian legislation and theory also recognise the possibility of co-perpetration on the basis of negligence.⁷⁹ Jescheck and Weigend on the other hand deny the possibility of co-perpetration on the basis of negligence,⁸⁰ Frister has the opposite opinion.⁸¹ The opinion in the German

⁷⁵ Lubanga, par. 344-345.

⁷⁶ Jescheck and Weigend, *supra* note 2, at 680. Novoselec, *supra* note 2, at 354. Bavcon, *supra* note 12, at 324.

⁷⁷ Novoselec, *supra* note 2, at 356.

⁷⁸ Bavcon, *supra* note 12, at 326.

⁷⁹ Novoselec, *supra* note 2, at 355.

⁸⁰ Jescheck and Weigend, *supra* note 2, at 676.

⁸¹ H. Frister, *Strafrecht Allgemeiner Teil* (2007), at 337.

theory is clearly divided. The chamber in *Lubanga* however tolerated co-perpetration on the basis of negligence. This can be seen from this subjective condition that all co-perpetrators must fulfill subjective elements of a certain crime and from additional rule.

Namely, the crime in question in *Lubanga* was the war crime of conscripting and enlisting children under the age of fifteen. In the case of this crime, the chamber applied in the decision on confirmation of charges the lower “should have known” standard for guilt from the Elements of crimes and at the same time stated that Elements of Crimes can provide for lower standards than the Statute.⁸² I respectfully disagree with this decision. It is true that article 30 of the Rome Statute holds that, “unless otherwise provided for”, the rule of this article for guilt standard should prevail. It is also true that the clause “unless otherwise provided for” is not expressly limited to Rome Statute and that the Elements of crimes expressly state that exceptions to the article 30 standard, based on the Statute, can also be indicated in the Elements of crimes and not only in the Rome Statute itself. My opinion is however that the exceptions to article 30 can be found only in the Rome Statute, for example in articles that define crimes. There are many arguments for this. In the first place, Elements of crimes should only assist the Court in the interpretation and application of articles 6, 7 and 8 of the Rome Statute, which define the crimes under the ICC’s jurisdiction. In the second place, Elements should be consistent with the Statute.⁸³ Thus, in my opinion, the Elements may only be used in interpreting an element of a crime, whilst the elements must be already found in the Statute itself. The Elements should not add something new to what is criminalized, but assist in interpretations of what is already in the Statute. They should therefore impose restrictions on the Court and not constitute a way to broaden criminal responsibility foreseen in the Statute. Otherwise, this would also contradict to principle of legality, which is strongly emphasized in the Statute.⁸⁴ Interesting in this regard is also the decision in *Bemba*, according to which not only

⁸² Lubanga, par. 359. Bemba, par. 352. Weigend, ‘Intent, Mistake of law and Co-perpetration in the *Lubanga* Decision on Confirmation of Charges’, 6 *Journal of International Criminal Justice* (2008), at 472-474.

⁸³ Article 9 of the Rome Statute. M. Politi, ‘Elements of Crimes’, in A. Cassese, P. Gaeta, J. R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002), at 452.

⁸⁴ Article 22 of the Rome Statute.

recklessness, but not even *dolus eventualis* were meant to be incorporated in the Rome Statute, especially due to the principle of legality.⁸⁵ This is an additional argument for my opinion.

But this question, whether the Elements of crimes can define a lower standard of guilt than the Rome Statute itself, is relevant for all crimes and forms of participation in crime, not only for co-participation, which is relevant for this article.

What is relevant specifically for co-perpetration and what the chamber stated in *Lubanga* decision on the confirmation of charges is that all co-perpetrators must be mutually aware of the crime and that they must mutually accept it by reconciling themselves with or consenting to the fact that implementing their common plan may result in the realisation of the objective elements of the crime.⁸⁶ Later, they must have implemented their plan, in spite of this awareness.⁸⁷ The chamber explains that even more precisely. If the risk that objective elements of the crime will be committed is substantial, then mutual acceptance can be inferred from the awareness that the plan would result in the realisation of the objective elements and from the decision to implement the plan anyway. If the risk is low, the inference of an awareness that the plan would result in the realization of the objective elements of crime does not suffice. The co-perpetrators must then clearly or expressly accept the idea that implementing the common plan would result in the realisation of crime.⁸⁸ Additionally, the co-perpetrator must be aware that his role is essential to the implementation of the common plan and consequently to the commission of the crime, and that he can frustrate the implementation of the common plan and commission of the crime by not fulfilling his essential task.⁸⁹ If that is not the case, we are not dealing with two co-perpetrators, but with two perpetrators, who commit crime in a parallel manner, but independently to one another.

