

**INTERNATIONAL CRIMINAL LAW
& PRACTICE**

TRAINING MATERIALS

**MODES OF
LIABILITY:
COMMISSION &
PARTICIPATION**

*Supporting the Transfer of Knowledge and Materials
of War Crimes Cases from the ICTY to National
Jurisdictions, funded by the European Union*

Developed by International Criminal Law Services



1. INTRODUCTION

2. WHAT IS ICL?

3. GENERAL PRINCIPLES

4. INTERNATIONAL COURTS

5. DOMESTIC APPLICATION

6. GENOCIDE

7. CRIMES AGAINST HUMANITY

8. WAR CRIMES

9. MODES OF LIABILITY

10. SUPERIOR RESPONSIBILITY

11. DEFENCES

12. PROCEDURE & EVIDENCE

13. SENTENCING

14. VICTIMS & WITNESSES

15. MLA & COOPERATION

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MODULE 9: MODES OF LIABILITY: COMMISSION AND PARTICIPATION

Part of the OSCE-ODIHR/ICTY/UNICRI Project “Supporting the Transfer of Knowledge and Materials of War Crimes Cases from the ICTY to National Jurisdictions”

Developed by International Criminal Law Services

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CONTENTS

9.	Modes of liability: Commission and Participation	1
9.1.	Introduction	1
9.1.1.	Module description	1
9.1.2.	Module outcomes	1
9.2.	International law and jurisprudence.....	3
9.2.1.	Overview	3
9.2.2.	ICTY.....	3
9.2.3.	ICC	19
9.3.	Regional law and jurisprudence.....	26
9.4.	SFRY.....	27
9.4.1.	Overview	27
9.5.	BiH.....	30
9.5.1.	Overview	30
9.5.2.	Planning.....	33
9.5.3.	Instigating or Inciting	33
9.5.4.	Ordering	34
9.5.5.	Organizing a group	36
9.5.6.	Perpetration / Co-perpetration.....	36
9.5.7.	Accessory / Aiding and abetting.....	41
9.5.8.	JCE	45
9.6.	Croatia.....	67
9.6.1.	Overview	67
9.6.2.	Planning.....	68
9.6.3.	Ordering	68
9.6.4.	Inciting.....	69
9.6.5.	Perpetration / Co-perpetration.....	70
9.6.6.	Association for the purpose of committing crimes.....	72
9.6.7.	Subsequent assistance to the perpetrator	73
9.7.	Serbia	74
9.7.1.	Overview	74
9.7.2.	Instigating.....	75
9.7.3.	Ordering	75
9.7.4.	Inciting.....	77
9.7.5.	Organising a group	77
9.7.6.	Perpetrating/Co-perpetrating.....	77
9.7.7.	Accessory / Aiding and abetting.....	79
9.8.	Further reading	83
9.8.1.	Books.....	83
9.8.2.	Articles.....	83
9.8.3.	Reports.....	84

9. MODES OF LIABILITY: COMMISSION AND PARTICIPATION

9.1. INTRODUCTION

These training materials have been developed by International Criminal Law Services (ICLS) as a part of the OSCE-ODIHR-ICTY-UNICRI “War Crimes Justice Project”, funded by the European Union. An introduction to how to use the materials can be found in Module 1, which also includes a case study and hypotheticals that can be used as training tools, and other useful annexes. The materials are intended to serve primarily as training tool and resource for legal trainers in Bosnia and Herzegovina (BiH), Croatia and Serbia, but are also envisaged for adaptation and use in other jurisdictions of the region. Discussion questions, tips, and other useful notes for training have been included where appropriate. However, trainers are encouraged to adapt the materials to the needs of the participants and the particular circumstances of each training session. Trainers are also encouraged to update the materials as may be necessary, especially with regards to new jurisprudence or changes to the criminal codes in their relevant jurisdiction.

Each Module provides a general overview of the international criminal law relevant to the Module’s topic before discussing the relevant law and jurisprudence for BiH, Croatia, and Serbia, respectively. The materials make use of the most relevant and available jurisprudence. It should be noted that where a first instance judgement has been cited, the drafters have taken special care to ensure that the part referred to was upheld on appeal. It may be useful for trainers to discuss additional cases that might also be relevant or illustrative for each topic, and to ask participants to discuss their own cases and experiences.

9.1.1. MODULE DESCRIPTION

This Module provides an overview of the modes of liability relied upon before the ICTY, ICTR and ICC. It focuses on the forms of individual criminal responsibility that are charged before international criminal courts. Thereafter, it discusses the modes of liability applied before the domestic courts in BiH, Croatia and Serbia. It does not consider the doctrine of superior responsibility, which is dealt with separately in Module 10.

9.1.2. MODULE OUTCOMES

Upon completing this Module, participants should understand:

- The various modes of liability used at the ICTY, ICTR and ICC;
- The differences between modes of liability at the ICTY, ICTR and the ICC;
- The elements of joint criminal enterprise as a form of liability;
- Which modes of liability would be the best applied to various types of cases;
- The modes of liability applied in national jurisdictions; and
- The modes of liability most useful to prosecutors for the cases in their respective jurisdictions.

Notes for trainers:

- This Module describes the ways in which perpetrators can be held responsible for their participation in the various substantive crimes discussed in Modules 6, 7 and 8. It is important for establishing a link between the perpetrators and the crimes and for identifying evidence that must be called at trial to prove their guilt.
- It is important at the outset that participants understand that the doctrine of superior responsibility will be dealt with in a separate Module. In the present Module, participants will be asked to concentrate on forms of individual criminal responsibility.
- The elements of each form of individual criminal liability are paired with relevant case law to explain their application in practice.
- As with other Modules, the first part of the Module will deal with modes of liability before international criminal courts or tribunals, and the second part will cover domestic jurisdictions.
- It will be important for participants to compare and contrast the elements of the different forms of individual criminal responsibility (often referred to as modes of liability or participation) before international criminal courts with those applicable in their national jurisdictions. In particular, the doctrine of joint criminal enterprise should be explored with participants in order to critically assess its application both before international and national courts.
- In order to achieve these objectives you will find “Notes to trainers” in boxes inserted at the beginning of important sections. These notes will highlight the main issues for trainers to address, identify questions which the trainers can use to direct the participants to focus on the important issues and to stimulate discussion, and make references to the parts of the case study that are relevant and which can be used as practical examples to apply the legal issues being taught.

9.2. INTERNATIONAL LAW AND JURISPRUDENCE

Notes for trainers:

- This section focuses on the modes of liability before the ICTY, ICTR and ICC. It starts with the provisions before the ICTY and ICTR and covers all forms of individual forms of responsibility before these courts including the doctrine of joint criminal enterprise (JCE).
- Thereafter, the provisions of the ICC Rome Statute are considered, and compared with those of the ICTY and ICTR.
- It is important to convey to participants in this section that both the elements of the substantive crime (such as murder as a war crime) *and* the mode of responsibility (such as JCE III) must be proved beyond a reasonable doubt.
- In order to discuss the practical effect of these provisions, it is suggested that participants review the case study to determine which forms of individual criminal responsibility could be charged on the facts of that case.
 - In particular, could the accused be charged under a joint criminal enterprise? And which form of JCE would be most appropriate?
 - What would be different if the accused were charged under the Rome Statute?
 - What evidence could be used from the statement of facts to support such a charge, and what further evidence may be required?

9.2.1. OVERVIEW

The ICTY/ICTR Statutes have incorporated modes of liability that are recognised under customary international law. It is noteworthy that the Rome Statute of the ICC departed from the law and jurisprudence on modes of liability established by the ICTY and ICTR. In particular, the ICC does not recognise joint criminal enterprise, *per se*. Rather, the Rome Statute has incorporated a different form of common purpose liability called co-perpetration (Article 25(3)(a)), indirect co-perpetration (Article 25(3)(a)) and other forms of common purpose liability (Article 25(3)(d)).

9.2.2. ICTY

ICTR Statute Article 6(1) and ICTY Statute Article 7(1) are identical. They form the general basis of the various modes of liability applied at those and some other international and hybrid

criminal courts. As with the bulk of the substantive law of the ICTY and ICTR, the definitions of the modes of liability are those found in customary law at the relevant time.¹

The Statutes cover those persons who plan, instigate, order, directly perpetrate a crime or otherwise aid and abet in its planning, preparation or execution. They also include those modes of participating in crimes that occur when a group of people, who all share a common purpose, undertake criminal activity that is then carried out either jointly or by some members of the group.²

ICTY/ICTR Statutes Article 7(1)/6(1)

A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime [...] shall be individually responsible for the crime.

At the ICTY and ICTR, as at some other international criminal courts, the legal basis of individual criminal responsibility is customary international law.³

9.2.2.1. FORMS OF INDIVIDUAL CRIMINAL RESPONSIBILITY

The forms of individual criminal responsibility applying to genocide, crimes against humanity and war crimes at the ICTY, ICTR and ICC are:

- Planning;
- Instigating;
- Ordering;
- Committing (direct perpetration);
- Aiding and abetting in the planning, preparation or execution of a crime;
- Joint criminal enterprise (which is considered to be a form of commission)
- Superior/command responsibility (see Module 10);
- Co-perpetration (joint perpetration);
- Indirect perpetration; and
- Indirect co-perpetration.

¹ Enver Hadžihasanović, Case No. IT-01-47, Appeals Chamber, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, ¶ 44; Duško Tadić, Case No. IT-94-1-T, Trial Judgement, 7 May 1997, ¶¶ 666-9; Duško Tadić, Case No. IT-94-1-A, Appeal Judgement, 26 Jan. 2000, ¶¶ 188-192.

² *Tadić*, AJ ¶¶ 188-192.

³ *Tadić*, TJ ¶¶ 666-669.

The modes of liability covered here stem mainly from the ICTY and ICTR Statutes and case law. See section 9.2.3 for information on differences at the ICC. Some of these modes of liability overlap to varying degrees.

It is important to recall that the elements of each mode of liability described in the following sections must be proven in addition to the elements of the particular substantive crimes being charged and their chapeau requirements.

The elements of each mode of liability must be proved in addition to the elements of the particular substantive crimes being charged and their chapeau requirements.

Modes of liability can be proven “by circumstantial or direct evidence, taking into account evidence of acts or omissions of the accused”.⁴

Similar forms of individual criminal responsibility are provided for in the criminal codes applicable in BiH, Croatia and Serbia (see sections 9.5, 9.6 and 9.7, respectively). As each of the forms of individual criminal responsibility that are applied before the ICTY, ICTR and ICC are considered below, participants should have in mind whether these are prevalent within their national systems, and to what extent.

9.2.2.1.1. PLANNING

Planning means that one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases.⁵

Actus reus – One or more persons designs a criminal action, procedure or arrangement for a particular crime that is later perpetrated.⁶ It is sufficient to show that the planning was a factor substantially contributing to the crime.⁷

The accused does not have to directly or physically commit the crime planned to be found guilty of planning.

- The accused does not have to directly or physically commit the crime planned to be found guilty of planning. The accused does not even have to be at the crime scene, as long as it is established that the direct perpetrators were acting according to the accused’s plan.⁸

⁴ See, e.g., Stanislav Galić, Case No. IT-98-29-A, Appeal Judgement, 30 Nov. 2006, ¶¶ 177-8.

⁵ Jean-Paul Akayesu, Case No. ICTR-96-4-T, Trial Judgement, 2 Sept. 1998, ¶ 480; Georges A. N. Rutaganda, Case No. ICTR-96-3-T, Trial Judgement, 26 May 2003, ¶ 37; Stanislav Galić, Case No. IT-98-29-T, Trial Judgement, 5 Dec. 2003, ¶ 168.

⁶ Dragomir Milošević, Case No. IT-98-29/1-A, Appeal Judgement, 12 Nov. 2009, ¶ 268; Laurent Semanza, Case No. ICTR-97-20-T, Trial Judgement, 15 May 2003, ¶ 380; Dario Kordić et al., Case No. IT-95-14/2-A, Appeal Judgement, 17 Dec. 2004, ¶ 26.

⁷ Milošević, AJ ¶ 268; Kordić et al., AJ ¶ 26.

⁸ Ljube Boškoski et al., Case No. IT-04-82-A, Appeal Judgement, 19 May 2010, ¶ 125.

- It is not necessary to identify by name the direct perpetrator(s) of the crime planned by the accused person.⁹

Mens rea – The accused intended to plan the crime, or at a minimum, was aware of the substantial likelihood that a crime would be committed when the planned acts or omissions occurred.¹⁰ The accused’s presence at the scene of the crime can be a factor used by the judges in determining his or her *mens rea*.¹¹

A person convicted of having committed a crime cannot be convicted of having planned the same crime, even though his involvement in the planning may be considered an aggravating factor.¹²

9.2.2.1.2. INSTIGATION

Actus reus – Instigation is “prompting”¹³ or “urging or encouraging”¹⁴ someone to commit a crime.

- It is sufficient to show that the instigation was a factor substantially contributing to the conduct of another person committing the crime.¹⁵
- Instigation can be express or implied and involve acts or omissions.¹⁶
- It is not necessary to specifically identify the person instigated (*i.e.* the direct/physical perpetrator) by name.¹⁷

The prosecution must establish a causal link between the instigation and the *actus reus* of the crime.¹⁸ However, it is not necessary to demonstrate that the crime would not have occurred but for the accused’s involvement.¹⁹

The accused does not need to be physically present when the material elements of the instigated crime are committed.²⁰

⁹ *Boškoski et al.*, AJ ¶ 75, citing *Kordić et al.*, AJ ¶¶ 26, 29, 31.

¹⁰ *Milošević*, AJ ¶ 268; *Kordić et al.*, AJ ¶ 29.

¹¹ *Boškoski et al.*, AJ ¶ 132.

¹² *Milošević*, AJ ¶ 268; Milomir Stakić, Case No. IT-97-24-T, Trial Judgement, 31 July 2003, ¶ 443; Mladen Naletilić et al., Case No. IT-98-34-T, Trial Judgement, 31 March 2003, ¶ 59; Radoslav Brđanin, Case No. IT-99-36-T, Trial Judgement, 1 Sept. 2004, ¶ 268.

¹³ Tihomir Blaškić, Case No. IT-95-14-T, Trial Judgement, 3 March 2000, ¶ 280.

¹⁴ Ignace Bagilishema, Case No. ICTR-95-1A, Appeal Judgement, 3 July 2002, ¶ 30.

¹⁵ Ferdinand Nahimana, Case No. ICTR-96-11A, Appeal Judgement, 28 Nov. 2007, ¶ 480.

¹⁶ *Blaškić*, TJ ¶ 270.

¹⁷ François Karera, Case No. ICTR-01-74-A, Appeal Judgement, 2 Feb. 2009, ¶ 318.

¹⁸ *Bagilishema*, AJ ¶ 30; Moinina Fofana et al., Case No. SCSL-2003-11-A, Appeal Judgement, 28 May 2008, ¶ 54.

¹⁹ Sylvestre Gacumbitsi, Case No. ICTR-01-64, Appeal Judgement, 7 July 2006, ¶ 129; *Kordić et al.*, AJ ¶ 27.

²⁰ *Nahimana*, AJ ¶ 660.

Instigation is more than merely facilitating the commission of the direct offence (as “mere” facilitation may suffice for aiding and abetting).²¹ It requires influencing the direct perpetrator by inciting, soliciting or otherwise inducing him to commit the crime. Even if the direct perpetrator was already thinking about committing a crime, the final determination to do so can still be brought about by persuasion or strong encouragement of the instigator. However, if the principal perpetrator has definitely decided to commit the crime, further encouragement or moral support may “merely” qualify as aiding and abetting.

Instigation is different from “ordering”. Instigation is different from “ordering”. Although exerting influence usually means the person can impress others, instigation, as opposed to “ordering”, does not assume or require a superior-subordinate relationship between the accused and the direct perpetrator(s). (See below).

Mens rea – The accused intended to provoke or induce the commission of the crime, or was aware of the substantial likelihood that the commission of a crime would be a probable consequence of his acts.²²

9.2.2.1.3. ORDERING

Actus reus – Someone in a position of *de jure* or *de facto* authority uses that authority to instruct another person to commit an offence.²³

- The person ordered must commit the material elements of the crime(s).²⁴
- Ordering does not require the physical presence of the accused at the site of the crime.²⁵

It is not necessary to demonstrate the existence of a formal superior-subordinate relationship between the accused and the direct perpetrator. It is sufficient that the accused possessed the authority to order the commission of an offence and that this authority can be reasonably implied.²⁶ The order does not need to be given in

It is not necessary to demonstrate the existence of a formal superior-subordinate relationship between the accused and the direct perpetrator.

²¹ This paragraph rests on Naser Orić, Case No. IT-03-68-T, Trial Judgement, 30 June 2006, ¶¶ 271-2.

²² *Kordić et al.*, AJ ¶¶ 29, 32; *Brđanin*, TJ ¶ 269; *Naletilić et al.*, TJ ¶ 60.

²³ *Kordić et al.*, AJ ¶ 28; *Galić*, TJ ¶ 168; Radislav Krstić, Case No. IT-98-33-T, Trial Judgment, 2 Aug. 2001, ¶ 601; *Akayesu*, TJ ¶ 483; *Rutaganda*, TJ ¶ 39.

²⁴ *Nahimana*, AJ ¶ 481.

²⁵ *Milošević*, AJ ¶ 290.

²⁶ *Gacumbitsi*, AJ ¶¶ 181-3.

any particular form,²⁷ nor does it have to be given by the person in a position of authority directly to the person committing the offence.²⁸

Mens rea – The accused must have been aware of the substantial likelihood that the crime committed would be the consequence of the execution or implementation of the order.²⁹ The *mens rea* of the person who was ordered and the direct perpetrators of the crime are irrelevant.³⁰

Like any other mode of liability, ordering can be proven by circumstantial or direct evidence, taking into account evidence of acts or omissions of the accused.³¹

An accused cannot be convicted of ordering and committing the same crime.³² Ordering can be considered an aggravating circumstance for sentencing.³³

The Court of BiH has followed the reasoning of the ICTY with regards to ordering. (See section 9.5.4, below).

9.2.2.1.4. COMMISSION/PERPETRATION

“Commission” is often used interchangeably with “perpetration”.

“Commission” as a mode of liability includes joint criminal enterprise (JCE), as discussed below.

Actus reus – Physically perpetrating the relevant criminal act or a culpable omission in violation of a rule of criminal law.³⁴

Mens rea – The accused must have the intention for a crime to occur as a consequence of the accused’s conduct.³⁵

9.2.2.1.4.1. COMMITTING A CRIME BY OMISSION

In order to be guilty of committing a crime by omission, the following elements must be established:

- (1) the accused must have had a legal duty to act;
- (2) the accused must have had the ability to act;

²⁷ Jean De Dieu Kamuhanda, Case No. ICTR-99-54A-A, Appeal Judgment, 19 Sept. 2005, ¶ 76.

²⁸ *Blaškić*, TJ ¶ 282.

²⁹ Tihomir Blaškić, Case No. IT-95-14-A, Appeal Judgment, 29 July 2004, ¶ 42; *Kordić et al.*, AJ ¶ 30.

³⁰ *Blaškić*, TJ ¶ 282; Dario Kordić et al., Case No. IT-95-14/2-T, Trial Judgment, 26 Feb. 2001, ¶ 388.

³¹ *Galić*, AJ ¶¶ 177-8.

³² *Stakić*, TJ ¶ 445.

³³ *Ibid.*, 914.

³⁴ *Nahimana*, AJ ¶ 478.

³⁵ *Naletilić et al.*, TJ ¶ 62; *Krstić*, TJ ¶ 601; *Galić*, TJ ¶ 168; *Rutaganda*, TJ ¶ 43.

- (3) the accused failed to act, intending the criminally sanctioned consequences or with awareness and consent that the consequences would occur; and
- (4) the failure to act resulted in the commission of the crime.³⁶

It is not clear whether this duty to act must derive from *criminal* law or whether *any* legal obligation to act is sufficient.³⁷

At a minimum, the *actus reus* of commission by omission requires an elevated degree of “concrete influence”.³⁸

The actus reus of commission by omission requires an elevated degree of “concrete influence”.

9.2.2.1.5. AIDING AND ABETTING

Actus reus – Providing practical assistance, encouragement or moral support to a principal offender of a crime, which substantially contributes to the perpetration of the crime.³⁹

The assistance may:

- consist of an act or omission;
- occur before, during, or after the act of the principal offender; and
- be removed in time and place from the actual crime.⁴⁰

The principal offender does not need to be aware of the accomplice’s contribution.⁴¹

The material elements of the crime committed by the direct perpetrator, the commission of which have been aided or abetted by the accused, must be established.⁴²

Mens rea – Knowledge or awareness that the acts or omissions performed by the aider and abettor assist in the commission of a crime by the principal offender.⁴³

³⁶ André Ntagerura et al., Case No. ICTR-96-10T, Trial Judgement, 1 Sept. 2009, ¶ 659 as cited in André Ntagerura et al., Case No. ICTR-96-10A, Appeal Judgement, 7 July 2006, ¶ 333.

³⁷ *Ntagerura et al.*, AJ ¶¶ 334-5.

³⁸ *Blaškić*, AJ ¶ 664; Naser Orić, Case No. IT-03-68-A, Appeal Judgement, 3 July 2008, ¶ 41.

³⁹ Zejnil Delalić et al. (“*Čelebići*”), Case No. IT-96-21-T, Trial Judgment, 16 Nov. 1998, ¶ 327; *Nahimana*, AJ ¶ 482.

⁴⁰ Vidoje Blagojević and Jokić, Case No. IT-02-60-T, Appeal Judgement, 9 May 2007, ¶ 127; *Blaškić*, AJ ¶ 48; *Naletilić et al.*, TJ ¶ 63; *Fofana*, AJ ¶ 72.

⁴¹ Tadić, AJ ¶ 229.

⁴² Zoran Kupreškić et al., Case No. IT-95-16-A, Appeal Judgment, 23 Oct. 2001, ¶ 254.

⁴³ Mitar Vasiljević, Case No. IT-98-32-A, Appeal Judgment, 25 Feb. 2004, ¶ 102; *Blaškić*, AJ ¶ 49.

- The aider and abettor must be aware of the essential elements of the crime committed by the principal offender, including the principal offender's state of mind. However, he need not share the intent of the principal offender.⁴⁴
- In addition, the aider and abettor need not have knowledge of the precise crime that was intended or that was actually committed, as long as he was aware that one of a number of crimes would probably be committed, including the one actually perpetrated.⁴⁵

The aider and abettor must be aware of the essential elements of the crime committed by the principal offender.

In cases of specific intent crimes such as genocide or persecution, the aider and abettor must know of the principal perpetrator's specific intent.⁴⁶

Aiding and abetting generally involves a lesser degree of direct participation in the crime than "committing".⁴⁷ Some examples of aiding and abetting at the international tribunals include:

- standing near victims while armed to prevent the victims from escaping;⁴⁸
- providing weapons to a direct perpetrator;⁴⁹
- taking a direct perpetrator to the scene of a crime and pointing at people to be killed;⁵⁰ and
- sending excavators after the killing of prisoners, which it was found substantially contributed to the crime because the perpetrators knew they could rely on this logistical support.⁵¹

9.2.2.1.5.1. SUBSTANTIAL CONTRIBUTION

The act of assistance need not have caused the act of the principal offender, but it must have had a substantial effect on the commission of the crime by the principal offender.

The act of assistance need not have caused the act of the principal offender, but it must have had a substantial effect on the commission of the crime by the principal offender.⁵² The question of whether a given

⁴⁴ Zlatko Aleksovski, Case No. IT-95-14/1-A, Appeal Judgement, 24 March 2000, ¶ 162.

⁴⁵ *Blaškić*, AJ ¶ 50; Anto Furundžija, Case No. IT-95-17/1-A, Appeal Judgment, 21 July 2000, ¶ 246. He need not have intended to provide assistance. *Blaškić*, AJ ¶ 49.

⁴⁶ *Blagojević and Jokić*, AJ ¶ 127; Radislav Krstić, Case No. IT-98-33-A, Appeal Judgment, 19 April 2004, ¶¶ 140-1.

⁴⁷ *Čelebići*, Case No. IT-96-21-A, Appeal Judgment, 20 Feb. 2001, ¶¶ 342-3; *Blagojević and Jokić*, AJ ¶ 192.

⁴⁸ *Vasiljević*, AJ ¶ 134.

⁴⁹ Elizaphan Ntakirutimana et al., Case No. ICTR-96-10-A and ICTR-96-17-A, Appeals Judgement, 13 Dec. 2004, ¶ 530.

⁵⁰ *Ibid.* ¶ 532.

⁵¹ Vidoje Blagojević and Jokić, Case No. IT-02-60-T, Trial Judgement, 17 Jan. 2005, ¶¶ 766-67.

⁵² *Blagojević and Jokić*, AJ ¶ 187; *Vasiljević*, AJ ¶ 102; *Aleksovski*, AJ ¶ 162.

act constitutes substantial assistance requires a fact-based inquiry.⁵³

Where the accused knowingly participated in the commission of an offence and his participation substantially affected the commission of that offence, he can still be found guilty even if his participation amounted to no more than his “routine duties”.⁵⁴

9.2.2.1.5.2. TACIT APPROVAL AND ENCOURAGEMENT

An accused can be convicted for aiding and abetting if it is established that his conduct amounted to tacit approval and encouragement of the crime and that such conduct substantially contributed to the crime.⁵⁵ For example, if a superior is at the scene of the crime but does not interfere with the commission of a crime by his subordinate, this could be considered tacit approval.

Liability for aiding and abetting by tacit approval is based on the encouragement and support that an omission might provide the principals of the crime. It is not based on an existing duty to act.⁵⁶ In such cases the combination of a position of authority and physical presence at the crime scene may allow the inference that non-interference by the accused actually amounts to tacit approval and encouragement.⁵⁷

9.2.2.1.5.3. AIDING AND ABETTING BY OMISSION

As discussed above, not acting when there is a legal duty to act can lead to individual criminal responsibility.⁵⁸ A person may aid and abet a crime through an omission, which requires that the accused had the ability and legal duty to act but failed to do so.⁵⁹ The *mens rea* and *actus reus* requirements for aiding and abetting by omission are the same as for aiding and abetting by a positive act.⁶⁰

In relation to aiding and abetting by omission, an officer may be required, within the limits of his capacity to act, to go beyond his *de jure* authority to counteract an illegal order.⁶¹

9.2.2.1.5.4. AIDING AND ABETTING BY COMMANDERS/SUPERIORS

The *actus reus* of aiding and abetting may be satisfied, for example, by a commander permitting the use of resources under his control, including personnel, to facilitate the perpetration of a

⁵³ *Blagojević and Jokić*, AJ ¶ 134.

⁵⁴ *Ibid.* ¶ 189.

⁵⁵ Radoslav Brđanin, Case No. IT-99-36-A, Appeal Judgement, 3 April 2007, ¶ 273.

⁵⁶ *Brđanin*, AJ ¶ 273.

⁵⁷ *Ibid.*

⁵⁸ *Orić*, AJ ¶ 43; See also Mile Mrkšić et al., Case No. IT-95-13/1-A, Appeal Judgment, 5 May 2009, ¶ 134.

⁵⁹ *Blaškić*, AJ ¶ 47, 663; *Nahimana*, AJ ¶ 482; *Ntagerura et al.*, AJ ¶ 335, 370; *Brđanin*, AJ ¶ 274.

⁶⁰ *Orić*, AJ ¶ 43; *Blaškić*, AJ ¶ 47.

⁶¹ *Mrkšić et al.*, AJ, ¶ 94.

crime.⁶² An individual's position of superior authority does not suffice to conclude from his mere presence at the crime scene that he encouraged or supported the crime; however, the presence of a superior can be perceived as an important indication of encouragement or support.⁶³

In the section that follows, joint criminal enterprise is discussed. It should be noted that the trial chamber in the *Đorđević* case found that the conduct of the accused both unlawfully aided and abetted the crimes charged as well as established that the accused was responsible under the JCE as charged. The trial chamber held that the modes of responsibility under Article 7(1) of the ICTY Statute are not mutually exclusive and it is possible to convict on more than one mode of liability in relation to a crime if it reflects the totality of the accused's conduct.⁶⁴

The actus reus of aiding and abetting may be satisfied by a commander permitting the use of resources under his control, including personnel, to facilitate the perpetration of the crime.

9.2.2.1.6. JOINT CRIMINAL ENTERPRISE

The individual criminal responsibility provisions of the ICTR Statute (Article 6(1)) and ICTY Statute (Article 7(1)) do not include explicit references to JCE. However, JCE is viewed as a form of "commission" of a crime under these provisions.⁶⁵

Joint criminal enterprise is not a crime in itself.

Individual criminal responsibility can arise when several individuals with a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons.⁶⁶ Anyone who contributes to the criminal activity in order to carry out a common criminal purpose⁶⁷ may be held criminally liable.⁶⁸ This mode of liability is referred to as "joint criminal enterprise" (JCE).

⁶² *Krstić*, AJ ¶¶ 137, 138, 144; *Blagojević and Jokić*, AJ ¶ 127.

⁶³ Anto Furundžija, Case No. IT-95-17/1-T, Trial Judgment, 10 Dec. 1998, ¶ 209; Zlatko Aleksovski, Case No. IT-95-14/1-T, Trial Judgment, 25 June 1999, ¶¶ 64-5, 87; *Čelebići*, AJ ¶¶ 357-9, 364.

⁶⁴ Vlastimir Đorđević, Case No. IT-05-87/1-T, Trial Judgment, 23 Feb. 2011, ¶¶ 2193 – 2194.

⁶⁵ See, e.g., *Tadić*, AJ ¶ 190; *Vasiljević*, AJ ¶ 95; Milorad Krnojelac, Case No. IT-97-25-A, Appeal Judgment, 17 Sept. 2003, ¶¶ 28-32, 73; *Ntakirutimana*, AJ ¶ 468; Momčilo Krajišnik, Case No. IT-00-39-A, Appeal Judgment, 17 March 2009, ¶¶ 655, 659, 662. Other hybrid and international criminal courts, including the SCSL and ICC, also apply JCE or variants thereof.

⁶⁶ Fatmir Limaj et al., Case No. IT-03-66-A, Appeal Judgment, 27 Sept. 2007, ¶ 99; *Brđanin*, AJ ¶ 430. But see Momčilo Krajišnik and Biljana Plavšić, Case Nos. IT-00-39 & 40-AR73.3, Appeals Chamber Decision on Interlocutory Appeal by Momčilo Krajišnik, Appeals Chamber, 14 Feb. 2002, ¶ 157 (*Krajišnik AC decision*) for impermissibly vague identifications in relation to some JCE members.

⁶⁷ The existence of common criminal plan must be shown. It can be specified in terms of both the criminal goal intended and its scope (e.g. the temporal and geographic limits of this goal, and the general identities of the intended victims). Existence can be expressed or inferred, and can be contemporaneous.

The group of persons must be identified. However, it is not necessary to identify every person by name. It is not necessary that the people in the group know one another. Circumstances permitting, it can be sufficient to refer to categories or groups of persons (such as “members of the ABC armed forces” or “members of Unit X of the police force”).⁶⁹

It is important to note that JCE is not a crime in itself. It is a form of individual criminal responsibility for crimes. Therefore, it is not possible to be convicted, for example, for aiding and abetting a JCE. Joint criminal enterprise has been relied upon by the Court of BiH, but not by other courts in BiH, Croatia or Serbia. Instead, these courts have relied upon the doctrine of co-perpetration. It is important for participants to consider the similarities and differences between JCE and co-perpetration. See sections 9.5.8 (BiH), 9.6.5 (Croatia), and 9.7.6 (Serbia), below.

9.2.2.1.6.1. THREE CATEGORIES OF JCE

There are three distinct categories of JCE that, according to ICTY and ICTR jurisprudence, reflect customary international law.⁷⁰

9.2.2.1.6.1.1. JCE I

The first category is a “basic” form of JCE.⁷¹ It is represented by cases where all co-perpetrators, acting pursuant to a common purpose, possess the same criminal intent. An example is a plan formulated by a multiple individuals to kill, where, although each of them carries out a different role, each has the intent to kill.

There are three distinct categories of joint criminal enterprise.

9.2.2.1.6.1.2. JCE II

The second category is a “systemic” form of JCE.⁷² It is characterised by:

- the existence of an organised system of ill-treatment;
- the accused’s awareness of the nature of that system; and
- his active participation in the enforcement of the system.

An example of this systemic form of JCE is in concentration camp situations where detainees are killed or mistreated pursuant to the JCE.

⁶⁸ *Tadić*, AJ ¶ 190. For rationale of JCE and response to some criticism of JCE see *e.g. Tadić*, AJ ¶¶ 188-192, 226; *Brđanin*, AJ ¶¶ 371, 431-2.

⁶⁹ *Limaj*, AJ ¶ 99; *Brđanin*, AJ ¶ 430. *But see Krajišnik*, AC decision ¶ 157 for impermissibly vague identifications in relation to some JCE members.

⁷⁰ *Tadić*, AJ ¶¶ 195-226; *Krnjelac*, AJ ¶¶ 83-4; *Ntakirutimana*, AJ ¶ 462; *Stakić*, AJ ¶¶ 64-5.

⁷¹ *See, e.g., Tadić*, AJ ¶ 196; *Ntakirutimana*, AJ ¶ 463.

⁷² *See, e.g., Tadić* AJ ¶¶ 202-3; *Krnjelac*, AJ ¶ 89; *Vasiljević*, AJ ¶ 98; *Ntakirutimana*, AJ ¶ 464.

9.2.2.1.6.1.3. JCE III

The third category is an “extended” form of JCE.⁷³ This arises where a plurality of persons have agreed on a JCE and a member of the JCE commits a crime that, although outside of the common purpose, is a natural and foreseeable consequence of carrying out the common purpose.

An example is when a group has a common purpose to forcibly remove, at gunpoint, members of one ethnicity from a village. In the course of doing so, one or more of the victims is shot and killed. While murder may not have been an explicit part of the common purpose, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might result in one or more of those civilians being killed.

The appeals chamber at the Special Tribunal for Lebanon has held that an accused cannot be found guilty of international crimes that require special intent, such as genocide and terrorism, under JCE III.⁷⁴

9.2.2.1.6.2. ACTUS REUS

The actus reus of Joint Criminal Enterprise:

1. a plurality of persons
2. the existence of a common plan that involves the commission of a crime
3. participation in the plan

The JCE categories have common *actus reus* requirements:

- (i) A plurality of persons. An accused must act with other persons pursuant to a common plan amounting to or involving the commission of one or more crimes. They need not be organised militarily, politically or administratively.
- (ii) The existence of a common plan, design or purpose which amounts to or involves the commission of a crime. The common plan need not itself amount to a crime, but its execution must involve the commission of crimes. There is no need for the criminal purpose to have been previously arranged or formulated. It may materialise extemporaneously and be inferred from the facts.

⁷³ See, e.g., *Tadić*, AJ ¶¶ 195-6, 204; *Vasiljević*, AJ ¶¶ 95-101; *Ntakirutimana*, AJ ¶ 465; *Krajišnik*, AJ ¶¶ 171-7. See *Brđanin*, AJ ¶ 432; Milan Martić, Case No. IT-95-11-A, Appeal Judgment, 8 Oct. 2008, ¶ 83 regarding punishment for various levels of participation in JCE III.

⁷⁴ Special Tribunal for Lebanon, Case No. STL-11-01/I/AC/R176bis, Appeals Chamber Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 Feb. 2011, ¶¶ 248-49.

(iii) Participation of the accused in the execution of the common design involving the perpetration of a crime. The accused can participate directly or indirectly. The participation in the execution of the JCE does not need to involve the commission of a specific crime under one of the statutory provisions of the ICTY and ICTR (such as murder, extermination, torture, rape, etc.). It could be assistance in, or contribution to, the execution of the common purpose.⁷⁵

The contribution to the commission of the crime does not need to be necessary or substantial, merely significant.

Thus, the participation of an accused in the JCE need not involve the physical commission of the material elements of a crime, as long as the accused contributes to the execution of the common objective involving the commission of crimes. Although the contribution need not be necessary or substantial, it should at least be a significant contribution to the crimes charged.⁷⁶

It is not required that the participation be a necessary precondition for the offence to be committed, or that the offence would not have occurred but for the accused's participation.⁷⁷ However, it must be shown that the accused's involvement in the crime formed a link in the chain of causation.⁷⁸

9.2.2.1.6.3. MENS REA

The three JCE categories have different *mens rea* requirements:

JCE I:⁷⁹ It must be shown that the accused and the other participants intended to perpetrate the crime or crimes that were part of the common plan. All of the participants or co-perpetrators must have shared the same criminal intent to commit these crimes. The accused must have intended to participate in a common plan aimed at the commission of the crime.

JCE II:⁸⁰ The accused must have personal knowledge of the system of ill-treatment and the intent to further this system of ill-treatment are required. The personal knowledge may be proven by direct evidence or by reasonable inference from the accused's position of authority.

⁷⁵ *Tadić*, AJ ¶ 227.

⁷⁶ *Brđanin*, AJ ¶ 430; See also Miroslav Kvočka, et al., Case No. IT-98-30/1-A, Appeal Judgment, 28 Feb. 2005, ¶ 97; Momčilo Krajišnik, Case No. IT-00-39-T, Trial Judgement, 27 Sept. 2006, ¶ 883.

⁷⁷ *Tadić*, AJ ¶ 199.

⁷⁸ *Blagojević and Jokić*, TJ ¶ 702.

⁷⁹ See, e.g., *Brđanin*, AJ ¶¶ 365, 430-1; *Vasiljević*, AJ ¶ 101.

⁸⁰ See, e.g., *Tadić*, AJ ¶¶ 202, 220, 228; *Ntakirutimana*, AJ ¶ 467.

JCE III:⁸¹ As with JCE I, it must be shown that the accused intended to perpetrate a crime within the common purpose. It is not required to establish that the accused had the intention to commit crimes committed in

An individual can be liable if he intended to further the common purpose of the JCE and the crime was a natural and foreseeable consequence of that common purpose.

furtherance of the JCE that were outside the common purpose. The accused can be liable under JCE III if he intended to further the common purpose of the JCE and the crime was a natural and foreseeable consequence of that common purpose. Thus, liability attaches if:

- (1) the commission of the crime or crimes outside of the common purpose was a *natural and foreseeable* consequence of the execution of the JCE;
- (2) the accused *willingly took that risk*.

The JCE *mens rea* test is whether the accused was subjectively reckless or had *dolus eventualis*. It is not a negligence standard.⁸²

JCE III does not require a “probability” that a crime would be committed. It does, however, require that the possibility of a crime being committed is substantial enough that it is foreseeable to the accused. Implausibly remote scenarios are not acceptable.⁸³

9.2.2.1.6.4. LIABILITY FOR CRIMES COMMITTED BY A PRINCIPAL PERPETRATOR WHO IS NOT A MEMBER OF THE JCE

Members of a JCE could be held liable for crimes committed by principal perpetrators who were not members of the enterprise if:

- (1) The crimes could be imputed to at least one member of the enterprise.
- (2) This member, when using the principal perpetrator(s), acted in accordance with the common plan.⁸⁴

Such a link is established by showing that the JCE member used the non-JCE member to commit a crime pursuant to the common criminal purpose of the JCE.⁸⁵

For example, if the commander of a group of soldiers was part of a JCE to kill members of one ethnicity in a village but ordered his soldiers (who were not part of the JCE) to do the killings, the killings could be imputed to the commander as well as the other members of the JCE could be guilty of the crime. If, in carrying out the killings, one of the soldiers also raped a woman, and it

⁸¹ See, e.g., *Stakić*, AJ ¶¶ 65, 87; *Brđanin*, AJ ¶ 411; *Tadić*, AJ ¶¶ 228, 204, 220; *Ntakirutimana*, AJ ¶ 467.