⁸⁵ Bemba, par. 367-369. Consequently the pre-trial chamber did not find the adequate *mens rea* and did not confirm certain charges.

⁸⁶ Lubanga, par. 361.

⁸⁷ Lubanga, par. 364.

⁸⁸ Lubanga, par. 636-364.

⁸⁹ Lubanga, par. 367.

In my opinion, the objective elements of co-perpetration are defined quite strictly in the *Lubanga* decision on the confirmation of charges. The requirement of the task which is essential to the commission of the crime can guarantee that the co-perpetrators are really those participants, who are in control of the crime. The requirements of awareness of their role and position and other subjective elements have the same function. This strict definition should now not be spoiled by expansive interpretation of each crime's *mens rea*.

5.2. Indirect Perpetration

(a) Indirect Perpetration

So far, the ICC has only dealt with one form of indirect perpetration. It dealt with a case of a perpetrator behind the perpetrator theory or *Organisationsherrschafts* doctrine. According to this doctrine the tool (physical perpetrator) is not an innocent agent, but is also held criminally responsible for the crime (although the Court has mentioned and interpreted also the theory of innocent agent, but declined to use it).⁹⁰ This form of participation was used in *Katanga and Chui*. According to this theory, the indirect perpetrator (or, in common law terms, the perpetrator by means), uses the physical perpetrator as a tool or an instrument for the commission of the crime. The physical perpetrator is criminally responsible for his fulfilment of elements of the crime and the indirect perpetrator for his control over the crime via his control over the will of the direct perpetrator.⁹¹ When an indirect perpetrator commits the crime through another by the means of control over an organization, *Organisationsherrschaft* doctrine applies.⁹²

Indirect perpetration and *Organisationsherrschaft* doctrine have not been not codified in any previous statutes of international or internationalized courts, but it has been used before in case law (the Argentina Junta trial)⁹³

⁹⁰ Katanga and Chui, par. 495 (duress, mistaken belief, no capacity for blameworthiness), par. 499. Jessberger and Geneuss, 'On the Application of a Theory of Indirect Perpetration in *Al Bashir*', 6 *Journal of International Criminal Justice* (2008) 5, at 5-6. Van der Wilt, *supra* note 72, at 5-6.

⁹¹ Katanga and Chui, par. 497.

⁹² K. Ambos, 'Command Responsibility and *Organisationsherrschaft*: Ways of Attributing International Crimes to the 'most responsible'', in A. Nollkaemper and H. van der Wilt (eds), *System Criminality in International Law* (2009), at 142.

⁹³ <http://www.desaparecidos.org/arg/doc/secretos/orden02.htm> (11.9.2009).

and the Stakić trial judgement of the ICTY⁹⁴). However, in the Rome Statute, indirect perpetration is explicitly codified. Therefore, a legal basis exists for it, which was strongly emphasized by the ICC.⁹⁵

Here again, the Court opted for the control of crime approach. Indirect perpetration also has both objective and subjective elements according to the Court's decision on confirmation of charges in *Katanga and Chui*, as it chose (again) the objective-subjective theory. The Court chose this approach because it is incorporated in the statute, has been used in national jurisdictions and in the case law of international courts and the ICC before.⁹⁶

i) Objective elements

The first objective element is the indirect perpetrator's control over the organization. The persons' blameworthiness increases in accordance with

⁹⁴ The Prosecutor v Milomir Stakić, IT-97-24, Trial Judgement, 31st July 2003 (Stakić). Here the use of this doctrine was rejected, because it had no legal basis in the Statute of ICTY, but also not in the customary law at that time. Hence, this argument does not apply to *Katanga and Chui and Chui and Chui*, since the indirect perpetration is now explicitly codified in the Rome Statute.

⁹⁵ *Katanga and Chui*, par. 499.