⁸² *Tadić*, AJ ¶ 220; *Stakić* AJ ¶¶ 99 – 103.

⁸³ Radovan Karadžić, Case No. IT-95-5/18-AR72.4, Appeals Chamber, Decision on Prosecution’s Motion Appealing Trial Chamber’s Decision on JCE III Foreseeability on JCE, 25 June 2009, ¶ 18.

⁸⁴ *Martić*, AJ ¶ 168.

⁸⁵ *Brđanin*, AJ ¶ 413.

was not a part the common JCE plan of but a foreseeable consequence of it, the rape could be imputed to the commander and all members of the JCE could be guilty of rape.

In order to convict a member of a JCE for crimes committed by non-JCE members, the commission of the crimes by the non-members must have formed part of a common criminal purpose (JCE I), or of an organised criminal system (JCE II), or were a natural and foreseeable consequence of a common criminal purpose (JCE III).⁸⁶

Establishing a link between the crime and a member of the JCE must be assessed on a case-by-case basis.⁸⁷ Indications of such a link include evidence that the JCE member explicitly or implicitly requested the non-JCE

The non-JCE member need not have shared the mens rea of the JCE member or have known of the JCE's existence.

member to commit such a crime, or instigated, ordered, encouraged or otherwise availed himself of the non-JCE member to commit the crime.⁸⁸ The non-JCE member need not have shared the *mens rea* of the JCE member or have known of the JCE's existence; what matters is whether the JCE member used the non-JCE member to commit the *actus reus* of the crime forming part of the common purpose.⁸⁹

9.2.2.1.6.5. EXPANDING OR NEW JCE

Joint criminal enterprises are not static. A new JCE can arise out of an already existing JCE.

Joint criminal enterprises are not static. A new JCE can arise out of an already existing JCE. If a common criminal purpose or plan is fundamentally altered, then there is a new common plan and therefore a new JCE. It is not merely a continuation of the old JCE.⁹⁰

An accused who may have agreed to the old JCE is not necessarily part of the new JCE and may not be guilty for crimes related to it.⁹¹ If the accused agrees to the new JCE, then he or she can be guilty of crimes related to the new JCE. This agreement can be explicit or can arise spontaneously and be implicitly inferred from circumstantial evidence.⁹²

⁸⁶ *Brđanin*, AJ ¶¶ 410-1, 418; *Martić*, AJ ¶ 171.

⁸⁷ *Brđanin*, AJ ¶ 413, *Martić*, AJ ¶ 169.

⁸⁸ *Krajišnik*, AJ ¶ 226.

⁸⁹ *Brđanin*, AJ ¶ 410.

⁹⁰ *Blagojević and Jokić*, TJ ¶ 700.

⁹¹ *Krajišnik*, TJ ¶ 1903.

⁹² *Krajišnik*, AJ ¶ 163.

9.2.2.1.6.6. GENERAL EXAMPLES

The table below provides examples of the three types of JCE.

Scenario	JCE Category
Six men surround a disarmed combatant and kick him to death. Accused tied combatant's hands.	JCE I – all co-perpetrators intend the killing of the combatant and significantly contribute to it.
Accused is logistics officer of prisoner-of-war camp in which prisoners are summarily executed.	JCE II – military or administrative unit collectively committing crimes in a concentration camp scenario.
Three drunken militia members rape a woman while the accused watches the door and keeps would-be rescuers at bay.	JCE I – all co-perpetrators intend the rape of the woman and significantly contribute to it.
The accused funds or illegally arms militia groups, which include persons convicted for serious crimes liberated for the military operation, in order to gain control of a territory. The militia then commit unlawful killings and plunder of property against the civilian population.	JCE III – the crimes were a natural and foreseeable consequence of the accused's participation.

9.2.2.1.6.7. DIFFERENCE BETWEEN JCE AND CONSPIRACY

The common law crime of conspiracy is an agreement to commit an offence; it does not require that any further action be taken in pursuance of that agreement.⁹³ As explained above, JCE requires that the accused takes action that contributes to the common criminal purpose.

In international law, the crime of conspiracy only exists in relation to genocide.

For example, in some jurisdictions, if a group of persons agreed to kill all members of one ethnicity in a particular village, just the act of agreeing could lead to a conviction for conspiracy. In international law, however, an accused would have to do more than simply agree—some kind of contribution towards the killings would have to be proven in order to convict under JCE.

In international law, the crime of conspiracy only exists in relation to genocide.

⁹³ See, e.g., Nikola Šainović et al., Case No. IT-05-87-T, Trial Judgement, 26 Feb. 2009, ¶ 23 (case formerly called Milutinović et al'').

9.2.3. ICC

Notes for trainers:

- Having considered the provisions of the ICTY and ICTR, the modes of liability before the ICC are now outlined in this section.
- It will be noted that no reference is made to the doctrine of joint criminal enterprise. However, co-perpetration, indirect co-perpetration and other forms of common purpose liability are incorporated as modes of liability. It would be of interest for participants to compare these ICC provisions with their national laws, which also include a reference to co-perpetration.

Rome Statute

Article 25(3): Individual criminal responsibility

In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

- a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
- b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
- c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
- d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
 - (ii) Be made in the knowledge of the intention of the group to commit the crime;
- e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
- f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

Rome Statute
Article 30: Mental element

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

The Rome Statute criminalises many of the same modes of liability as the ICTY. However, many modes of liability at the ICC are distinct from those discussed above. This section will highlight the most important differences. It is important to remember that the ICC is still developing jurisprudence on these issues.

9.2.3.1. DIRECT COMMISSION

Article 25(3)(a) criminalises three forms of "commission": direct perpetration, co-perpetration, and indirect perpetration. The jurisprudence of the ICC has also established indirect co-perpetration as a form of commission.⁹⁴

Direct perpetration is much the same at the ICC as at the ICTY and ICTR. At the ICC, an accused can be held directly liable for a crime if it is proven that he physically carried out all material elements of the offense with intent and knowledge.⁹⁵

9.2.3.2. INDIRECT COMMISSION

If the accused uses another person to physically carry out the crime and controls the will of the direct perpetrator, this is an indirect commission.

In this form of liability, the accused uses another person to physically carry out the crime. The accused controls the will of the direct perpetrator. This makes the accused an indirect perpetrator, even if the direct perpetrator

⁹⁴ Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, 29 Jan. 2007, ¶¶ 318-367.

⁹⁵ Rome Statute, Arts. 25(3)(a) and 30.

would not be criminally responsible for the crime committed.⁹⁶

For example, this would arise when a person persuades a mentally handicapped person or child to push a third person off of a bridge. This can also be applied to state leaders who control government organizations and use those organizations to commit crimes.

9.2.3.2.1. CONTROL OF AN ORGANISATION

Indirect co-perpetration can arise through an accused controlling an organization.

- The accused must be in control of a hierarchical organisation, and must exercise his or her authority and control over the organisation.
- The means for exercising control can include a capacity for hiring, training, disciplining, or providing resources to subordinates.
- This authority and control is evident by his subordinates' compliance with his or her orders.⁹⁷
- If the accused's orders are not carried out by one subordinate, another will do so almost automatically.⁹⁸

Moreover, "[t]he leader must use his control over the apparatus to execute crimes, which means that the leader, as the perpetrator behind the perpetrator, mobilises his authority and power within the organisation to secure compliance with his orders".⁹⁹

The accused must act with intent and knowledge, and must be aware that he or she controls the commission of crimes through another person. In other words, the accused must know that by not acting through a third person or through an organised and hierarchical apparatus of power, he or she can frustrate the commission of the crime.¹⁰⁰

9.2.3.3. CO-PERPETRATION

The Rome Statute of the ICC has departed from the joint criminal enterprise theory of liability, and instead established a form of joint liability called "co-perpetration" under Article 25(3)(a). In addition, it establishes a residual form of common purpose liability under Article 25(3)(d). The precise

The ICC does not recognise the JCE theory of liability and established a form of joint liability called "co-perpetration" under Article 25(3)(a).

⁹⁶ Germain Katanga et al., Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges, 30 Sept. 2008, ¶¶ 511-3.

⁹⁷ *Katanga et al.*, Decision on the Confirmation of Charges, ¶ 513.

⁹⁸ ROBERT CRYER, *ET AL.*, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 109, 366 (2010); *Katanga et al.*, Decision on the Confirmation of Charges, ¶¶ 500 – 10.

⁹⁹ *Katanga et al.*, Decision on the Confirmation of Charges, ¶ 514.

¹⁰⁰ In the event of commission through an organised hierarchical apparatus of power, the indirect perpetrator must further be aware of the existence of such an apparatus of power.

extent to which Article 25(3)(d) overlaps with the law on joint criminal enterprise is debatable.

To prove that a person committed a crime “jointly with another person”, under a co-perpetration mode of liability, the prosecutor must prove:

- (1) That two or more people shared a common plan.
- (2) Each of the co-perpetrators had been assigned an essential role in the execution of the plan.
- (3) The co-perpetrator acted with intent and knowledge.¹⁰¹
- (4) The co-perpetrators were aware that
 - a. implementing the common plan may or will¹⁰² result in the commission of crimes; and
 - b. that they were in a position to frustrate the commission of the crime by not fulfilling the role assigned to them.¹⁰³

9.2.3.3.1. COMMON PLAN

The plan may be legal or illegal. If the plan is legal, then its implementation must necessarily result in the commission of a crime.

The plan may be legal or may be to commit a crime. If the plan is legal, then its implementation must necessarily result in the commission of a crime. The plan can be explicit or implicit, inferred from the concerted action of the co-perpetrators.¹⁰⁴

For example, an accused forms a common plan to further the war efforts of a rebel group by recruiting young people into the rebel group and using them to actively participate in military operations and as bodyguards. Although this alleged common plan does not specifically target children under 15, it is clear that in the ordinary course of events, carrying out this plan would involve recruiting children less than 15 years of age, and their active involvement in hostilities, which is a crime under the Rome Statute.¹⁰⁵ Thus, even if this rebel group did not set out to recruit children under 15, their inclusion in the recruits of “young people” was a risk the rebel group willingly took.

¹⁰¹ Rome Statute, Art. 30; *Lubanga*, Decision on the Confirmation of Charges, ¶¶ 349-356.

¹⁰² Compare *Lubanga*, which applied a “may” standard with regards to whether the crimes occurred, with Jean Pierre Bemba Gombo, Case No. ICC-CPI-20090612-PR420, Pre-Trial Chamber II, 15 June 2009, ¶¶ 352 – 69 (holding that nothing less than virtual certainty would suffice and applying a “will” standard).

¹⁰³ *Lubanga*, Decision on the Confirmation of Charges, ¶¶ 361-367.

¹⁰⁴ *Ibid.* at ¶¶ 343-345.

¹⁰⁵ *Ibid.* at ¶ 377.

9.2.3.3.2. ESSENTIAL ROLE

The role is “essential” where, if the person it is assigned to does not perform it, the crime cannot be committed.¹⁰⁶

The contribution can be made before the plan is executed.¹⁰⁷ This may include designing an attack, supplying weapons or ammunition, exercising power to move recruited and trained troops to the fields, or coordinating or monitoring the activities of troops.¹⁰⁸

The role is “essential” where, if the person it is assigned to does not perform it, the crime cannot be committed.

For example, in the plan to recruit young people to further the war efforts of a rebel group, the leader of the group was assigned to coordinate the overall execution of the plan.¹⁰⁹ Specific tasks could include maintaining contact with others who participated in the plan, inspecting military training camps, encouraging new recruits—including those under age 15—and preparing them for war, or providing financial resources.

9.2.3.3.3. COMMON PLAN RESULTING IN COMMISSION OF CRIMES

The accused must be aware that by carrying out the common plan, crimes would be committed in the ordinary course of events.¹¹⁰ A pre-trial chamber at the ICC held:

Co-perpetration of a crime requires that [the] suspects: (a) are 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 are aware that the realisation of the objective elements will be a consequence of their acts in the ordinary course of events.¹¹¹

9.2.3.3.4. INDIRECT CO-PERPETRATION

Indirect co-perpetration is a form of co-perpetration where the essential contribution assigned to a co-perpetrator is carried out by another person who does not share the common plan or a hierarchical organization. This mode of liability encompasses all of the elements of co-perpetration and indirect commission, as described above.

¹⁰⁶ *Ibid.* at ¶¶ 346-348.

¹⁰⁷ *Ibid.* at ¶¶ 347-8.

¹⁰⁸ *Katanga et al.*, Decision on the Confirmation of Charges, ¶ 526.

¹⁰⁹ *Lubanga*, Decision on the Confirmation of Charges, ¶ 383.

¹¹⁰ *Katanga et al.*, Decision on the Confirmation of Charges, ¶ 533.

¹¹¹ *Ibid.* at ¶ 533.

9.2.3.4. AIDING AND ABETTING

The principle of aiding and abetting at the ICC is slightly different from how it is applied at the ICTY and ICTR.

The principle of aiding and abetting at the ICC is slightly different from how it is applied at the ICTY and ICTR. The Rome Statute of the ICC criminalises anyone who “for the purpose of facilitating the commission of such a crime,

aids, abets, or otherwise assists in its commission or its attempted commission, including providing the means for its commission”.¹¹² However, unlike at the ICTY and ICTR, there is no express requirement that the accused provide a substantial contribution to the commission of the crime.

The *mens rea* is also different. Under the Rome Statute, it must be established that the accused acts with intent and knows and desires that his or her conduct will facilitate and assist the commission of the crime.¹¹³ This is a higher standard than the “knowledge” required by the ICTY and ICTR.¹¹⁴

9.2.3.5. CONTRIBUTION TO GROUP CRIMES IN ANY OTHER WAY

Article 25(3)(d) also criminalises contributing to the commission or attempted commission of a crime committed by a group of persons acting with the same common purpose. This is different from co-perpetration. The following elements must be proven:

- (1) There is a common plan between two or more persons that amounts to or involves the commission of crimes. It is not clear if the accused must share the common plan of the group. Under Article 25(3)(d)(ii) it is probably not required that the accused share the common plan.
- (2) The accused provides a contribution to the commission of the crime by the group. It is not necessary that the contribution be essential for the commission of the crimes.¹¹⁵
- (3) The contribution must be
 - a. intentional; and
 - b. be made either
 - (i) with the aim of furthering the criminal activity or criminal purpose of the group, or
 - (ii) in the knowledge of the intention of the group to commit the crime.
 - (iii)

¹¹² Rome Statute, Art. 25(3)(c).

¹¹³ Albin Eser *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 801 (Cassese *et al.* 2002); Kai Ambos *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS NOTES, ARTICLE BY ARTICLE 483 (Otto Triffterer ed., 1999). It may be argued that the aider and abettor must not share the criminal intent of the principal perpetrator. Krstić, AJ ¶¶. 140-142.

¹¹⁴ CRYER, *supra* note 99, at 377.

¹¹⁵ Eser, *supra* note 114, at 802-803.

9.2.3.6. ATTEMPT AND ABANDONMENT

The Rome Statute does not include a provision with regards to planning or preparing like the ICTY and ICTR Statutes. However, Article 25(3)(f) deals with attempted and abandoned crimes. Liability can arise even if the crime was not completed, if the accused takes a substantial step towards committing a crime, but independent circumstances prevent the crime from occurring. The accused will not be criminally liable if he:

Liability can arise even if the crime was not completed, if the accused takes a substantial step towards committing a crime, but independent circumstances prevent the crime from occurring.

- abandons the crime or
- otherwise prevents the completion of the crime; and
- completely and voluntarily gives up the criminal purpose.

However, if they abandon their role in the crime, and it is completed by others, they may be liable for aiding and abetting or participating in a common criminal plan.¹¹⁶

¹¹⁶ CRYER, *supra* note 99, at 383.

9.3. REGIONAL LAW AND JURISPRUDENCE

Notes for trainers:

- The Module now shifts to focus on the national laws of BiH, Croatia and Serbia. However, it is not recommended to discuss the regional sections in isolation while training this Module. For that reason, cross references have been included in the international section to the main regional laws and developments. The sections that follow provide a basis for more in-depth discussion about the national laws with practitioners who will be implementing them in their domestic courts.
- As the SFRY Criminal Code is still relevant to modes of liability, it is important to start with the provisions in this code and for participants to discuss the relevance and applicability of these provisions.
- Trainers should bear in mind that Module 5 provides an in-depth overview of the way in which international law is incorporated within the national laws. For this reason, such issues are not dealt with in detail in this section of this Module, and it would be most helpful to have trained Module 5 in advance of modules that deal with substantive crimes and modes of liability.
- After the section on the SFRY Criminal Code, the Module deals with the laws applicable in BiH, Croatia and Serbia in separate sections so that participants from any of these countries need only focus on their jurisdiction. Where available, the most relevant jurisprudence has also been cited. Participants should be encouraged to use their own cases to discuss the application of the laws and procedures being taught.
- **Tip to trainers:** One effective method to engage the participants is to ask them to analyse one of the most important cases that has occurred in their domestic jurisdiction. Some cases have been cited below, but others may be raised by the participants themselves or provided by the trainers.

9.4. SFRY

When trying war crimes cases arising from the conflicts in the former Yugoslavia, the entity level courts in BiH apply the SFRY Criminal Code as the law applicable at the time of the commission of the crimes and as the law considered to be more favourable to the accused. Although the Court of BiH generally applies the BiH Criminal Code, it may also apply the SFRY Criminal Code to cases involving these crimes if the SFRY Criminal Code is more lenient to the accused.

Courts in Croatia apply the OKZ RH to the crimes arising from the conflict in the former Yugoslavia, which incorporates the modes of liability as set out in the SFRY Criminal Code, as the law applicable at the time of the commission of the crimes arising out of the conflicts in the former Yugoslavia.

Courts in Serbia apply either the SFRY Criminal Code or the FRY Criminal Code (which incorporates the modes of liability in the SFRY Criminal Code) as *tempore criminis* laws to crimes arising from the conflicts in the former Yugoslavia.

For more on this, see Module 5.

It is therefore necessary to list the modes of liability as set out by the SFRY Criminal Code.

9.4.1. OVERVIEW

There are general modes of liability included in the SFRY Criminal Code¹¹⁷ that apply to all crimes, including:

- Perpetration / Co-perpetration (Article 22);
- Incitement (Article 23); and
- Accessory liability or aiding and abetting (Article 24).

There are also modes of liability included in the chapter of SFRY Criminal Code on international crimes. Chapter XVI of the SFRY Criminal Code sets out the modes of liability for criminal offences against humanity and international law, including:

- Perpetrating/Co-perpetrating (all articles in Chapter XVI);
- Ordering (Articles 141 – 144; 146(3); 147; 150(a));
- Instigating (Article 145(4)); and
- Organising a group for the perpetration of crimes (Article 145).¹¹⁸

¹¹⁷ SFRY Criminal Code, Official Gazette of the SFRY No. 44/76, 36/77, 34/84, 74/87, 57/89, 3/90, 38/90.

¹¹⁸ Note that this is both a crime and a mode of liability. See, e.g., . See, e.g., Komentar Krivičnog/kaznenog zakona Bosne i Hercegovine, Savjet/Vijeće Evrope / Evropska komisija, 2005, str. 584 (Commentary of the BiH Criminal Code, Council of Europe / European Commission, 2005, p. 584).

Each article pertaining to a specific criminal act also sets out the applicable modes of liability for that crime.

The different modes of liability, and which crimes they apply to, are discussed below.

9.4.1.1. INSTIGATING

Instigating as a mode of liability was included in Article 145(4) of the SFRY Criminal Code for:

- Genocide (Article 141);
- War crimes against civilians (Article 142);
- War crimes against the wounded and sick (Article 143); and
- War crimes against prisoners of war (Article 144).

9.4.1.2. ORDERING

Ordering as a mode of liability was included in the SFRY Criminal Code for:

- Genocide (Article 141);
- War crimes against civilians (Article 142);
- War crimes against the wounded and sick (Article 143);
- War crimes against prisoners of war (Article 144);
- Ordering that there should be no survivors among enemy soldiers (Article 146(3));
- Marauding (Article 147); and
- Unjustified delay of repatriation of the prisoners of war (Article 150(a)).

9.4.1.3. INCITEMENT

Criminal liability for incitement was set out in Article 23 of the SFRY Criminal Code:

SFRY Criminal Code

Article 23

- (1) Whoever intentionally incites another to commit a criminal act shall be punished as if he himself has committed it.
- (2) Whoever intentionally incites another to commit a criminal act for which five years imprisonment or a more severe punishment is laid down by statute, and the act is never even attempted, shall be punished in accordance with the provisions applicable to attempt.

9.4.1.4. ORGANIZING A GROUP

Article 145 of the SFRY Criminal Code included “organizing a group for the purpose of committing genocide, war crimes against civilians, war crimes against wounded and sick and war crimes against prisoners of war”, as well as becoming a member of such a group, as modes of liability characterised as a separate criminal act.

9.4.1.5. PERPETRATION / CO-PERPETRATION

Perpetration as a mode of liability for the criminal acts punishable under Chapter XVI of the SFRY Criminal Code was included in every Article in the Chapter.

Co-perpetration was set out in Article 22 of the SFRY Criminal Code:

If several persons jointly commit a criminal act by participating in the act of commission or in some other way, each of them shall be punished as prescribed for the act.¹¹⁹

9.4.1.6. ACCESSORY / AIDING AND ABETTING

Aiding and abetting as a mode of liability was set out in Article 24 of the SFRY Criminal Code:

SFRY Criminal Code Article 24

- (1) Whoever intentionally aids another in the commission of a criminal act shall be punished as if he himself had committed it, but his punishment may also be reduced.
- (2) The following, in particular, shall be considered as aiding: giving of instructions or advice about how to commit a criminal act, supplying the tools and resources for the crime, removing obstacles to the commission of a crime, as well as promising, prior to the commission of the act, to conceal the existence of the criminal act, to hide the offender, the means to commit the crime, its traces, or goods gained acquired by the commission of a criminal act.

¹¹⁹ SFRY CC, Art. 22.

9.5. BIH

Notes for trainers:

- This section focuses on BiH law. Participants must appreciate the difference in the laws applied by the Court of BiH as opposed to those applied in the BiH entity level courts.
- The modes of liability applied by the different courts in BiH are set out in this section so that participants can discuss their elements and application in practice.
- In addition, the relevant case law, as far as it is known, is highlighted. Participants should be encouraged to discuss the decisions taken in these cases and whether they will be followed in future cases.
- Participants could be encouraged to describe the difference between being a co-perpetrator and an accessory.
- Participants could also discuss the application of their national laws and case law to the facts of the case study. They could be asked to determine whether the accused in the case study could be successfully prosecuted for any of the modes of liability applicable in their national jurisdictions.
- It will be useful for participants to compare the law and jurisprudence of BiH with the jurisprudence of the ICTY and the provisions in the ICC Rome Statute, especially regarding JCE and co-perpetration.

The Court of BiH generally applies the BiH Criminal Code of 2003 when trying crimes against humanity, war crimes and genocide arising from conflicts in the former Yugoslavia. The BiH entity level courts generally apply the SFRY Criminal Code when trying war crimes cases in respect to these conflicts. See Module 5 for more on the application of the law that is more favourable to the accused.

See section 9.4 above for more discussion on the SFRY Criminal Code modes of liability.

9.5.1. OVERVIEW

The BiH Criminal Code¹²⁰ sets out modes of liability applicable to all the crimes listed in the Code. These are not discussed in detail here, but include:

- Perpetration/Co-perpetration (Article 29);
- Incitement (Article 30); and

¹²⁰ BiH Criminal Code, BiH Official Gazette No. 03/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 08/10, consolidated version, *available at* www.sudbih.gov.ba.

- Accessory liability (Article 31).

Chapter XVII of the BiH Criminal Code deals with criminal offences against humanity and values protected by international law. Each article pertaining to a specific crime also includes the modes of liability applicable for that crime, in addition to the general modes of liability discussed above.

Article 180 also provides for individual and superior modes of liability, applicable to many atrocity crimes included in the BiH Criminal Code.¹²¹ Article 180(1) provides for the following modes of liability:

- Planning;
- Instigating;
- Ordering;
- Organising a group for commission of crimes;¹²²
- Perpetration / Co-perpetration; and
- Aiding and abetting.

Article 180 of the BiH Criminal Code:

- (1) A person who planned, ordered, perpetrated or otherwise aided and abetted in the planning, preparation or execution of a criminal offence referred to in Article 171 (Genocide), 172 (Crimes against Humanity), 173 (War Crimes against Civilians), 174 (War Crimes against the Wounded and Sick), 175 (War Crimes against Prisoners of War), 177 (Unlawful Killing or Wounding of the Enemy), 178 (Marauding the Killed and Wounded at the Battlefield) and 179 (Violating the Laws and Practices of Warfare) of this Code, shall be guilty of the criminal offence. The official position of any individual, whether as Head of State or Government or as a responsible Government official person, shall not relieve such person of culpability nor mitigate punishment.
- (2) The fact that any of the criminal offences referred to in Article 171 through 175 and Article 177 through 179 of this Code was perpetrated by a subordinate does not relieve his superior of culpability if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
- (3) The fact that a person acted pursuant to an order of a Government or of a superior shall not relieve him of culpability, but may be considered in mitigation of punishment if the court determines that justice so requires.

¹²¹ BiH CC, Art. 180 applies to Art. 171 (Genocide), 172 (Crimes against Humanity), 173 (War Crimes against Civilians), 174 (War Crimes against the Wounded and Sick), 175 (War Crimes against Prisoners of War), 177 (Unlawful Killing or Wounding of the Enemy), 178 (Marauding the Killed and Wounded at the Battlefield) and 179 (Violating the Laws and Practices of Warfare).

¹²² Note that this is both a crime and a mode of liability. See, e.g., Commentary of the BiH Criminal Code, p. 584.

The modes of liability included in Article 180 generally correspond with the provisions of the BiH Criminal Code dealing with co-perpetration, accessory and incitement for all crimes (Articles 29, 30 and 31, respectively). However, the legislators intended Article 180 to broaden the possible modes of liability for atrocity crimes and were guided by the principles of criminal liability in international criminal law and the ICTY Statute provisions.¹²³ Article 180(1) is almost identical to Article 7(1) of the ICTY Statute.¹²⁴

Article 180(1) of the BiH Criminal Code is almost identical to Article 7(1) of the ICTY Statute.

The acts listed in Article 180(1) are sometimes hard to differentiate, as perpetrators usually undertake several mutually overlapping actions when committing a crime.¹²⁵ Some of these acts create or affirm decisions of other persons to commit a criminal act (e.g. instigation), while others are acts

preceding the perpetration of a criminal act (e.g. planning and aiding and abetting).¹²⁶ It is therefore important to understand the differences between these modes of liability and how they can interact.

It is also important to remember that individual criminal liability for the above-mentioned conduct under Article 180 is only applicable for crimes specifically enumerated in Chapter XVII of the BiH Criminal Code,¹²⁷ namely:

Individual criminal liability under Article 180 is only applicable for crimes enumerated in Chapter XVII of the BiH Criminal Code.

- Genocide (Article 171);
- Crimes against Humanity (Article 172);
- War Crimes against Civilians (Article 173);
- War Crimes against the Wounded and Sick (Article 174);
- War Crimes against Prisoners of War (Article 175);
- Unlawful Killing or Wounding of the Enemy (Article 177);
- Marauding the Killed and Wounded at the Battlefield (Article 178); and
- Violating the Laws and Practices of Warfare (Article 179).

Article 180(2) sets out provisions on superior responsibility. For more on this see Module 10.

¹²³ Commentary of the BiH Criminal Code, p. 594.

¹²⁴ *Ibid.*, p. 593.

¹²⁵ *Ibid.* at p. 594.

¹²⁶ *Ibid.*

¹²⁷ *Ibid.* at p. 595.

9.5.2. PLANNING

Planning includes mental consideration of the following:

- ideas for either individual or mass perpetration of crimes;
- the manner of and the means of perpetration;
- the roles of individual persons; and
- planning the time and place of the crime.¹²⁸

While planning is characterised by the prevalence of intellectual activities, preparing includes mostly manual or physical activities, such as the procurement of means or weapons for committing criminal acts.¹²⁹ Preparing actually represents one of the phases of planning a criminal act.¹³⁰

Criminal liability also extends to assisting (aiding and abetting) someone else in planning and preparing a crime (see below, section 9.5.7).¹³¹

9.5.3. INSTIGATING OR INCITING

Anyone who “calls on or instigates the perpetration” of genocide, crimes against humanity, or war crimes is liable for instigating.

Instigating an atrocity crime as a mode of liability is criminalised in Article 176(4) of the BiH Criminal Code (not Article 180). Anyone who “calls on or instigates the perpetration” of genocide, crimes against humanity, war crimes against civilians, war crimes against wounded and sick and war crimes

against prisoners of war (Articles 171 – 175 of the BiH Criminal Code) is liable for instigating.

This is closely related to inciting. Article 30(1) of the BiH Criminal Code criminalises incitement of crimes. It provides:

Whoever intentionally incites another to perpetrate a criminal offence, shall be punished as if he has perpetrated such offence.

Article 30(2) of the BiH Criminal Code criminalises incitement of a crime, even if the crime is never attempted (provided that it is a crime punishable by more than three or more years of imprisonment).

Article 30(3) of the BiH Criminal Code defines incitement as:

¹²⁸ *Ibid.* at p. 594.

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

The incitement to the commission of a criminal offence shall particularly mean the following: pleading, inducement or persuasion, demonstrating the benefits of the commission of a criminal offence, giving or promising gifts, misuse of subordination or dependency relations, leading or keeping a person in a state of actual or legal misconception.

9.5.4. ORDERING

Article 180 of the BiH Criminal Code also includes ordering or issuing an order to another to commit a criminal act.¹³²

Ordering as a mode of liability was also included in the following provisions:

- Genocide (Article 171);
- War crimes against civilians (Article 173);
- War crimes against wounded and sick (Article 174);
- War crimes against prisoners of war (Article 175);
- Ordering that there should be no survivors among enemy soldiers (Article 177(3));
- Marauding (Article 178);
- Ordering the violation of laws and practices of warfare (Article 179);
- Unjustified delay of repatriation of the prisoners of war (Article 182); and
- Ordering the use of chemical or biological weapons or some other means or method of combat prohibited by the rules of international law (Article 193a).

In the *Savić* case, the accused was found guilty under Article 181(1) of the BiH Criminal Code for ordering crimes. The trial panel held, in line with the ICTY jurisprudence, that:

- “Ordering” entailed a person in a position of authority using that position to convince another to commit an offence;¹³³ and
- It was not necessary that the order be issued in some special form.¹³⁴

The trial panel concluded:

In the present case, the accused did not personally order the residents of Dušće to go towards Višegrad, nor did he personally separate the Bosniac men from the column. [...] [However] bearing in mind that he was the Commander to the present soldiers, that it was he who was to be asked for everything, that at the particular time he was on the site, that a number of times while the column of civilians was moving he passed by the column which was heading towards

¹³² *Ibid.* at p. 595.

¹³³ Court of BiH, Momir Savić, Case No. X-KR-07/478, 1st Instance Verdict, 3 July 2009, p. 106 (p. 97 BCS) (relevant part upheld on appeal) referring to *Krstić*, TJ ¶ 601.

¹³⁴ *Savić*, 1st inst. p. 106 (p. 97 BCS).

Višegrad, the Panel finds that he had the necessary authority and the active control over his soldiers, so that the Panel finds that he was the only one who could give orders to his soldiers to take the described actions against civilians of Bosniac ethnicity.¹³⁵

The panel held that the accused's subjective intent need not be explicitly expressed, but could be derived from the circumstances.¹³⁶ In this case, the trial panel found that the accused must have acted with "the awareness of the substantial likelihood that a criminal act or mission would occur as a consequence of his conduct".¹³⁷

The accused's subjective intent need not be explicitly expressed, but can be derived from circumstances.

The trial panel held:

The accused was aware of the acts and he wanted their commission, which ensues from the fact that he, in his capacity as the Commander, was present on the site and coordinated the activities of his subordinates, thus contributing to the actions which they undertook.¹³⁸

These findings were upheld on appeal.¹³⁹ The appellate panel concurred with the trial panel's findings with regard to the position of the accused at the relevant time, noting that his position involved the power of decision-making and issuing orders and decisions. The appellate panel also agreed that the evidence demonstrated that the accused knew what was happening as well as that "he was in charge".¹⁴⁰

In the *Kurtović* case, both the trial and appellate panels concluded that the accused had issued orders with regard to the underlying crimes. In that case, witnesses testified that the accused had ordered members of the Civil Protection to take detainees to the front lines where they were forced to perform labour.¹⁴¹

¹³⁵ *Ibid.* at p. 107 (p. 98 BCS) (relevant part upheld on appeal) (emphasis in the original).

¹³⁶ *Ibid.* at p. 106 (p. 97 BCS) referring to *Čelebići*, TJ ¶ 328.

¹³⁷ *Ibid.* at p. 106 (p. 97 BCS) (relevant part upheld on appeal) referring to Miroslav Kvočka et al., Case No. IT-98-30/1-T, Trial Judgment, 2 Nov. 2001, ¶ 251.

¹³⁸ *Savić*, 1st inst. p. 107 (p. 98 BCS) (relevant part upheld on appeal).

¹³⁹ Court of BiH, Momir Savić, Case No. X-KR-07/478, Appeal Judgement, 19 Feb. 2010, ¶ 105.

¹⁴⁰ Court of BiH, Momir Savić, Case No. X-KR-07/478, 2nd Instance Verdict, 19 Feb. 2010, ¶ 106 (Note: while the English translation of the verdict states that "the Accused could and had to know", the BCS original of the verdict states that "the Accused knew").

¹⁴¹ Court of BiH, Zijad Kurtović, Case No. X-KRZ-06/299, 1st Instance Verdict, 30 April 2008, pp. 44-45 (pp. 43-44 BCS) (relevant part upheld on appeal); Court of BiH, Zijad Kurtović, Case No. X-KRZ-06/299, 2nd inst., 25 March 2009, ¶¶ 73-74.

9.5.5. ORGANIZING A GROUP

Article 176 of the BiH Criminal Code criminalises:

Article 176 of the BiH Criminal Code

- (i) organizing a group for purpose of committing
 - a. genocide,
 - b. crimes against humanity,
 - c. war crimes against civilians,
 - d. war crimes against the wounded and sick; and
 - e. war crimes against prisoners of war; and
- (ii) becoming a member of such a group.

9.5.6. PERPETRATION / CO-PERPETRATION

The actual perpetration of the criminal acts in Chapter XVII of the BiH Criminal Code was criminalised in every article of that chapter. The elements are therefore included in the articles individually, which are discussed in Module 6 (Genocide), Module 7 (Crimes against humanity) and Module 8 (War crimes).

Article 29 of the BiH Criminal Code provides that co-perpetration is also a mode of liability:

If several persons who, by participating in the perpetration of a criminal offence or by taking some other act by which a decisive contribution has been made to its perpetration, have jointly perpetrated a criminal offence, each shall be punished as prescribed for the criminal offence.

The elements of co-perpetration in Article 29 of the BiH Criminal Code are:

- (1) A plurality of persons
- (2) Participation in perpetration or
- (3) Providing a *decisive* contribution which is important and without which the criminal offence would not be committed or would not be committed in the planned way.
- (4) Consciously, willingly and jointly committing a criminal offence as his own (shared intent).

Co-perpetration is a form of perpetration where several persons, each of them fulfilling required elements for a perpetrator, *knowingly and wilfully* commit certain criminal acts.¹⁴²

Co-perpetration is a form of perpetration where several persons, each of them fulfilling required elements for a perpetrator, knowingly and wilfully commit certain criminal acts.

Contrary to an aider or an instigator, co-perpetrators do not participate in an act accomplished by another person. A co-perpetrator participates *in his own act*, while aiders and instigators participate in someone else's act.¹⁴³ Co-perpetrators each individually provide a contribution that is essential to the commission of the criminal act, and without which the criminal act would not have been realised or would not have been realised in the planned manner.¹⁴⁴

In defining "co-perpetration", the earlier SFRY jurisprudence often applied a theory of "work division", according to which co-perpetrators were those participants who, on the basis of an agreement on the commission of the act and division of tasks, accomplished their own part in the commission of the crime.¹⁴⁵ According to this theory, any contribution based on the agreement on the division of work, no matter how insignificant, would be sufficient for co-perpetration liability.¹⁴⁶ Based on this theory, in an earlier decision of the Supreme Court of Serbia, it was concluded that an accused that stood on guard was considered a co-perpetrator of the criminal act.¹⁴⁷

However, the BiH Criminal Code now accepts so-called theory of "control over the crime" (*Tatherrschaftslehre*), according to which co-perpetration represents the joint perpetration of a crime by several persons who contribute *in a decisive manner* to its commission.¹⁴⁸ The conduct of a co-perpetrator objectively needs to have an important and decisive role in the commission of the act, to the extent that the act cannot be committed without the conduct of other co-perpetrators. This creates a joint "authority" over the crime.¹⁴⁹

A co-perpetrator participates in his own act, while aiders and instigators participate in someone else's act.

The appellate panel of the Court of BiH in the *Andrun* case held that:

[C]o-perpetration represents a form of perpetration that exists when several persons, who satisfy all the conditions that are required for a perpetrator, consciously and willingly commit a criminal offence based on their joint decision in the manner that each of the co-perpetrators gives his contribution which is

¹⁴² Commentary of the BiH Criminal Code, p. 174 (emphasis added).

¹⁴³ *Ibid.* at p. 173 (emphasis added).

¹⁴⁴ *Ibid.* at p. 174.

¹⁴⁵ *Ibid.* at p. 178.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.* at p. 179.

¹⁴⁸ *Ibid.* at p. 178 (emphasis added).

¹⁴⁹ *Ibid.*

important and without which the criminal offence would not be committed or would not be committed in the planned way. Therefore, along the joint action of several persons in the perpetration of the criminal offence, it is necessary that they should be aware of the fact that the committed act represents a joint result of their actions.¹⁵⁰

The appellate panel concluded that the accused was liable as a co-perpetrator. Although it could not be established that the accused personally killed the victim:

[T]he Accused took part in Dizdar’s murder by taking him out, knowing at the same time that he would be killed. Andrun was also present when Dizdar was killed, so that he significantly contributed to the commission of the offence in the described manner.¹⁵¹

In the *Janković* case, the trial panel concluded that issuing an order that is complied with can constitute a decisive contribution. The trial panel held:

The apprehension and taking away of eight men from Brezine was executed by soldiers who were following [the] accused’s orders. By these actions, the accused made a decisive contribution as a co-perpetrator pursuant to Article 29 BiH Criminal Code, to the joint commission of the criminal offences of forcible transfer of population and imprisonment under Article 172(1) items d) and e) of BiH Criminal Code.¹⁵²

9.5.6.1. “DECISIVENESS” AND APPLICABILITY OF THE BIH CRIMINAL CODE OR THE SFRY CRIMINAL CODE

In the *Andrun* case, the appellate panel had to decide which law was more lenient to the accused, the BiH Criminal Code or the SFRY Criminal Code.¹⁵³ The panel distinguished the definitions of “co-perpetration” under the BiH Criminal Code and the SFRY Criminal Code.

The panel noted that the SFRY Criminal Code provided that “if several persons jointly commit a criminal act by participating in the act of commission or in some other way, each of them shall be

¹⁵⁰ Court of BiH, Nikola Andrun, Case No. X-KRŽ-05/42, 2nd Instance Verdict, 19 Aug. 2008, p. 25 (p. 42 BCS).

¹⁵¹ *Andrun*, 2nd inst., pp. 24, 34 (pp. 24, 35 BCS). Other examples of cases relating to Art. 29 include Court of BiH, Slavko Šakić, Case No. X-KR-0541-1, 1st Instance Verdict, 29 Oct. 2008, p. 13 *et seq* (p. 13 *et seq* BCS).