⁹⁶ *Katanga and Chui*, par. 500. *Lubanga*, par. 318. The prosecutor decided for this form of participation also in the case of *Al Bashir*, where the pre-trial chamber in the Decision on the Prosecution's Request for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir stated that "there are reasonable grounds to believe that Omar Al Bashir is criminally responsible under article 25(3)(a) of the Statute as an indirect perpetrator, or as an indirect co-perpetrator, for /.../". The Chamber also found that "Omar Al Bashir has been the de jure and de facto President of the State of Sudan and Commander-in-Chief of the Sudanese Armed Forces from March 2003 to 14 July 2008, and that, in that position, he played an essential role in coordinating, with other high-ranking Sudanese political and military leaders, the design and implementation of the abovementioned GoS counter-insurgency campaign; /.../ that the Chamber finds, in the alternative, that there are reasonable grounds to believe: (i) that the role of Omar Al Bashir went beyond coordinating the design and implementation of the common plan; (ii) that he was in full control of all branches of the "apparatus" of the State of Sudan, including the Sudanese Armed Forces and their allied Janjaweed Militia, the Sudanese Police Force, the NISS and the HAC; and (iii) that he used such control to secure the implementation of the common plan /.../." Decision on the Prosecution's Application for a Warrant of Arrest Against Omar al-Bashir, Al Bashir (ICC-02/05-01/09), Pre-Trial Chamber 1, 4 March 2009.

his position in the hierarchy of the organization.⁹⁷ The leader (civil or military)⁹⁸ has authority and control over the apparatus, whilst this authority and control are manifest in subordinates' compliance with his order. Control can show itself in various signs of power: the capacity to hire, train, impose discipline and provide resources to subordinates.⁹⁹ The leader uses his control over the apparatus to execute crimes. He mobilises his authority and power to secure compliance with his orders to commit a crime, and he decides, whether and how the crime will be committed.¹⁰⁰

Exactly the relationship between the leader, who has complete control over the organization and the physical perpetrator, who is reduced to an exchangeable tool, should differentiate *Organisationsherrschaft* doctrine from instigation, where there is no such relationship. Also, according to the ICC, an authority who issues an order within such an organization¹⁰¹ assumes a different kind of responsibility than in ordinary cases of instigation.¹⁰² The difference in position of the suspects is obvious (principal or mere accessory), consequently is also the legal characterization of his act (instigation or indirect perpetrator) different. Since the indirect perpetrator is considered a perpetrator and the instigator "only" an accessory, it is very important that indirect perpetrator's control over organization is carefully attributed and proved.

The second objective element is the requirement of an organized and hierarchical apparatus of power. An organization is based on hierarchical relations between superiors and subordinates. There should be a sufficient number of subordinates, who can fulfil an order to commit a crime;

⁹⁷ Katanga and Chui, par. 503. Van der Wilt, *supra* note 72, at 5-6, Jessberger and Ge-neuss, *supra* note 90, at 2.

⁹⁸ Van der Wilt, *supra* note 72, at 5-6.

⁹⁹ Katanga and Chui, par. 513.

¹⁰⁰ Katanga and Chui, par. 514, 518.

¹⁰¹ In this concrete case the Court was dealing with two military organizations; FRPI (Force de Résistance Patriotique en Ituri) and FNI (Front des Nationalistes et Intégrationnistes) from Congo.

¹⁰² Katanga and Chui, par. 517. Jescheck and Weigend, *supra* note 2, at 647, 653. Instigation as a form of participation is or was used in *The Prosecutor v Kony, Otti, Okot Odhiambo, Dominic Ongwen, Raska Lukwiya* and in *The Prosecutor v Ahmad Muhammad Harun* («Ahmad Harun»).

if one does not fulfil it, he will simply be replaced by another, who will. This ensures that the order will be complied with.¹⁰³

The third objective element is that the execution of crimes is secured by an almost automatic compliance with the orders. The leader's subordinate is merely a gear in a giant machine and he commits the crime automatically, after receiving an order from the leader. This is ensured by the fact that he can be replaced at any time by another, who will commit the crime and by other attributes of the organization (for example intensive, strict and violent training). The physical perpetrator is viewed as only an exchangeable tool.¹⁰⁴

ii) Subjective elements

The indirect perpetrator must fulfil the subjective elements of the crime in question.¹⁰⁵ This is the same rule as with co-perpetration. Again, as with the co-perpetration, the general rules regarding *mens rea* in article 30 of Rome Statute apply.

The indirect perpetrator must also be aware and accept that exercising his control over the organization will result in the commission of the crime.

124 He must be aware of the factual circumstances enabling him to control the crime through another person, of the character of the organization, his authority in the organization and the factual circumstances enabling near-automatic compliance with his orders. Then he must undertake activities with the specific intent to bring about the *actus reus* of the crime, or he must be aware that this will be a consequence of his acts in the ordinary course of events.¹⁰⁶ Thirdly, the indirect perpetrator must be aware of his essential role in the commission of the crime and of his ability to prevent the crime from occurring by refusing to activate the mechanism that would lead almost automatically to the commission of the crime.¹⁰⁷

This theory has closely followed Roxin's theory on *Organisationsherrschaft*. At the same time, it also rejects the general common law theory of an innocent agent. What still remains open to criticism is the double posi-

¹⁰³ Katanga and Chui, par. 512.