¹⁵² Court of BiH, Gojko Janković, Case No. X-KR-05/161, 1st Instance Verdict, 16 Feb. 2007, pp. 40, 49 (pp. 39, 48 BCS). The legal qualification of the offence was rejected by the appellate panel: the mode of liability was, however, upheld. See Court of BiH, Gojko Janković, Case No. X-KR-05/161, 2nd Instance Verdict, 23 Oct. 2007, pp. 14-15 (p. 14 BCS).

¹⁵³ See a discussion of this issue in Module 5.3.2.3.

punished as prescribed for the act”, and found that this definition meant that all the persons participating in the criminal act were to be punished by the same sentence.¹⁵⁴

The panel noted that the BiH Criminal Code provides a narrower definition because the participation is limited to “decisive” contributions to the commission of the crime.¹⁵⁵ This is harder to prove, while the SFRY Criminal Code required only a general contribution to the crime.¹⁵⁶ The panel concluded that in this respect the BiH Criminal Code was more lenient to the accused compared to the SFRY Criminal Code.¹⁵⁷

The BiH Criminal Code provides a narrower definition because the participation is limited to “decisive” contributions to the commission of the crime, which is harder to prove. The panel concluded that in this respect the BiH Criminal Code was more lenient to the accused than the SFRY Criminal Code.

As the BiH entity level courts apply the SFRY Criminal Code when trying war crimes cases stemming from the conflicts in the former Yugoslavia,¹⁵⁸ they do not require the contribution of a co-perpetrator to be “decisive” as this was not a requirement under the SFRY Criminal Code. For instance, in the *Vlahovljak et al.* case, the trial panel of the Cantonal Court in Mostar found the accused guilty as co-perpetrators, and stated that:

In [a] case when several persons act with intent (awareness of the conduct and the will to cause the consequence) in a joint act of commission (*e.g.*, by simultaneous firing at the vital parts of victim’s body) and their joint activity accomplishes the consequence of this criminal act – death of one or more civilians – all those persons are, in the sense of Article 22 of the adopted SFRY Criminal Code, considered co-perpetrators to the criminal act.¹⁵⁹

9.5.6.2. OMISSIONS ARE NOT “DECISIVE”

The Court of BiH trial panel in the *Todorović* case held that “passive” conduct could represent a “decisive” contribution.¹⁶⁰ This was overturned on appeal. The appellate panel held that under Article 29 of the BiH Criminal Code, a “decisive” contribution had been defined as a contribution “without which the offence would not be accomplished (at all or in a way as it is planned to be

¹⁵⁴ *Andrun*, 2nd inst., p. 42 BCS (Note: this part seems to be left out from the English version of the verdict, possibly due to a translation error).

¹⁵⁵ *Ibid.* (Note: this part seems to be left out from the English version of the, possibly due to a translation error).

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*

¹⁵⁸ For more on this see Module 5.

¹⁵⁹ Cantonal Court in Mostar, *Nihad Vlahovljak et al.*, Case No. 007-0-K-07-00 006, 1st Instance Verdict, 8 Aug. 2007, pp. 8-9 (upheld on appeal).

¹⁶⁰ Court of BiH, *Mirko Todorović et al.*, Case No. X-KRŽ-07/382, 2nd Instance Verdict, 23 Jan. 2009, ¶ 149 (appellate panel reference to the trial panel conclusion).

accomplished”).¹⁶¹ Analysing the provisions of Article 35 of the BiH Criminal Code (intent) and Article 31 of the BiH Criminal Code (accessory liability), the appellate panel concluded that:

[T]he trial panel erred in law in relying on what it considered the appellants’ failure to prevent the commission of the crimes to establish that the appellants decisively contributed to the perpetration of the crimes of imprisonment, torture and murder.¹⁶²

The appellate panel held that:

The Trial Panel established that the Appellants participated in the commission of the criminal offenses by guarding the captured civilians before and during the perpetration of the crimes. The Trial Panel did not establish that the Appellants’ omissions were culpable omissions that constituted the *actus reus* of the crimes. Accordingly, it is axiomatic that the decisiveness of the appellants’ contribution to the perpetration of those crimes can only be assessed with respect to the *affirmative culpable* acts. The Trial Panel’s reliance on the Appellants’ omissions, their failure to prevent the crimes, as establishing the decisiveness of their contribution was therefore an error of law”.¹⁶³

Accordingly, the appellate panel found the accused guilty as accessories to the crime and not as co-perpetrators.¹⁶⁴

9.5.6.3. NO NEED FOR THE EXISTENCE OF A PRIOR AGREEMENT

With regards to the existence of a prior agreement on the division of roles (see the discussion above on the theory of “work division”), it seems that even some of the BiH entity level courts, which apply the SFRY Criminal Code when trying war crimes cases, no longer require the existence of a prior agreement for the existence of co-perpetration. In one case before the Supreme Court of Republika Srpska, where the accused was found guilty as a co-perpetrator to a war crime, the Supreme Court held:

The Court did not accept the Prosecution claim that a prior agreement existed between the accused and the unknown uniformed persons [...]. In the end, the existence of a prior agreement [...] is not of significance for the existence of the act.¹⁶⁵

¹⁶¹ *Ibid.* at ¶ 152.

¹⁶² *Ibid.* at ¶ 155.

¹⁶³ *Ibid.* at ¶ 160 (emphasis added).

¹⁶⁴ *Ibid.* at ¶ 164.

¹⁶⁵ Supreme Court of Republika Srpska, Case No. 118-0-KZ-K-06-000-006, 22 Feb. 2007, p. 6. Note, however, that the Supreme Court held it was not of significance for the existence of the “act”, not “co-perpetration”; however, the conclusion that it was not of significance for “co-perpetration” arises from

However, the Supreme Court of Republika Srpska noted in another case that in this specific case the existence of such prior agreement followed from the evidence presented. The court held:

[E]very accused, within the framework of that agreement, undertook actions for the realization of the act, wanting the accomplishment of the act as his own and as a joint one. Therefore, they acted with direct intent and the impugned verdict correctly decided on the awareness and the will as components of their mental relation to the act as a whole, therefore in relation to the consequence as well.¹⁶⁶

9.5.6.4. NO NEED TO BE PRESENT DURING THE ACTUAL COMMISSION

In the *Lelek* case, the appellate panel held that it was not required that the accused be present during the actual commission of the criminal offence if his prior acts constituted a decisive contribution.

In this case, the panel found that the accused was not present in the room when the crimes occurred, but he was liable as a co-perpetrator by leading the group of perpetrators to the critical location and giving consent to carry out the criminal acts.¹⁶⁷

9.5.7. ACCESSORY / AIDING AND ABETTING

Article 31(2) of the BiH Criminal Code defines aiding and abetting the perpetration of a criminal offence as:

- giving advice or instructions as to how to perpetrate a criminal offence;
- supplying the perpetrator with tools for perpetrating the criminal offence;
- removing obstacles to the perpetration of criminal offence; and
- promising, prior to the perpetration of the criminal offence, to conceal the existence of the criminal offence by hiding the perpetrator, the tools used for perpetrating the criminal offence, traces of the criminal offence, or goods acquired by perpetration of the criminal offence.

9.5.7.1. ACTUS REUS

Relying on the ICTY *Aleksovski* judgement, the Commentary on the BiH Criminal Code describes aiding as:

- (1) undertaking activities representing
 - a. practical aid;

the fact that although the existence of a prior plan in this case was not proven, the accused was found guilty as a co-perpetrator.

¹⁶⁶ Supreme Court of Republika Srpska, Case No. 118-0-Kz-06-000-018, 18 April 2006, p. 5.

¹⁶⁷ Court of BiH, Željko Lelek, Case No. X-KRŽ-06/202, 2nd Instance Verdict, 12 Jan. 2009, ¶¶ 33, 95-96.

- b. encouragement; or
 - c. moral support
- (2) that have a substantial effect on perpetration of a criminal act
- (3) where the person providing the aid knows that his/her acts aided the main perpetrator in committing the criminal act.¹⁶⁸

In the *Maktouf* case, the accused was charged as an accessory under Article 31 of the BiH Criminal Code for taking hostages in violation of Article 173(1)(e). The appellate panel concluded that the accused was criminally responsible as an accessory because he supplied a perpetrator with tools for perpetrating the criminal offence and removed obstacles to the perpetration of the criminal offence by:

- obtaining a list of persons that he was supposed to take as hostages;
- knowingly and willingly using his knowledge of the place of residence of the persons on the list;
- driving his van to the building where the said persons lived; and
- after they were abducted and placed into the vehicle, driving the vehicle transporting them to Orasac camp.¹⁶⁹

The panel added that the accused ceased to be an accessory at the moment he drove the vehicle with the abducted civilians to the entry of the Orasac camp.¹⁷⁰

In the *Todorović* case, the accused was charged as an accessory under Article 31 in conjunction with Article 180(1) of the BiH Criminal Code. The appellate panel found that the appellants helped a group of soldiers perpetrate torture and murder by:

- participating in the capture of Bosniak civilians from an abandoned quarry; and
- helping “remove obstacles” for the principal perpetrators by escorting and guarding with automatic weapons the captured civilians before and while they were tortured and then murdered.¹⁷¹

In the *Janković* case, the trial panel found the accused guilty of aiding and abetting torture and rape pursuant to Article 180(1) BiH Criminal Code by:

- taking the victim, despite being fully aware that the victim was being taken away for the purpose of rape; and
- providing practical assistance to the rape by allowing the perpetrator access to a house under his effective control where the injured party was raped.¹⁷²

¹⁶⁸ Commentary of the BiH Criminal Code, pp. 594-595.

¹⁶⁹ Court of BiH, Abduladhim Maktouf, Case No. KPZ-32/05, 2nd Instance Verdict, 4 April 2006, p. 15 (p. 18 BCS).

¹⁷⁰ *Ibid.* at p. 16 (p. 19 BCS).

¹⁷¹ *Todorović et al.*, 2nd inst., ¶ 169.

In the *Pekez (son of Špiro)* case, the appellate panel found the accused guilty of aiding and abetting but not co-perpetration of the criminal offences.¹⁷³ The accused participated in the collection of the villagers, but not in their killing, since he withdrew himself after the first phase of the joint plan to kill the villagers.¹⁷⁴ However, because his activities did not cease until after the villagers were rounded up and brought to the execution site, the panel held that he aided the other perpetrators in the realization of the joint criminal plan to kill the villagers.¹⁷⁵

In *Bjelić*, the accused was charged as an accessory under Articles 180(1) and 31 of the BiH Criminal Code for violating the provisions of Article 175(a) and (b) (war crimes against prisoners of war). Accepting a plea agreement, the panel first noted, relying on the ICTY *Tadić* judgement, that all acts of assistance or acts that lend encouragement or support to the commission of the crime constitute sufficient participation to entail responsibility whenever the participation had a substantial effect on the commission of the crime.¹⁷⁶

The panel concluded that the accused was an accessory to the commission of the crimes, by:

- being present during the violence and being aware that it took place, but not opposing it in any way; and
- after the perpetrators committed violence against the prisoners, repairing all that they had previously destroyed and broken, bringing everything into the previous state of repair, instead of reporting the events to his superior.¹⁷⁷

The trial panel in *Bjelić* also held that it was not necessary to prove that a cause-and-effect relationship existed between the act of aiding and abetting and the commission of the crime. Rather it was sufficient to establish that the participation of the accused significantly facilitated the perpetration of the crime.¹⁷⁸

However, in the *Tanasković* case, the trial panel noted the existence of such a cause-and-effect relationship:

[I]t is clear that the relevant incident would not have happened had the accused not taken actions of ordering the witness to come with him and her apprehension to the site where the offence was committed. The causative-consequential connection between the actions of the accused and the consequence that resulted is clear. And, considering the event in the entirety, it

¹⁷² Court of BiH, Gojko Janković, Case No. X-KR-05/161, 1st Instance Verdict, 16 Feb. 2007, pp. 59, 61 (pp. 57, 59 BCS) (upheld on appeal).

¹⁷³ Court of BiH, Mirko Pekez et al., Case No. X-KRŽ-05/96-1, 2nd Instance Verdict, 5 May 2009, ¶ 111.

¹⁷⁴ *Ibid.* at ¶ 109-111.

¹⁷⁵ *Ibid.* at ¶ 109.

¹⁷⁶ Court of BiH, Veiz Bjelić, Case No. X-KR-07/430-1, 1st Instant Verdict, 28 March 2008, p. 17 (p. 17 BCS) referring to *Tadić*, TJ ¶ 689.

¹⁷⁷ *Bjelić*, 1st inst., p. 17 (p. 18 BCS).

¹⁷⁸ *Ibid.* at p. 17 (p. 17 BCS).

is obvious that the accused is indirectly responsible for the criminal offense of rape, as an accessory and not as an accomplice.¹⁷⁹

9.5.7.2. MENS REA

In the *Pekez (son of Špiro)* case, the appellate panel formulated the *mens rea* for accessory liability as:

- the accessory is aware that by his actions he aids the perpetrator to commit the offence; and
- the accessory is aware of the essential elements of the criminal offence.¹⁸⁰

9.5.7.2.1. ACCESSORY TO GENOCIDE: SPECIFIC INTENT

The trial panel in the *Stupar et al.* case found the accused guilty of genocide as co-perpetrators, as they:

- had knowledge of the genocidal plan to destroy in part or in whole the protected group of Bosniak men;
- participated in these killings with intent; and
- shared a genocidal intent.¹⁸¹

However, the appellate panel overturned this conviction and found the accused guilty as accessories, not co-perpetrators. The appellate panel held that, although the trial panel reasonably found that the accused possessed knowledge of the genocidal plan and intended to kill members of the protected group, the trial panel had erroneously found that the accused also acted with a specific intent to destroy in whole or in part the national, ethnic, racial or religious group of people.¹⁸² As the appellate panel found that specific intent was not proven beyond a reasonable doubt,¹⁸³ it concluded that the accused were guilty as accessories to genocide and not as co-perpetrators of genocide.¹⁸⁴ In doing so, the appellate panel noted that:

An accessory, as a form of complicity, represents the intentional support of a criminal offence committed by another person. That is, it includes actions that enable the perpetration of a criminal offence by another person. [...]

¹⁷⁹ Court of BiH, Nenad Tanasković, Case No. X-KR/06/165, 1st Instance Verdict, 24 Aug. 2007, p. 27 (p. 25 BCS).

¹⁸⁰ *Pekez et al.*, 2nd inst., ¶ 108; See also: Court of BiH, *Todorović et al.*, Case No. X-KRŽ-07/382, 2nd Instance Verdict, 23 Jan. 2009, ¶ 170-176.

¹⁸¹ Court of BiH, Milos Stupar et al., Case No. X-KRZ-05/24, 2nd Instance Verdict, 9 Sept. 2009, ¶¶ 531-535; For more on genocide and its *mens rea*, see Module 6.3.1.

¹⁸² *Ibid.* at ¶ 538.

¹⁸³ *Ibid.* at ¶ 562.

¹⁸⁴ *Ibid.* at ¶ 565.

If a person is only aware of the genocidal intent of the perpetrator, but the person did not share the intent, the person is an accessory to genocide.¹⁸⁵

The same conclusion was reached by the appellate panel in the *Mitrović* case. The appellate panel held that it was the specific intent that differentiated an accessory from a perpetrator of genocide: if the person whose actions contributed to the perpetration of genocide had the intent to bring about the destruction of a group, in whole or in part, that person was a perpetrator of genocide.¹⁸⁶ A person who did not share the intent to commit genocide, but who intentionally helped another to commit genocide, was an accessory to genocide.¹⁸⁷

9.5.8. JCE

Notes for trainers:

- The next section considers the manner in which the doctrine of joint criminal enterprise (JCE) has been applied by the Court of BiH. In particular the *Rašević et al.* case is discussed in detail. Participants should use this case to consider the way in which the Court of BiH has interpreted the doctrine of joint criminal enterprise.
- It is apparent that the ICTY's jurisprudence has been relied upon. Participants should debate whether this jurisprudence is binding on the national courts. Participants should be mindful of the principle of legality and whether the JCE doctrine was part of national law at the time of the commission of the offenses.
- Participants could also be encouraged to discuss the differences between JCE and co-perpetration as it may have been applied in this case or others they have encountered.
- This case also provides an opportunity for participants to look at the elements of JCE I and II.
- Although JCE III has not been charged before the Court of BiH, it is commonly used at the ICTY and participants should therefore consider how it could be relied upon in future cases in BiH.

9.5.8.1. JCE AND THE PRINCIPLE OF LEGALITY

The Court of BiH applies the doctrine of joint criminal enterprise under Article 180(1) much as it is applied by the ICTY under Article 7(1) of the ICTY Statute. The basis for this was explained in the *Rašević et al.* case.

¹⁸⁵ *Stupar et al.*, 2nd inst. of 9 Sept. 2009, ¶¶ 567, 570.

¹⁸⁶ Petar Mitrović, Case No. X-KR-05/24-1, 2nd Instance Verdict, 7 Sept. 2009, ¶ 260.

¹⁸⁷ *Ibid.* at ¶ 261.

The trial panel noted that Article 180(1) of the BiH Criminal Code was derived from and was identical to Article 7(1) of the ICTY Statute.¹⁸⁸ The panel also noted that Article 180(1) became part of the BiH Criminal Code after Article 7(1) had been enacted and interpreted by the ICTY to include, specifically, JCE as a mode of co-perpetration leading to personal criminal liability.¹⁸⁹

It is a well-established principle that when international law is incorporated into domestic law, domestic courts must consider the parent norms of international law and their interpretation by international courts.

Relying on international law authorities, the panel held that it is a well-established principle that when international law is incorporated into domestic law, domestic courts must consider the parent norms of international law and their interpretation by international courts.¹⁹⁰ The panel, therefore, concluded that in applying the term “perpetrated” in Article

180 of the BiH Criminal Code, it had to consider the definition of that term as it was understood when it was copied from international law into the BiH Criminal Code.¹⁹¹ The trial panel thus held that the term “perpetrated” from Article 180(1) specifically provides that:¹⁹²

- JCE is a form of co-perpetration that establishes personal criminal liability.
- “Perpetration” as it appears in Article 7(1) of the ICTY Statute and thus Article 180(1) of the BiH Criminal Code includes knowing participation in a joint criminal enterprise.
- The elements of JCE are established in customary international law and are discernable.

The elements of JCE are established in customary international law and are discernable.

The trial panel held that compliance with the principle of legality required proof that the accused incurred criminal liability under a principle of law:

- To which they were subject at the time, and
- That at the time of commission of the crimes, it was reasonably foreseeable that the accused would be criminally liable under that principle.¹⁹³

The trial panel’s holdings with respect to these elements are discussed below.

¹⁸⁸ Court of BiH, Mitar Rašević et al., Case No. X-KRZ- 06/275, 1st Instance Verdict, 28 Feb. 2008, p. 103 (p. 114 BCS) (upheld on appeal).

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.* at p. 103 (p. 113 BCS).

¹⁹¹ *Ibid.* at pp. 103-104 (pp. 113-114 BCS) (upheld on appeal); *See also* Court of BiH, Dušan Fuštar, X-KR06/2001-1, 1st Instance Verdict, 21 April 2008, p. 21 (p. 20 BCS) (final verdict).

¹⁹² *Rašević et al.*, 1st inst., p. 104 (pp. 114-115 BCS) (upheld on appeal).

¹⁹³ *Ibid.* at pp. 105-106 (pp. 116-117 BCS) (upheld on appeal).

2.1.1.1.2. THE ACCUSED WERE SUBJECT TO CUSTOMARY INTERNATIONAL LAW AT THE TIME THE CRIMES WERE COMMITTED

In line with the ICTY's *Kunarac* appeal judgement,¹⁹⁴ the trial panel in the *Rašević et al.* case held that customary international law was “an integral part of national law” accepted by “all national legal systems” long before 1992.¹⁹⁵

The trial panel in the Rašević et al. case held that customary international law was “an integral part of national law” accepted by “all national legal systems” long before 1992.