¹⁰⁴ Katanga and Chui, par. 515-518.

¹⁰⁵ Katanga and Chui, par. 527.

¹⁰⁶ Katanga and Chui, par. 533-534.

¹⁰⁷ Katanga and Chui, par. 539.

tion of the physical perpetrator. The Court acknowledges this double position,¹⁰⁸ but does not take up a point of view. From one point of view, he is considered as a tool, who is completely submitted to the will, authority, power and control of the indirect perpetrator. On the other hand, the physical perpetrator is nevertheless held to be criminally responsible, as he is considered to be a direct perpetrator and by that a principal, who also exercises control over the commission of crime. This criticism is true for any perpetrator behind the perpetrator theory and not just for the *Organisationschaft* doctrine and was already discussed above. At least in the Rome Statute, a clear legal basis for it has saved the ICC the trouble of substantiating legal basis of this theory and the ICC has the power to use it. What needs to be done in future however is to reserve this theory for really clear cases of near-automatism and for (state) apparatuses which correspond to Roxin's theory?

(b) Indirect co-perpetration

The ICC did not stop at the use of indirect perpetration only. It also combined co-perpetration and indirect perpetration for the cases where two or more indirect perpetrators jointly control the commission of a crime through organizations (joint commission through another person).¹⁰⁹ Furthermore, not all of the indirect co-perpetrators must control the relevant organization jointly. It is enough that one of them controls the organization as an indirect perpetrator and that the other acts jointly with him as co-perpetrator.¹¹⁰ The defence of *Katanga and Chui* argued against this combined use of two forms of participation, but the Court rejected the objection with the simple argument that this mode of liability is "in accordance with the Statute."¹¹¹ I would however wish for some substantiated reasoning, why the Court thinks it can use this combined for of participation.

According to the objective-subjective theory, which was chosen by the Court, as it was already in the previous two forms of participation, the prosecutor must prove first the objective elements of the indirect pepe-

¹⁰⁸ Katanga and Chui, par. 499.

¹⁰⁹ Katanga and Chui, par. 489.

¹¹⁰ Katanga and Chui, par. 493.

¹¹¹ Katanga and Chui, par. 491.

tration (the relation between the physical and the indirect perpetrator),¹¹² then additional objective elements of co-perpetration (the relation between senior leaders as co-perpetrators) and lastly, the subjective elements of indirect co-perpetration.

One of the most crucial questions in the case of *Katanga and Chui* was, whether the crimes of different groups can be attributed to all senior leaders, even though the groups accepted orders only from the leaders of the same ethnicity. Hence, not all senior leaders had control over all the organizations and each senior leader had control over his own organization. The ICC decided that this it is not a precondition that all senior leaders have control over all organizations.. It suffices that one of the senior leaders had control over the organization and that co-perpetration can be established between senior leaders. Consequently, senior leaders of one organization can also be criminally responsible for the crimes of another organization.¹¹³

126 — In my opinion, this argumentation is correct. If we have at least two senior leaders, who jointly share control over the whole organization, the exact control of each senior leader is questioned from my point of view. As they share control over the organization, it cannot be said that each of them has absolute control over the organization. In my opinion, the construction of indirect co-perpetration is only possible in the event of facts and circumstances such as those in *Katanga and Chui*, thus when two or more senior leaders separately control organizations, namely, where each senior leader has effective control over his organization and members of these organizations commit the crimes in question. The control over these organizations represents the *condition sine qua non* contribution of each senior leader as co-perpetrator. The control over organization is considered as each co-perpetrator's essential contribution to the commission of

¹¹² See previous chapter. The elements in *Katanga and Chui* are the same as in *Lubanga*.