In addition, the former Yugoslavia and its successor states were parties to international humanitarian law treaties, including the Geneva Conventions of 1949 and both of Additional Protocols, and hence subject to the “Martens Clause” as it appeared in its various forms in these treaties and protocols.¹⁹⁶ The trial panel also noted that Article 210 of the Constitution of the SFRY provided for the direct application of treaty law:

Treaties shall be applied as of the date of their entry into force, unless otherwise determined by a ratification act or by a contract signed pursuant to the powers of an authorized body. *The courts shall directly apply the treaties that have been published.*¹⁹⁷

The trial panel found that the accused were expressly under the “authority of the principles of international law derived from established custom” at the time the offences were committed, and courts were under an obligation to “directly apply” that law.¹⁹⁸

The trial panel found that the accused were expressly under the “authority of the principles of international law derived from established custom” at the time the offences were committed, and courts were under an obligation to “directly apply” that law.

9.5.8.1.1. JCE WAS FORESEEABLE AT TIME THE CRIMES WERE COMMITTED

Regarding the foreseeability requirement, the Court of BiH found it relevant that there existed a “settled” body of case law which was public and accessible, through which the requirements of the law were made clear.¹⁹⁹ Where such a body of public and accessible case law existed, the

The trial panel established that liability under JCE was foreseeable.

accused were deemed to have sufficient notice that their activities were subject to criminal sanction so that they could conform their conduct

¹⁹⁴ Dragoljub Kunarac et al., Case No. IT-96-23, Appeal Judgment, 12 June 2002, ¶ 95.

¹⁹⁵ *Rašević et al.*, 1st inst., p. 106 (p. 118 BCS) (upheld on appeal).

¹⁹⁶ *Ibid.* See also, *Fužtar*, 1st inst., p. 21 (p. 20 BCS).

¹⁹⁷ *Rašević et al.*, 1st inst., p. 106 (pp. 116-117 BCS) (emphasis added).

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.* at p. 107 (p. 119 BCS) (upheld on appeal).

to the expectations of the law.²⁰⁰ In this case, the trial panel established that liability under JCE was foreseeable given that:²⁰¹

- The accused were professional prison administrators who had worked at the KP Dom (correctional facility) when it operated as a model penal institution.
- The accused were well aware of the point in April when it ceased to be such an institution and became a concentration camp.
- The notoriety which accompanied the Nazi concentration camp cases was well-known throughout all countries that fought in WWII.
- The fact that many of those persons responsible for maintaining the Nazi concentration camps were tried and punished for their role in maintaining the camp systems was well-known.
- The WWII cases were very publicly tried and reported, occurring in internationally overseen trials held in Germany in locations reasonably close to the former Yugoslavia.
- The case-law and conclusions of those tribunals were both public and accessible.

Moreover, the trial panel compared Article 26 of the SFRY Criminal Code to the elements of systemic JCE.²⁰² Article 26 of the SFRY Criminal Code reads:

Anybody creating or making use of an organization, gang, cabal, group or any other association for the purpose of committing criminal acts is criminally responsible for all criminal acts resulting from the criminal design of these associations and shall be punished as if he himself committed them, irrespective of whether and in what manner he himself directly participated in the commission of any of these acts.²⁰³

The Commentaries on the SFRY Criminal Code to this section recite that a perpetrator convicted under this provision:²⁰⁴

- Is responsible for the acts that are directly included in the plan of the criminal group as well as those acts that are the result of this plan if they are of such a nature that their perpetration is in line with the realization of the goals of this group;
- Is liable for the single criminal acts perpetrated, even if he did not take part in the perpetration at all;
- Will be sentenced in the same way as the perpetrator of the crime.

The Commentaries on the SFRY Criminal Code further describe the common criminal plan of the group as usually “unwritten” and discernable through inference.²⁰⁵

²⁰⁰ *Ibid.*

²⁰¹ *Ibid.*

²⁰² *Ibid.* at pp. 107-108 (pp. 119-120 BCS); *Fužtar*, 1st inst., p. 22 (p. 21 BCS).

²⁰³ *Rašević et al.*, 1st inst., p. 108 (pp. 119-120 BCS).

²⁰⁴ *Ibid.* at p. 108 (p. 120 BCS) (upheld on appeal) referring to the Commentary of the SFRY Criminal Code of 1978, pp. 143-144.

If the goals of the group are known, the general criminal plan of this group can be inferred from this [knowledge]. In this way it is possible to determine which acts are directly covered by the plan, [...] the acts that have to be perpetrated are usually not specified or individualized, the contents of the criminal plan is determined with regard to the general goal/aim of the group.

The trial panel in the *Rašević et al.* case took into account the similarities between the basic elements of the written domestic law applicable at the time and systemic JCE as it existed in international law at the time. The trial panel concluded that it was beyond doubt that the accused had sufficient notice that they risked being prosecuted under international humanitarian law for their participation in maintaining a system through which inmates of a camp were subjected to persecution.²⁰⁶

The accused appealed, arguing that JCE had no basis in international customary law and that it was incorporated in the case-law of the ICTY only after the charged offences had occurred.²⁰⁷

The appellate panel considered that “JCE was irrefutably an institution of customary international law that existed and was applied long before the accused committed the offence”.

The appellate panel upheld the conclusions of the trial panel in their entirety and held that the principle of legality was not violated by the trial panel.²⁰⁸ The appellate panel held that the customary status of Article 7 of the ICTY Statute was not an issue, as it had been confirmed in numerous war crimes trials, starting from the

WWII trials.²⁰⁹ The appellate panel considered that “JCE was irrefutably an institution of customary international law that existed and was applied long before the accused committed the offence”.²¹⁰

Furthermore, the appellate panel noted that the provisions of customary international law pertaining to JCE were binding on Bosnia and Herzegovina (and before that on the SFRY) due to the fact that both Constitutions stipulated a direct application of signed

The appellate panel noted that the provisions of customary international law pertaining to JCE were binding on Bosnia and Herzegovina (and before that on the SFRY).

²⁰⁵ *Rašević et al.*, 1st inst. p. 108 (p. 120 BCS) (upheld on appeal) referring to the Commentary of the SFRY Criminal Code of 1978.

²⁰⁶ *Rašević et al.*, 1st inst. p. 108 (p. 120 BCS), noting also that “In addition, Art. 145 (2) of the Criminal Code of the SFRY criminalised membership in a group organised for the commission of genocide and war crimes, as a separate specific crime, although not as a mode of liability”.

²⁰⁷ Court of BiH, Mitar Rašević et al., Case No. X-KRZ- 06/275, 2nd Instance Verdict, 6 Nov. 2008, p. 25 (p. 26 BCS).

²⁰⁸ *Rašević et al.*, 2nd inst., p. 26 (p. 27 BCS).

²⁰⁹ *Ibid.* at p. 25 (pp. 26-27 BCS).

²¹⁰ *Ibid.* at p. 26 (p. 27 BCS).

and ratified international treaties, including international humanitarian law treaties.²¹¹

9.5.8.2. CATEGORIES OF JCE

In the *Rašević et al.* case, the trial panel applied JCE as set out by the ICTY in the *Tadić* case.²¹² The trial panel noted that it was not bound by the decisions of the ICTY, but was persuaded by the characterisation of JCE by the international court, whereby its elements, *mens rea* and *actus reus*, properly reflected the state of customary international law as it existed in April 1992 and thereafter.²¹³

9.5.8.2.1. JCE I - BASIC

“Basic” JCE implies the existence of several elements. They include:²¹⁴

- (1) A plurality of persons;
- (2) The existence of a common plan or design which amounts to or involves the commission of a crime (there is no necessity for this plan or design to have been previously formulated or arranged)
- (3) *Actus reus*: participation of the accused in the common plan or design
 - a. by committing a crime listed under Article 180(1) or
 - b. by contributing to the execution of the common purpose in some other manner;
- (4) *Mens rea*:
 - a. awareness that their actions or omissions enable commission of the crime within that enterprise;
 - b. knowledge of the crime; and
 - c. conscious participation in the crime in a manner which significantly support or facilitates the commission of the crime concerned.

9.5.8.2.2. JCE II - SYSTEMIC

“Systemic” JCE requires the accused’s knowledge of an organised system of ill-treatment, as well as the accused’s intent to further this system.

“Systemic” JCE, established in the first instance verdict in the *Rašević et al.* case, is a variation of the basic form of JCE.²¹⁵ It requires the accused’s knowledge of an organised system of ill-treatment, as well as the accused’s intent to further this system.²¹⁶

²¹¹ *Ibid.*

²¹² *Rašević et al.*, 1st inst. pp. 111-112 (p. 124 BCS).

²¹³ *Ibid.* at pp. 111-112 (p. 125 BCS).

²¹⁴ *Rašević et al.*, 2nd inst., p. 26 (p. 28 BCS); *Pekez et al.*, 1st inst., pp. 31-32 (p. 29 BCS) (relevant part upheld in *Pekez*, 2nd Instance Verdict, 29 Sept. 2008, pp. 5-6 (p. 4 BCS)).

²¹⁵ *Rašević et al.*, 2nd inst., p. 26 (p. 28 BCS).

²¹⁶ *Ibid.*

9.5.8.2.2.1. SYSTEMIC JCE UNDER INTERNATIONAL CUSTOMARY LAW

As held by the trial panel in the *Rašević et al.* case, by 1950, there was a significant record both of state practice and articulated acceptance by states for the principle of systemic JCE and the elements it required. Under systemic JCE, persons who violate international humanitarian law by knowingly contributing to the maintenance of a system of ill-treatment (e.g. criminal mistreatment of inmates in concentration camps) can be charged, tried and punished as principals.²¹⁷ By 1992, the trial panel noted, systemic JCE had crystallised into a theory of liability recognised by customary international law.²¹⁸ The trial panel referred to various documented Nazi cases, including:²¹⁹

By 1950, there was a significant record both of state practice and articulated acceptance by states for the principle of systemic JCE and the elements it required.

- The trial of Josef Kramer and Forty-four others (“Belsen”), where thirty of the accused were found personally criminally liable for their commission of war crimes under a theory of culpability now called systemic JCE;
- The trial of Martin Gottfried Weiss and Thirty-nine others (“Dachau Concentration Camp”), where the court found that three elements needed to be established to incur personal criminal liability under this theory of perpetration, namely:
 - that there was in force at Dachau a system to ill-treat the prisoners and commit the crimes listed in the charges,
 - that each accused was aware of the system, and
 - that each accused, by his conduct [...] participated in enforcing this system);
- The trial of Hans Alfuldisch and Sixty others (“Mauthausen Concentration Camp”), where sixty-one accused were found personally criminally liable for their knowing participation in a system of mistreatment of the inmates.

The trial panel further referred to recognition of the customary status of JCE liability by the ICTY in the *Tadić* case.²²⁰

9.5.8.2.2.2. ELEMENTS OF SYSTEMIC JCE

The trial panel in the *Rašević et al.* case held that the elements of JCE, which were evident from customary international law, were easily identified.²²¹ The *actus reus* requires:²²²

- a plurality of persons;

²¹⁷ *Rašević et al.*, 1st inst., p. 109 (p. 122 BCS).

²¹⁸ *Ibid.*

²¹⁹ *Ibid.* at pp. 110-111 (pp. 122-123 BCS).

²²⁰ *Ibid.* at pp. 110-111 (pp. 123-124 BCS); *See also Fuštar*, 1st inst., pp. 20-21 (pp. 19-20 BCS).

²²¹ *Rašević et al.*, 1st inst., p. 112 (p. 126 BCS); *see also* Court of BiH, Željko Mejakić et al., Case No. X-KRŽ-06/200, 2nd inst., 16 Feb. 2009, ¶ 116.

²²² *Rašević et al.*, 1st inst., p. 112 (p. 126 BCS).

- a common purpose; and
- participation by the accused in contributing to that purpose.

In a systemic JCE, the common purpose is to commit one or more specific crimes and it is achieved by “an organized system set in place”.²²³ The participation necessary to contribute to the common purpose of the system need not be actual commission of the underlying crime itself, provided that the participation by the accused actively contributed to enforcing the system.²²⁴

In a systemic JCE, the common purpose is to commit one or more specific crimes and it is achieved by “an organized system set in place”.

The *mens rea* for systemic JCE is:²²⁵

- personal knowledge of the organised system set in place and its common criminal purpose; and
- the intention to further that particular system.

If the common criminal purpose involves commission of a crime that requires specific intent (e.g., persecution), then the participant must share that specific intent.²²⁶ However, shared intent, even specific intent, may be inferred.²²⁷

If the common criminal purpose involves commission of a crime that requires specific intent, then the participant must share that specific intent.

9.5.8.2.2.2.1. PLURALITY OF PERSONS

In the *Rašević et al.* case, the trial panel held that in order to have a joint criminal enterprise, it must involve more than one person.²²⁸ However, it is not necessary to have any particular form of organization, nor is it necessary to limit the enterprise to membership in one or any organization.²²⁹ Several persons from several different affiliations can come together to form the criminal system.²³⁰

The trial panel noted that the principle perpetrators (*i.e.* those who actually commit the underlying criminal offences) need to be identified as precisely as possible. However, the panel held that where all co-perpetrators are not tried in the same proceeding, it would be unrealistic and unfair to attempt to identify each individual involved in the system.²³¹

²²³ *Ibid.*

²²⁴ *Ibid.*

²²⁵ *Ibid.*, referring to *Tadić*, AJ ¶ 203, 220.

²²⁶ *Ibid.* at pp. 112-113 (p. 126 BCS), referring to *Kvočka et al.*, TJ ¶ 288.

²²⁷ *Rašević et al.*, 1st inst., p. 113 (p. 126 BCS), referring to *Kvočka et al.*, TJ ¶ 288.

²²⁸ *Ibid.* at p. 125 (p. 141 BCS).

²²⁹ *Ibid.*

²³⁰ *Ibid.*

²³¹ *Ibid.*, referring to *Krnjelac*, AJ ¶ 116.

Systemic JCE must involve a plurality of persons, each of whom furthered the system and thereby the commission of the crimes, even if they did not directly participate in the actus reus of the individual crimes.

Systemic JCE must involve a plurality of persons, each of whom furthered the system and thereby the commission of the crimes, even if they did not directly participate in the *actus reus* of the individual crimes.²³² It is necessary that the JCE, as defined, could not have functioned without the “others” who made up the plurality of perpetrators.²³³

It is not a defence that the accused did not personally conduct all of the activities and commit all of the crimes necessary to carry out the common purpose of the JCE.²³⁴ It is sufficient that the roles they did play contributed to the *actus reus* of some of the crimes and contributed to the overall criminal purpose of the JCE.²³⁵

9.5.8.2.2.2. COMMON CRIMINAL PURPOSE

In a systemic JCE, the common purpose is to commit one or more specific crimes to be achieved by “an organized system set in place”. The system itself must have as its purpose the “commission of crimes which [...] could be considered as common to all offenders, beyond all reasonable doubt”.²³⁶

There is no need to prove an express agreement about the crimes to be committed by the system, and the common criminal purpose might develop with or without formal planning.²³⁷ However, in the absence of evidence of a formal agreement or plan, there must be sufficient evidence to convince a trier of fact beyond a reasonable doubt that a common criminal purpose exists.²³⁸ That conclusion may be based on evidence such as:

There is no need to prove an express agreement about the crimes to be committed by the system, and the common criminal purpose might develop with or without formal planning.

- the participants acting in unison or in tandem;
- the repetitive nature of crimes of a similar character; and
- the observable commission of the crimes.²³⁹

²³² *Rašević et al.*, 1st inst., p. 125 (p. 142 BCS)

²³³ *Ibid.* at p. 126 (p. 142 BCS).

²³⁴ *Ibid.*

²³⁵ *Ibid.*

²³⁶ Court of BiH, *Rašević et al.*, 1st inst., p. 126 (p. 143 BCS) (upheld on appeal) referring to Krnojelac AJ ¶ 120.

²³⁷ *Rašević et al.*, 1st inst., p. 126 (p. 143 BCS), referring to *Kvočka et al.*, AJ ¶ 117.

²³⁸ *Rašević et al.*, 1st inst., p. 126 (p. 143 BCS) (noting that the prosecution of the Nazi War crimes cases did not face this dilemma, in that the criminal plan to exterminate captured persons was part of a written policy, e.g., *US v. Otto Ohlenforf et al.* (“Einsatzgruppen”), Green Series, Vol. IV).

²³⁹ *Rašević et al.*, 1st inst., p. 126 (p. 143 BCS).

The coordinated commission of repeated crimes by a multiplicity of actors throughout an extensive period of time can be sufficient evidence to establish the existence of a systemic JCE to commit those crimes.²⁴⁰

In the *Rašević et al.* case, the trial panel noted the evidence (direct or circumstantial)²⁴¹ of a common purpose:

[...] the crimes were themselves systematically and thematically linked, emphasizing again the centrality of the KP Dom. The pattern of crimes originating at the KP Dom reflect an organized and systematic progression, from imprisonment, to the creation of inhumane conditions, to beatings and torture in the course of interrogations, to final dispositions through murders, enforced disappearances, forcible transfers and deportations. The interrogations that began immediately after the KP Dom opened as a detention camp reveal the common purpose behind these crimes; the beatings and torture of detainees during interrogations directly served this initial task; the crimes that followed fulfilled the common purpose – all of which served to complete the ethnic cleansing policy that directed the widespread and systematic attack against the non-Serb civilian population of Foča.²⁴²

9.5.8.2.2.2.3. PARTICIPATION

In the *Rašević et al.* case, the trial panel, relying on ICTY jurisprudence from *Kvočka*, held that in order to incur liability under systemic JCE, the accused had to make a contribution to the criminal system, although the accused was not required to actually take part in the *actus reus* of the underlying criminal offences.²⁴³ The trial panel further held it was not necessary that an accused was present at the time the crimes were committed.²⁴⁴ However, liability does not extend to crimes committed in the system which occurred either before the accused joined the systemic JCE or after he separated himself from it.²⁴⁵

Evidentiary factors which bear on whether an accused has made a contribution to the common criminal purpose include:²⁴⁶

- the *de facto* or *de jure* position of the accused within the system;²⁴⁷
- the size of the criminal enterprise, the amount of time present at the site of the system;

²⁴⁰ *Ibid.*

²⁴¹ *Ibid.*

²⁴² *Ibid.* at p. 127 (p. 144 BCS).

²⁴³ *Ibid.* at p. 130 (p. 148 BCS), referring to *Kvočka*, AJ ¶ 112 and *Krstić*, TJ ¶ 644; *Mejakić et al.*, 2nd inst., ¶ 116.

²⁴⁴ *Rašević et al.*, 1st inst., p. 130 (p. 148 BCS), referring to *Kvočka*, AJ ¶ 112 and *Krnojelac*, AJ ¶ 81.

²⁴⁵ *Rašević et al.*, 1st inst., p. 130 (p. 148 BCS), referring to *Kvočka*, TJ ¶ 349.

²⁴⁶ *Rašević et al.*, 1st inst., p. 130 (p. 148 BCS); see also *Mejakić et al.*, 2nd inst., ¶ 119.

²⁴⁷ *Rašević et al.*, 1st inst., p. 130 (p. 148 BCS), referring to *Kvočka*, AJ ¶ 101.

- the efforts made to prevent criminal activity or to impede the efficient functioning of the system;
- the intensity of the criminal activity;
- the type of activity he actually performed; and
- the manner in which he performed his functions within the system.²⁴⁸

The prosecutor in *Rašević et al.* had charged co-perpetration under Article 180(1) in conjunction with Article 29, the latter requiring “decisive” contribution. For that reason, the trial panel held that it was necessary to prove more than the customary international law standard with regard to “some other act” contributing to the enterprise (*i.e.* no requirement that the act needed to be “substantial or significant”).²⁴⁹

The appellate panel rejected the trial panel’s opinion on this matter (*i.e.* that the existence of a systemic JCE required a substantial contribution on the part of the perpetrator) because Article

The importance of participation of the accused was necessary and relevant to establish that the accused shared the intent to achieve a common criminal goal.

29 of the BiH Criminal Code (co-perpetration) would have been applied.²⁵⁰ The appellate panel noted, however, that the importance of participation of the accused was necessary and relevant to establish that the accused shared the intent to achieve a common criminal goal.²⁵¹

The appellate panel further explained that the distinction between co-perpetration and participation in a JCE was that a larger degree of contribution (decisive contribution) was required for co-perpetration.²⁵² Further, an aider only has knowledge of the intent of the principal offender whereas a participant in a systemic JCE shares the intent of the principal offender.²⁵³ Therefore, if an accused is aware of a system of ill-treatment and agrees to it, it may be reasonably inferred that he has intent to contribute to that system and accordingly be regarded as a co-perpetrator in a JCE rather than just an aider.²⁵⁴

The distinction between co-perpetration and participation in a JCE was that a larger degree of contribution (decisive contribution) was required for co-perpetration.

Aiders and abettors who aid or abet JCE as accessories, can become co-perpetrators—even if they did not directly commit a crime—if their participation lasted for an extensive period and advanced the goal of the JCE.²⁵⁵

A few examples of court’s considerations with regard to participation are discussed below.

²⁴⁸ *Rašević et al.*, 1st inst., p. 130 (p. 148 BCS), referring to *Kvočka*, TJ ¶ 311.

²⁴⁹ *Rašević et al.*, 1st inst., p. 161 (p. 186 BCS).

²⁵⁰ *Rašević et al.*, 2nd inst., p. 27 (p. 28 BCS).

²⁵¹ *Ibid.*

²⁵² *Ibid.*

²⁵³ *Ibid.*

²⁵⁴ *Ibid.* at p. 27 (p. 29 BCS), referring to *Krnojelac*, AJ ¶ 74 and *Brđanin*, TJ ¶ 274.

²⁵⁵ *Rašević et al.*, 2nd inst., p. 27 (p. 28 BCS).

In the *Rašević et al.* case, the trial panel took into consideration, *inter alia*, the exercise of *de facto* authority when considering the accused's participation in a JCE.²⁵⁶

The trial panel took into consideration, inter alia, the exercise of de facto authority when considering the accused's participation in a JCE.

In the *Mejakić* case, the appellate panel, upholding the finding of the trial panel, considered, *inter alia*, that Mejakić's participation in the systemic JCE that existed at the Omarska camp was significant, and his contribution was decisive.²⁵⁷ As one of the key persons in the camp (the Chief of Security Guards), by his actions during the establishment of the camp, together with Miroslav Kvočka, and later during the performance of his daily duties, the accused made a decisive contribution to the unhindered and efficient functioning of the Omarska camp.²⁵⁸ As a person of authority, by his continued performance of duties and tasks at the camp and by his direct involvement in the maltreatment of the victim, the accused instigated his subordinates to continue participating in the systemic joint criminal enterprise.²⁵⁹

9.5.8.2.2.4. MENS REA – KNOWLEDGE

In the *Rašević et al.* case, the trial panel, relying on the ICTY in the *Kvočka* case, held that in order to be liable as a co-perpetrator for the crimes committed in a systemic JCE, the accused must have had personal knowledge of the organised system set in place and its common criminal purpose.²⁶⁰

Knowledge of the common criminal purpose requires that the accused knew the type and extent of the criminal activity in which the system was engaged.

Knowledge of the common criminal purpose requires that the accused knew the type and extent of the criminal activity in which the system was engaged.²⁶¹ However, it is not necessary to prove that the accused had personal knowledge of each and every crime committed within the system.²⁶²

The trial panel in the *Rašević et al.* case held that evidence of knowledge could come from express testimony or could be inferred from the accused's position of authority within the system.²⁶³ In addition, other factors can demonstrate the existence and extent of personal knowledge, including.²⁶⁴

²⁵⁶ *Rašević et al.*, 1st inst., p. 133 (p. 153 BCS).

²⁵⁷ *Mejakić et al.*, 2nd inst., ¶ 120.

²⁵⁸ *Ibid.*

²⁵⁹ *Ibid.*

²⁶⁰ *Rašević et al.*, 1st inst., p. 138 (p. 158 BCS).

²⁶¹ *Ibid.*

²⁶² *Ibid.* referring to *Kvočka*, AJ ¶ 276; *Fužtar*, 1st inst., pp. 25-26 (pp. 24-25 BCS).

²⁶³ *Rašević et al.*, 1st inst., p. 138 (p. 158 BCS), referring to *Kvočka*, AJ ¶ 203; see also *Fužtar*, 1st inst., pp. 25-26 (pp. 24-25 BCS).

²⁶⁴ *Rašević et al.*, 1st inst., p. 138 (p. 158 BCS).

- the amount of time the accused spent in the camp;
- the actual tasks performed by the accused;
- the accused's location within the camp;
- the accused's access to other areas of the camp;
- the frequency with which the accused travelled throughout the camp;
- the nature and extent of the accused's contact with inmates;
- the nature and extent of the accused's contact with other staff in both superior and inferior positions;
- the nature and extent of the accused's contact with outsiders entering the camp; and
- what the accused saw, heard, smelled or was informed of regarding the criminal activity of the system and the accused's reaction to this information.²⁶⁵

9.5.8.2.2.2.5. MENS REA – INTENT

In the *Rašević et al.* case, the trial panel held that the intent necessary to incur liability for crimes committed in a systemic JCE was the intent to further the system.²⁶⁶ If the common purpose of the system involves commission of a crime for which specific intent is required, the accused must share that specific intent as well.²⁶⁷

Shared intent, either the specific intent required for the underlying crime or the general intent to further the system, can be established by evidence other than express statements of intent.

Shared intent, either the specific intent required for the underlying crime or the general intent to further the system, can be established by evidence other than express statements of intent.²⁶⁸ The trial panel acknowledged the interpretation of the ICTY trial chamber in *Kvočka*:

If the criminal enterprise entails killing members of a particular ethnic group, and members of that ethnic group were of a differing religion, race or political group than the co-perpetrators, that would demonstrate an intent to discriminate on political, racial, or religious grounds [...] a knowing and continued participation in this enterprise would evince an intent to persecute members of the targeted ethnic group.²⁶⁹

Factors demonstrating intent include the significance of the accused's contribution and the extent of his knowledge.²⁷⁰

Factors demonstrating intent include the significance of the accused's contribution and the extent of his knowledge.

The trial panel noted the opinion of the ICTY appeals

²⁶⁵ *Ibid.* at p. 138 (pp. 158-159 BCS), referring to *Kvočka*, TJ ¶ 324.

²⁶⁶ *Rašević et al.*, 1st inst., p. 144 (p. 166 BCS).

²⁶⁷ *Ibid.*

²⁶⁸ *Ibid.*

²⁶⁹ *Ibid.* referring to *Kvočka*, AJ ¶ 109.

²⁷⁰ *Rašević et al.*, 1st inst., p. 144 (p. 166 BCS).

chamber in *Krnojelac* when it concluded that if, because of the accused's position within the system and opportunity to observe, he had knowledge of the system, the crimes committed by the system and the discriminatory nature of the crimes, then:

a trier of fact should reasonably have inferred [...] that [the accused] was part of the system and thereby intended to further it. The same conclusion must be reached when determining whether the findings should have led a trier of fact reasonably to conclude that [the Accused] shared the discriminatory intent [...].²⁷¹

The significance of the accused's contribution to the system can also show his shared intent.²⁷² The trial panel identified relevant factors, including:²⁷³

- the significance of the accused's contribution and the extent of his knowledge;
- the accused's high rank within the system;
- the accused undertaking increased responsibilities within the system after its criminal purpose became obvious;
- the length of time the accused remained a part of the system;
- the importance of the accused's tasks to maintaining the system;
- the efficiency with which the accused carried out his tasks;
- the accused's verbal expressions regarding the system; and
- any direct participation of the accused in the *actus reus* of the underlying crimes.²⁷⁴

The trial panel noted that the motive for forming the shared intent is immaterial.²⁷⁵ The fact that the accused either liked the system or disliked the victims of the persecution was not relevant to establish either the accused's intent to further the system or the specific intent.²⁷⁶

The fact that the accused either liked the system or disliked the victims of the persecution was not relevant to establish either the accused's intent to further the system or the specific intent.

[S]hared criminal intent in JCE does not require the co-perpetrators' personal satisfaction or enthusiasm, or his personal initiative in contributing to the joint enterprise.²⁷⁷

²⁷¹ *Ibid.* at p. 144 (pp. 166-167 BCS), referring to *Krnojelac*, AJ ¶ 111; see also *Fuštar*, 1st inst., pp. 24-26 (pp. 23-25 BCS).

²⁷² *Rašević et al.*, 1st inst., p. 144 (p. 167 BCS).

²⁷³ *Ibid.* at p. 144 (pp. 167-168 BCS), referring to *Kvočka*, AJ ¶ 243.

²⁷⁴ *Ibid.*

²⁷⁵ *Rašević et al.*, 1st inst., p. 144 (p. 167 BCS).

²⁷⁶ *Ibid.*

²⁷⁷ *Ibid.* referring to *Krnojelac*, AJ ¶ 100; See also *Mejakić et al.*, 2nd inst., ¶ 135.

Charitable acts can never be exculpatory unless directed against the functioning of the system as such.²⁷⁸

The trial panel concluded:

[...] the Accused were acting with direct intent to further the systemic joint criminal enterprise in place at the KP Dom. They were aware of their deeds and they desired the perpetration. Moreover, they shared the discriminatory intent to persecute the non-Serb detainees at the KP Dom. As has been discussed, the Accused were in positions of authority at the KP Dom, had personal knowledge of the system in place and the type of crimes committed in that system. They remained part of the system and contributed their talents, leadership and experience to the system. Moreover, the Accused continued their participation with the knowledge that the crimes were committed with the intent to discriminate against the non-Serb detainees on the basis of their ethnicity, a fact made manifest daily by the non-criminal treatment of the Serb convicts at the same institution. The Accused's continued participation in positions of authority in full knowledge of the crimes committed and nature of the system was not momentary, but extended for over two years. Accordingly, while the Accused may not have derived personal satisfaction or enjoyment from their participation in the system of persecution, they nonetheless knowingly contributed to that prosecutorial system, thereby evidencing the intent to further that system and the shared discriminatory intent".²⁷⁹

9.5.8.2.3. JCE III

"Extended" JCE pertains to cases where one or more perpetrators commit a crime that, although not agreed upon in the common criminal plan, was a natural and foreseeable consequence of the execution of that plan.²⁸⁰

According to the information known at the time of writing, none of the cases before the Court of BiH have involved the charges under JCE III (except in the *Božić* case, where the court found the JCE improperly pled. See below, section 9.5.8.5.).

9.5.8.3. DIFFERENCE BETWEEN JCE AND OTHER FORMS OF LIABILITY

In some cases before the Court of BiH, the prosecution has charged accused with crimes under both JCE and co-perpetration as modes of liability. The Court of BiH has also had to make distinctions between JCE and aiding and abetting, and JCE and superior responsibility. Jurisprudence on these issues is discussed below.

²⁷⁸ *Mejakić et al.*, 2nd inst., ¶ 136.

²⁷⁹ *Rašević et al.*, 1st inst., pp. 144-145 (p. 167 BCS); see also *Fužtar*, 1st inst., p. 26 (p. 25 BCS) (final).

²⁸⁰ *Rašević et al.*, 2nd inst., p. 26 (p. 28 BCS).

9.5.8.3.1. JCE AND CO-PERPETRATION

In the *Rašević et al.* case, where the accused was charged under JCE II, the trial panel concluded:

[T]here is no discrepancy between customary international law for JCE and Article 29 regarding the degree of participation necessary to establish co-perpetration when the accused has participated in any way in the actus reus of the crimes. However, there is a discrepancy when the accused has taken “some other act” toward the commission of an offense. Under customary international law, all other elements of JCE having been proven, the degree of participation which that “other act” constitutes need not be “substantial or significant”. However, under Article 29, it must be “decisive”. As the Prosecutor has charged co-perpetration under Article 180(1) in conjunction with Article 29, and argued that the Panel should apply both, it is necessary that more than the customary international law standard be proven.²⁸¹

The trial panel went on to find that the accused had made a “decisive” contribution to the systemic JCE, therefore meeting both the customary international law standard of contribution and the Article 29 standard.²⁸²

The appellate panel rejected the trial panel’s opinion that the existence of a systemic JCE required a substantial contribution on the part of the perpetrator, because in that case Article 29 of the BiH Criminal Code (co-perpetration) would have been applied.²⁸³ The appellate panel noted, however, that the importance of participation of the accused was necessary and relevant to establish that the accused shared the intent to achieve a common criminal goal.²⁸⁴

In relation to this, the appellate panel further explained that a larger degree of contribution (a decisive contribution) was required for co-perpetration than for participation in a JCE.²⁸⁵

In the *Vuković Ranko et al.* case, the appellate panel noted that the contested verdict placed JCE in parallel with co-perpetration, which the appellate panel found unacceptable “since these two concepts are mutually exclusive and their coexistence is not possible”.²⁸⁶ The appellate panel noted that the concept of JCE was not stipulated or defined in BiH criminal legislation nor did the first instance verdict try to explain it conceptually.

The appellate panel noted that the contested verdict placed JCE in parallel with co-perpetration, which the appellate panel found unacceptable.

²⁸¹ *Rašević et al.*, 1st inst., at p. 161 (p. 186 BCS).

²⁸² *Ibid.*

²⁸³ *Rašević et al.*, 2nd inst., p. 27 (p. 28 BCS).

²⁸⁴ *Ibid.*

²⁸⁵ *Ibid.*

²⁸⁶ Court of BiH, Ranko Vuković et al., Case No. X-KR-06/180-2, 2nd Instance Verdict, 2 Sept. 2008, p. 5 (p. 5 BCS).

The appellate panel held, “it is not known whether this is a case of a particular criminal offence or a form of criminal responsibility, and if we accept the latter one, this concept is hardly in accordance with the classical concept of co-perpetration recognized by our criminal code”.²⁸⁷ The appellate panel also held:

The difference is incontestable between each of the three forms of joint criminal enterprise established in the ICTY jurisprudence and the concept of co-perpetration in terms of Articles 29 and 32 of the CC BiH, particularly in the field of *mens rea*, since joint criminal enterprise implies common intent on the level of [the] subjective element, in which the first instance Verdict is also explicit, while co-perpetration implies the principle of limited responsibility, so it is impossible to equalize criminal responsibility stipulated under the cited article with the concept of joint criminal enterprise developed in the ICTY jurisprudence, as the first instance Verdict completely erroneously did.²⁸⁸

9.5.8.3.2. JCE AND AIDING AND ABETTING

Aiders and abettors who aid or abet a JCE can become co-perpetrators even if they did not directly commit a crime if their participation lasted for an extensive period and advanced the goal of the JCE.

The appellate panel in the *Rašević et al.* case held that the acts of a participant in a systemic JCE carry more weight than those of an aider, since an aider only has knowledge of the intent of the principal offender, whereas a participant in a JCE shares the intent of the principal offender.²⁸⁹

Therefore, if an accused is aware of a system of ill-treatment and agrees to it, it may be reasonably inferred that he has intent to contribute to that system and accordingly be regarded as a co-perpetrator in a JCE and not just as an aider.²⁹⁰

Aiders and abettors who aid or abet a JCE can become co-perpetrators even if they did not directly commit a crime if their participation lasted for an extensive period and advanced the goal of the JCE.²⁹¹

9.5.8.3.3. NO DUAL LIABILITY FOR JCE AND COMMAND RESPONSIBILITY

The appellate panel in the *Rašević et al.* case followed the reasoning of the ICTY in *Krnjelac*, and held that in cases where accused were charged with participation in JCE and under command responsibility, it would be inappropriate to enter a conviction under both modes of liability for the same count based on the same acts.²⁹² According to the appellate panel, it was completely

²⁸⁷ *Ibid.* at p. 6 (pp. 5-6 BCS).

²⁸⁸ *Ibid.* at p. 6 (p. 6 BCS), footnotes omitted.

²⁸⁹ *Rašević et al.*, 2nd inst., p. 27 (p. 28 BCS).

²⁹⁰ *Ibid.* at p. 27 (p. 29 BCS), referring to *Krnjelac*, AJ ¶ 74 and *Brđanin*, TJ ¶ 274.

²⁹¹ *Rašević et al.*, 2nd inst., p. 27 (p. 28 BCS).

²⁹² *Ibid.* at p. 29 (p. 31 BCS); see also *Mejakić et al.*, 2nd inst., ¶¶ 67-68.

illogical to find the accused criminally responsible for planning, instigating, ordering or committing the offence while simultaneously convicting him of failing to prevent the crime or punish the perpetrator thereof.²⁹³ The appellate panel held that it would be reasonable to enter a conviction under the mode of responsibility that gives the most accurate account of the accused's conduct.²⁹⁴

9.5.8.4. PARAMETER OF PLEADED JCE

Having considered the scope of the JCE, as alleged by the indictment in *Božić et al.* case, the Court of BiH appellate panel and trial panel both expressed the concern that the standard with respect to both the characterization of the joint criminal conduct and the corresponding criminal liability was "incredibly broad".²⁹⁵

In particular, the appellate panel noted that the prosecutor essentially alleged that hundreds, perhaps even thousands, of military and police members who happened to be in the Srebrenica enclave from 11 to 18 July 1995 were members of a single JCE, the common purpose of which was to persecute Bosniak civilians.²⁹⁶ Thus, the appellate panel held:

[S]prawling horizontally as well vertically, the alleged JCE morphed into a gigantic octopus encompassing and interlocking every person from the highest ranking officers to the lowest foot soldiers of the VRS and RS MUP, thus attributing totality of crimes to the group as a whole.²⁹⁷

The appellate panel noted that the ICTY appeals chamber in *Krnjelac* restricted the potential scope of JCE liability by:

- (i) requiring a high degree of precision in describing the membership and activities of the enterprise,
- (ii) stating that regardless of the category of JCE alleged, using the concept of JCE to define an individual's responsibility for crimes physically committed by others required a strict definition of a common purpose, and
- (iii) noting that the relevant principal perpetrators should also be identified as precisely as possible.²⁹⁸

Stating that, regardless of the category of JCE alleged, using the concept of JCE to define an individual's responsibility for crimes physically committed by others required a strict definition of a common purpose.

²⁹³ *Rašević et al.*, 2nd inst., p. 29 (p. 31 BCS).

²⁹⁴ *Ibid.*; See also *Mejakić et al.*, 2nd inst., ¶¶ 67-68.

²⁹⁵ Court of BiH, *Božić Zdravko et al.*, Case No. X-KRZ-06/236, 2nd Instance Verdict, 5 Oct. 2009, ¶ 122.

²⁹⁶ *Ibid.*

²⁹⁷ *Ibid.* ¶ 122.

²⁹⁸ *Ibid.* at ¶ 124, referring to the ICTY, *Krnjelac*, AJ ¶ 116.

The courts must exercise their utmost diligence in order to avoid assignment of criminal liability for mere membership in, or association with, a particular group when utilizing the JCE doctrine.

The appellate panel concluded that the danger of applying JCE broadly was that it had a potential to encompass individuals who should not be held individually responsible under widely accepted limits of criminal law.²⁹⁹ Accordingly, the appellate panel held that the courts must exercise their utmost diligence in order to avoid assignment of criminal liability for mere membership in, or association with, a particular group when utilizing the JCE doctrine.³⁰⁰

Furthermore, the appellate panel noted that the prosecutor simply assumed that given the scale of the events and the evidence of crimes committed in the enclave during the indictment period, there must have been a JCE and that the named accused must have been members of that JCE by virtue of their presence.³⁰¹ In relation to that, the appellate panel stressed that if the prosecutor insisted that the accused acted pursuant to a single JCE, he needed to prove it as well as the membership of the accused and their concerted action.³⁰² The mere existence of a parameter fence, the appellate panel concluded, was not a sufficient substitute for proof and it contradicted personal culpability to convict a person for committing crimes when he or she satisfied neither the objective nor subjective elements of the offence charged.³⁰³

Dismissing the prosecution appeal, the appellate panel concluded that the trial panel did not err when it found that the alleged JCE was too broad and over-extended.³⁰⁴

9.5.8.5. PLEADING JCE

In the *Božić* case, the prosecution charged the accused with knowing participation in the JCE and argued that they were criminally responsible for their own acts and omissions as well as those which were natural and foreseeable consequences of the common purpose or plan or operation.³⁰⁵

The trial panel found that the prosecutor “inconsistently incorporated and refer[ed] to legal elements of different forms of JCE liability without specifying clearly which form of liability is being alleged” in the amended indictment.³⁰⁶ The trial panel also outlined a legal standard of pleading of JCE liability pursuant to various articles of the BiH CPC as well as ICTY jurisprudence. The standard of pleading required a certain level of precision to ensure a fair trial and found that the prosecutor failed in his duty to do so.³⁰⁷ The trial panel concluded that it would contravene

²⁹⁹ *Božić et al.*, 2nd inst., ¶ 126.