¹¹³ *Katanga and Chui*, par. 519 and 520. Van der Wilt, *supra* note 72, at 7. This form of participation is used also alternatively with indirect perpetration in the *Al Bashir* case. I agree with Wilt that this case raises the question, how is it possible at the same time to emphasise the overwhelming control of *Al Bashir* in Sudan ("full control over all branches of apparatus in Sudan") and at the same time to propose using co-perpetration, which is all about joint control over crime. Van der Wilt, *supra* note 72, at 8. It is proposed also in *The Prosecutor v. Bahr Idriss Abu Garda* case, also from Sudan.

a crime, since between senior leaders still normal elements of co-perpetration must be fulfilled:

- the existence of an agreement or common plan between the persons who physically carry out the elements of the crime or between those who carry out the elements of the crime through another individual;¹¹⁴
- a coordinated essential contribution by every co-perpetrator, which may also consist of activating the mechanisms which lead to automatic compliance with their orders and to the commission of the crime or of commission of this task physically by the co-perpetrator himself;¹¹⁵

Subjective elements are a mixture of subjective elements of co-perpetration and indirect perpetration. Each indirect perpetrator must:

- fulfil the subjective elements of the crime in question (*mens rea*);¹¹⁶
- (a) be mutually aware that implementing their common plan will result in the realisation of the objective elements of the crime; (b) undertake such activities with the specific intent to bring about the objective elements of the crime, or be aware that the realisation of the objective elements will be a consequence of their acts in the ordinary course of events;¹¹⁷
- be aware of: (i) his essential role in the implementation of the common plan and (ii) his ability — by reason of the essential nature of his task — to frustrate the implementation of the common plan, and hence the commission of the crime, by refusing to activate the mechanisms that would lead almost automatically to the commission of the crimes.¹¹⁸

These combined elements of co-perpetration and indirect perpetration are the same as with these two forms of participation, used separately, but adjusted to the combined use.

¹¹⁴ Katanga and Chui, par. 522.

¹¹⁵ Katanga and Chui, par. 512, 524-526: "Designing the attack, supplying weapons and ammunitions, exercising the power to move the previously recruited and trained troops to the fields; and/or coordinating and monitoring the activities of those troops, may constitute contributions."

¹¹⁶ Katanga and Chui, par. 527-532.

¹¹⁷ Katanga and Chui, par. 533-537.

¹¹⁸ Katanga and Chui, par. 538-539.

6. Conclusion

Few conclusions can be drawn from the analyzed comparative regulations, historical development, regulation of Rome Statute and the so far existing case law of ICC. In my opinion, the attitude of the ICC towards forms of participation differs from that of the ICTY and other courts. So far, a more civil law approach has been taken by the ICC (although *Organisationsherrschaft* is disputed also in civil law). The ICC deploys co-perpetration, indirect perpetration, instigation and participation in group crimes. Additionally, in some cases command responsibility is proposed, but these cases represent a smaller portion. It may be said therefore that traditional forms of participation (co-perpetration, indirect perpetration) from civil law system are used by the ICC, although in a new, reformed way (like the indirect co-perpetration and the notorious *Organisation sherrschaft*). The civil law system approach is seen also from the fact that the Court used a more theoretical way to differentiate between perpetrators and accessories. It discussed different theories on this differentiation and chose the objective-subjective theory. But even though these participation forms are reformed, the traditional civil law theory on substantive criminal law and its way of thinking is slowly finding its way into the jurisprudence of ICC. In my opinion, this is also based on the different manner in which forms of participation are codified in the Rome Statute as opposed to the manner in which they are regulated in other statutes. The Rome Statute itself is far more systematic, defined and restrictive in the participation field than others. The principle of legality should also be taken in consideration. Namely, it is for the first time expressly codified in the articles 22, 23 and 24. This should also limit the expansion of participation forms in the case law. Additionally, for the first time in the history of international criminal law, the Rome Statute explicitly codified indirect perpetration, so there is a clear legal basis for that. Also, with the participation forms where attempted commission of crime is demanded, the statute's provisions are narrower than previous statutes of other international and internationalized courts, which had no such limitations.

The ICC has taken a stand for restrictive comprehension of perpetration, because it distinguishes between perpetrators and accessories. The Rome Statute even contains a provision which prescribes consideration of distinctions between forms of participation in the sentencing phase of the proceedings. This is a significant characteristic. It shows that there has been a development from monistic to differentiated system of forms of

participation in crime. It is true, that this development occurred already in the case law of the ICTY, but there the Court did it. Here, it occurred already in the statute. The ICC also rejected all pure subjective and objective theories, including the theory of contemporaneousness, because the Rome Statute does not include and recognise any time limitations for any form of participation. Instead it decided for the objective-subjective (control over crime) theory.

What remains open to criticism with the deployment of *Organisationsherrschaft* theory is the double position of the physical perpetrator. As said, from one point of view, he is considered as a tool, who is completely submitted to the will, authority, power and control of the indirect perpetrator. On the other hand, the physical perpetrator is held criminally responsible, he is considered a direct perpetrator and with that a principal, who also exercises control over the commission of crime. Is it possible to be both at the same time, to be merely a tool and at the same time have control over crime?

In my opinion, the argumentation of the ICC with regards to indirect co-perpetration *Katanga and Chui* with regard to more than one organization is correct. Namely, according to the facts of this case two senior leaders had control over two organizations, each senior leader over his own organization. On the other hand, if we have at least two senior leaders, who jointly share control over all organizations at the same time, the members of which are committing crimes, the exact control of each senior leader over each organization is questioned in my opinion. As they share the control over all organization, it cannot be said that each of them has overall control over each organization separately. Namely, in order to be named an indirect perpetrator, he has to have and overall or absolute control over an organization in question. It is my further opinion that the construction of indirect co-perpetration is only possible in the event of facts and circumstances such as those in *Katanga and Chui*, when two or more senior leaders separately control organizations, namely, each senior leader has effective control over his organization and members of these organizations commit the crimes in question. The control over these organizations represents the *condition sine qua non* contribution of each senior leader as co-perpetrator, since between senior leaders normal elements of co-perpetration must be fulfilled.

130 — There is however one pertinent question regarding *Organisationsherrschaft* theory. It seems that this theory is only applicable in situations, where we are dealing with apparatus or organizations, like the Nazi state apparatus. However, not all organizations, which are relevant for prosecution in international criminal law, are organized like that. I would suggest that the right way to solve this problem is to only apply this theory to apparatuses, which correspond to the preconditions of *Organisationsherrschaft* doctrine, especially the effective control, hierarchy and fluent exchangeability of its member's conditions. Only an organization with such characteristics could justify the use of indirect perpetration and would distinguish indirect perpetration from instigation. Consequently the senior leader of the organization would be considered as a perpetrator and not as an accessory only. The instigator does not have the control over crime, he only orders or in any other way causes that the physical perpetrator decides to commit a certain crime. The indirect perpetrator is in control of the crime, he decides when or where it will be executed. With both forms of participation, physical perpetrators can be hold responsible. The difference in the respective positions of both types of participants is obvious (namely, a principal in indirect perpetration *versus* an accessory with instigation). There is also the difference in the stage of sentencing for these two forms of participation; indirect perpetration as a form of perpetration is considered as a more aggravating form of participation. Due to these reasons all the conditions for the indirect perpetration, including the control over organization, must be carefully proved. The problem that I see is, however, that once a Court gets a hold on a new theory, it starts using it and it gets really difficult for the Court to say no to this theory, even though the facts of each case cannot be subsumed under it.

No theory is perfect, indeed. The *Organisationsherrschaft* doctrine also has flaws and has been criticised, especially because of the already emphasized double position of the direct perpetrator. What is important however, at least in my opinion, is that the ICC has taken a step away from joint criminal enterprise theory in the direction of more common forms of participation in crime. Until now, the ICC has been using mainly co-perpetration and indirect perpetration, although also combining them into a “new” form of indirect co-perpetration. But it is a fresh approach to building new forms from traditional forms of participation, which are used also in the chosen civil law systems. In my opinion the

this case law of the ICC shows that it is possible to use traditional forms of participation instead of using disputed joint criminal enterprise. In this way, international criminal law is developing and becoming more and more like real (national) criminal law, which respects its basic rules, which are postulated also in the Rome Statute. And this has been in my opinion one of the most important achievements of the ICC in the substantive criminal law so far.

It seems that the case law of ICC is slowly putting aside the differences between participation in “ordinary” crimes and participation in international crimes. This can be seen from its case law. Namely, it is using the same forms of participation for international crimes as the national courts are using for normal crimes. Before, the international and internationalized courts tried to invent new forms of participation to connect senior leaders to international crimes. This in my opinion shows that it would be possible to apply “normal” forms of participation from ordinary criminal law also for international crimes. When other courts tried to invent new forms of participation, it was due to the collective nature of international crimes. They wanted to create a form of participation that would embrace this characteristics. However, the recent ICC case law shows that it is possible to use “normal” forms of participation, build them into a new, combined form and adjust them slightly, but also that it is the role of other branches of law or even other forms of social control and mechanism to take notice of the collective nature of these crimes, to embrace all relevant individuals and groups and to impose the collective responsibility.¹¹⁹ It is not the place of criminal law to impose the collective responsibility, only the individual.

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