³⁰⁰ *Ibid.*

³⁰¹ *Ibid.* at ¶ 127.

³⁰² *Ibid.* at ¶ 128.

³⁰³ *Ibid.*

³⁰⁴ *Ibid.* at ¶ 129.

³⁰⁵ *Ibid.* at ¶ 131, referring to amended indictment, p. 2.

³⁰⁶ *Ibid.* at ¶ 132, referring to trial verdict, p. 65 (p. 63 BCS).

³⁰⁷ *Ibid.*, referring to trial verdict, pp. 65-66 (p. 63 BCS).

the rights of the accused for the trial panel to cure the prosecutor's mistake and find a suitable form of JCE liability in order to convict the accused.³⁰⁸ Accordingly, the trial panel concluded that the prosecutor's failure constituted one of the grounds for the panel's rejection of JCE in this case.³⁰⁹

The prosecution must adequately plead and specify the basis on which it considered responsibility of the accused may be incurred.

The appellate panel upheld the trial panel's finding and held that the prosecution must adequately plead and specify the basis on which it considered responsibility of the accused may be incurred.³¹⁰ The appellate panel reiterated it would also contravene the rights of the defence if the trial panel, seized of a valid but partially defective indictment, chose a theory not clearly or defectively pleaded by the prosecution.³¹¹

Relying on the ICTY *Krnjelac* trial chamber finding, the appellate panel held that when the prosecution seeks to allege an accused's participation in a JCE, it must clearly state in the indictment:³¹²

- the nature of the joint criminal enterprise;
- the time at which or the period over which the enterprise is said to have existed;
- the identity of those engaged in the enterprise (or at least by reference to their category as a group); and
- the nature of the participation by the accused in that enterprise.

Furthermore, relying on the ICTY and ICTR jurisprudence, the appellate panel held the following:

- in order for an accused charged with joint criminal enterprise to fully understand the acts he is allegedly responsible for, the indictment should also clearly indicate which form of joint criminal enterprise is being alleged;³¹³
- if any of the matters are to be established by inference, the prosecution must identify in the indictment the facts and circumstances from which the inference sought to be drawn;³¹⁴
- the prosecution must also expressly plead in its

In order for an accused charged with joint criminal enterprise to fully understand the acts he is allegedly responsible for, the indictment should also clearly indicate which form of joint criminal enterprise is being alleged.

³⁰⁸ *Ibid.*, referring to trial verdict, p. 66 (p. 63 BCS).

³⁰⁹ *Ibid.*

³¹⁰ *Ibid.* at ¶ 133.

³¹¹ *Ibid.*

³¹² *Ibid.* at ¶ 134, referring to the ICTY, *Krnjelac*, Case No. IT-97-25, Decision on Form of Second Amended Indictment, 11 May 2000, ¶ 16.

³¹³ *Božić et al.*, 2nd inst., ¶ 135, referring to the ICTR, *Ntagerura et al.*, AJ ¶ 24 and the ICTY, *Kvočka et al.*, AJ ¶ 28, referring to *Krnjelac*, AJ ¶ 138.

³¹⁴ *Božić et al.*, 2nd inst., ¶ 135, referring to the ICTY, *Krnjelac*, Case No. IT-97-25, Trial Chamber Decision on Form of Second Amended Indictment, 11 May 2000, ¶ 16.

case whether each of the crimes alleged is said to have fallen within the object and purpose of the joint criminal enterprise or to have gone beyond that object;³¹⁵ and

- if any of the crimes charged are alleged to fall within the object of the enterprise, then the prosecution must plead that the accused had the state of mind required for that crime. If the crimes charged are alleged to go beyond the object of the enterprise, then the prosecution must identify in the indictment the agreed object of the enterprise upon which it relies.³¹⁶

The appellate panel concluded that if the form of the indictment does not give the accused sufficient notice of the legal and factual reasons for the charges against him, then no conviction may result because the accused's right to a fair trial is compromised.³¹⁷

The appellate panel noted that the prosecutor alleged JCE in the preamble of the amended indictment, but that in the counts where the amended indictment detailed the factual allegations on which the crimes charged were based, JCE was not specified as a form of commission.³¹⁸ Instead, each count specified that the accused participated in the alleged crimes.³¹⁹ The appellate panel found that, in these circumstances, the accused did not have adequate notice that their responsibility for any event would depend on their participation in a JCE.³²⁰

In addition, the appellate panel, like the trial panel, held that it was unsure how the prosecution came to a conclusion that "knowing participation" in the JCE was a sufficient notice to the accused of a specific form of JCE being alleged.³²¹ The appellate panel noted that "knowing participation" was not a legal element of either basic or extended JCE.³²² Furthermore, the appellate panel held it was also uncertain how "unidentified members of VRS" met the specificity and clarity requirement to establish identity of those engaged in criminal enterprise.³²³ Therefore, the appellate panel found that the prosecution failed to properly inform the accused as to which form of JCE was being alleged.³²⁴

³¹⁵ *Božić et al.*, 2nd inst., ¶ 136, referring to the ICTY, *Brđanin and Talić*, Trial Chamber Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, ¶¶ 39-41.

³¹⁶ *Ibid.*

³¹⁷ *Božić et al.*, 2nd inst., ¶ 137.

³¹⁸ *Ibid.* at ¶ 138.

³¹⁹ *Ibid.*

³²⁰ *Ibid.*, referring to *Gacumbitsi*, AJ ¶¶ 172-73 (finding JCE not clearly pled in the indictment) and Siméon Nchamihigo, Case No. ICTR-01-63-T, Trial Judgement, 12 Nov. 2008, ¶ 328.

³²¹ *Božić et al.*, 2nd inst., ¶ 139.

³²² *Ibid.*

³²³ *Ibid.*

³²⁴ *Ibid.*

9.5.8.6. JCE AND THE RANK OF THE ACCUSED

The appellate panel in the *Božić et al.* case also dealt with issue of whether JCE liability was a doctrine applicable to low-ranking soldiers (such as the accused in this case) and whether their conduct pursuant to military orders gave rise to JCE liability.³²⁵

The prosecution argued on appeal that the trial panel misdirected itself on the law when it found that JCE liability did not apply to common soldiers such as the accused in the case and that they were only responsible for the crimes they perpetrated directly.³²⁶ The prosecution also argued that the trial panel erred on the law when it found that the accused acted pursuant to the military orders they received from their superiors, which as a matter of law did not entail JCE responsibility.³²⁷

The appellate panel emphasised the importance of respecting the basic criminal law principle of individual culpability and reiterated that the accused:

[C]annot be considered criminally responsible for those crimes committed pursuant to the design of his ultimate superiors to which he did not contribute, simply on the grounds that those superiors also considered the Accused's acts as part of their design [...] the common soldiers of the VRS and the MUP [...] are responsible for the crimes they participate in, and no more. To conclude otherwise would be to assign collective responsibility to all soldiers for the crimes of their superiors.³²⁸

The appellate panel upheld the trial panel's finding that guilty intent and criminal conduct of others to which the accused did not substantially contribute could not be the basis for their criminal responsibility even under the JCE theory.³²⁹ The appellate panel concluded that JCE liability did not and should not rise and extend to common soldiers, in the absence of proof that they knew of the criminal plan concocted by the high echelon leaders, and intended to join in that plan.³³⁰ Furthermore, as held by the appellate panel, the accused cannot be considered to be members of the alleged JCE by virtue of their presence in the area in the absence of the evidence that they intended to commit the alleged crimes and/or shared the alleged criminal purpose.³³¹

JCE liability did not extend to common soldiers, in absence of proof that they knew of the criminal plan concocted by the high echelon leaders, and intended to join in that plan.

³²⁵ *Ibid.* at ¶ 162 et seq.

³²⁶ *Ibid.* at ¶ 163.

³²⁷ *Ibid.*

³²⁸ *Ibid.* at ¶ 165, referring to the Court of BiH, Petar Mitrović, Case No.X-KRZ-05/24-1, 1st Instance Verdict, p. 124 (relevant part upheld on appeal).

³²⁹ *Božić et al.*, 2nd inst., ¶ 166.

³³⁰ *Ibid.* at ¶ 167.

³³¹ *Ibid.* at ¶ 169.

9.6. CROATIA

Notes for trainers:

- This section focuses on Croatian law. Participants should appreciate that the courts in Croatia apply the OKZ RH to crimes arising from the conflict in the former Yugoslavia which incorporates the modes of liability provided for in the SFRY Criminal Code.
- The modes of liability applied by the courts in Croatia are set out in this section so that participants can discuss their elements and application in practice.
- In addition, the relevant case law, as far as it is known, is highlighted. Participants should be encouraged to discuss the decisions taken in these cases and whether they will be followed in future cases.
- Participants can also discuss the application of their national laws and case law to the facts of the case study. They could be asked to determine whether the accused in the case study could be successfully prosecuted for any of the modes of liability applicable in their national jurisdictions.
- It will be useful for participants to compare the law and jurisprudence of Croatia with the jurisprudence of the ICTY and the provisions in the ICC Rome Statute.

When trying war crimes cases arising from the conflicts in the former Yugoslavia, courts in Croatia do not apply the current 1998 Criminal Code. Rather, they apply OKZ RH, which incorporates the modes of liability provided for in the SFRY Criminal Code. For more on the temporal applicability of laws in Croatia, see Module 5.

However, the modes of liability and perpetration of the relevant criminal offences under 1998 Criminal Code will be set out here for comparison.

9.6.1. OVERVIEW

There are general modes of liability included in the Croatian Criminal Code³³² that apply to all crimes. These modes of liability include:

- Perpetration/co-perpetration;
- Incitement; and
- Accessory liability or aiding and abetting.

³³² Official Gazette of Croatia „Narodne Novine“ No. 110/97, 27/98, 50/00, 129/00, 51/01, 111/03, 190/03, 105/04, 71/06, 110/07, 152/08.

Chapter XIII of the 1998 Criminal code also includes the following modes of liability for international crimes:

- Preparing;
- Ordering;
- Incitement;
- Perpetration / Co-perpetration;
- Association for the purpose of committing criminal offences;
- Accessory / Aiding and abetting;
- Subsequent assistance of the perpetrator; and
- Superior responsibility.

9.6.2. PLANNING

Article 187(a) of the 1998 Criminal Code includes the following as modes of liability:

- Removing obstacles;
- Creating a plan;
- Setting an agreement with others; or
- Undertaking some other activity which creates conditions for commission of criminal acts;
- Collecting means, in any manner, with the aim that such means would be, in whole or in part, used for the commission of such acts.

The modes of liability in Article 187(a) are applicable to the following crimes:

- Genocide, aggressive war, crimes against humanity, war crimes against civilians, war crimes against the wounded and sick, war crimes against prisoners of war (Articles 156 - 160);
- Terrorism, public incitement to terrorism, recruiting and training for terrorism, endangering the safety of internationally protected persons, taking of hostages, misuse of nuclear or radioactive material (Articles 169 - 172);

9.6.3. ORDERING

Ordering as a mode of liability under Chapter XIII of the 1998 Criminal Code is also included in the following articles:

- Genocide (Article 156);
- Aggressive war (Article 157);
- Crimes against humanity (Article 157(a));
- War crimes against civilians (Article 158);
- War crimes against the wounded and sick (Article 159);
- War crimes against prisoners of war (Article 160);

- Ordering that there should be no survivors among enemy soldiers (Article 161(3));
- Marauding (Article 162);
- Ordering the use of chemical or biological weapons or some other means or method of combat prohibited by the rules of international law (Article 163(2)); and
- Unjustified delay of repatriation of the prisoners of war (Article 166).

In the OKZ RH, the code that the courts in Croatia apply when trying war crimes cases arising from the conflicts in former Yugoslavia, ordering (as a mode of liability included in provisions dealing with specific offences), reflected the manner in which this mode of liability was dealt with under the SFRY Criminal Code (see above, section 9.4.1.2.).

In the *Ćurčić et al. (Borovo selo)* case, one of the accused was found guilty for ordering (under Article 120(1) of the OKZ RH – war crimes against civilians) the unlawful detention of civilians, their torture, inhumane treatment, infliction of suffering, violation of their bodily integrity and health and forced labour.³³³ Although there was no written evidence of the accused's orders, the trial chamber concluded that the accused ordered the crimes from facts including:

- the accused had been a police station commander and exercised his powers in an authoritative manner;
- the prisons had been guarded by the members of the police;
- the detention without enough food and water, forced labour, mistreatment during interrogations, and beatings with rubber and wooden bats represented cases of executing the accused's orders; and
- all the events took place in area of the accused's real function.³³⁴

The chamber concluded that the events did not represent sporadic excesses of individuals, but systematic violent behaviour towards detainees, and that whatever had been done could only be done upon orders of the accused.³³⁵

Moreover, the chamber held that it was not important whether the accused had been the inspirer of every beating, or whether there had been a tacit broadening of the accused's basic orders, as the accused was a part of the chain of command and the final controller of the implementation of the orders.³³⁶

9.6.4. INCITING

Intentional incitement as a mode of liability is criminalised in Article 37 of the 1998 Criminal Code that applies to all crimes specified in the Code.

³³³ County Court in Vukovar, *Ćurčić et al. (Borovo selo)*, Case No. K-12/05, 1st Instance Verdict, 14 Dec. 2005, pp. 2-3 (upheld on appeal).

³³⁴ *Ibid.* at p. 36.

³³⁵ *Ibid.*

³³⁶ *Ibid.*

Article 37(2) of the 1998 Criminal Code criminalises the intentional incitement of the commission of a crime, even if the commission of that crime has not been attempted.

Article 37(3) of the 1998 Criminal Code provides that “[i]n the case of an inadvertent attempt of incitement, the court may remit the punishment of the instigator”.

9.6.5. PERPETRATION / CO-PERPETRATION

Perpetration of the crimes in Chapter XIII of the 1998 Criminal Code is included as a mode of liability in Articles within the Chapter.

Article 35(1) of the 1998 Criminal Code defines a perpetrator as a person who commits a criminal offence by his own act or omission or through another agent.

Article 35(3) of the 1998 Criminal Code defines co-perpetrators as two or more persons who, on the basis of a joint decision, commit a criminal offence in such a way that each of them participates in the perpetration or, in some other way, substantially contributes to the perpetration of a criminal offence. However, it is important to note that this “substantial” contribution was not required under Article 20 of the OKZ RH, the criminal code that is applied for crimes arising out of the conflicts in the former Yugoslavia. Article 20 of OKZ RH reflected Article 22 of the SFRY Criminal Code (see above, section 9.4.1.5.).

9.6.5.1. CO-PERPETRATION

To find an accused guilty as a co-perpetrator to a crime, both objective and subjective elements need to be met, as outlined below.³³⁷

9.6.5.1.1. ACTUS REUS

The first objective requirement of co-perpetration is the existence of joint conduct involving more than one person.

The first objective requirement of co-perpetration is the existence of joint conduct involving more than one person.³³⁸

In the *Marguš and Dilber (Čepin)* case, the County Court in Osijek convicted the accused for war crimes against civilians as co-perpetrators.³³⁹ The chamber found that, in order to find that the accused acted as co-perpetrators, it was not necessary that each of them individually and directly realised all the elements of war crimes against civilians by his own conduct, if, in doing so, he objectively

³³⁷ See, e.g., County Court in Osijek, *Marguš and Dilber (Čepin)*, Case No. K-33/06-412, 1st Instance Verdict., 21 March 2007, pp. 17, 27 (upheld on appeal); County Court in Osijek, *Novak Simić et al. (Dalj III)*, Case No. Krz-42/07-228, 1st Instance Verdict, 21 April 2008, pp. 10-11 (relevant parts upheld on appeal).

³³⁸ *Ibid.* at p. 10.

³³⁹ *Čepin*, 1st inst., p. 4 (upheld on appeal).

contributed to the commission of the criminal offence with the appropriate *mens rea* (see below).³⁴⁰

In the *Madi et al. (Cerna)* case, one of the accused was convicted as a co-perpetrator (under Article 20 of the OKZ RH, reflecting Article 22 of the SFRY Criminal Code) for driving the other accused (co-perpetrators) to the house of the victim, showing them the

The Supreme Court held that in the framework of a joint commission of the crime, every accused had his own role and within division of the roles, each of them knew what was done by the others and wanted the commission of the crime as his own.

house, waiting for them and then driving them back.³⁴¹ The Supreme Court rejected the appellant's argument he could not be a co-perpetrator as he merely received an order to drive the others and that he didn't kill anyone himself.³⁴² The Supreme Court held that in the framework of a joint commission of the crime, every accused had his own distinct role and each of them knew what was done by the others and wanted the commission of the crime as his own.³⁴³ The Supreme Court further held that the accused received the order, which meant that he knew what the order meant, he knew what was necessary to be done and he participated in the joint commission of the crime within the framework of the order.³⁴⁴ The Supreme Court concluded that the criminal offence would not have been committed without the contribution of every accused, thus meeting all requirements of co-perpetration.³⁴⁵

9.6.5.1.2. MENS REA

The plan or prior agreement can be tacit.

The subjective requirement of co-perpetration is established by existence of a common agreement (or plan) which results in the joint conduct (the objective element; see above).³⁴⁶ The plan or prior agreement can be tacit.³⁴⁷ The County Court in Osijek noted that this requirement was clearly established in international customary law and, implicitly, in the Statute of the ICTY.³⁴⁸

The appeals chamber in the *Simić et al. (Dalj III)* case held that it is not necessary that the accused knew about the

It is not necessary that the accused knew about the general plan.

³⁴⁰ *Ibid.* at p. 27 (upheld on appeal).

³⁴¹ Supreme Court of Croatia, Tomislav Madi et al. (Cerna), Case No. I Kz 910/08-10, 2nd Instance Verdict, 25 March 2009, p. 15. County Court in Vukovar, Tomislav Madi et al. (Cerna), Case No. K-5/07, 1st instance Verdict, 12 February 2008 (published on 14 February 2008), pp. 32, 29-20.

³⁴² *Cerna*, 2nd inst., p.15.

³⁴³ *Ibid.*

³⁴⁴ *Ibid.*

³⁴⁵ *Ibid.*

³⁴⁶ *Čepin*, 1st inst., p. 17; *See also Simić et al.*, 1st inst., p. 10.

³⁴⁷ *Simić et al.*, 1st inst., p. 14; Supreme Court of Croatia, Novak Simić et al. (Dalj III), Case No. I-Kz 791/08-9, 2nd Instance Verdict, 3 Dec. 2008, pp. 8-9.

³⁴⁸ *Čepin*, 1st inst., p. 17; *See also Simić et al.*, 1st inst., pp. 10-11, 14; (note: in both cases, the chamber did not specify which "International Tribunal").

general plan. Rather, what was decisive was the fact that the accused acted pursuant to the plan, thus “*de facto* accepting it”, and intended the consequences of such a plan.³⁴⁹ The appeals chamber held that this amounted to the accused acting as a co-perpetrator, as he essentially contributed to its commission.³⁵⁰

In the *Marguš and Dilber (Čepin)* case, the chamber established the accused’s awareness regarding the nexus between the unlawful conduct of the accused and the consequence (unlawful detention, inhuman treatment, pillage and killings) on the basis of circumstantial evidence of his conduct.³⁵¹

In the *Simić et al. (Dalj III)* case, the chamber held that circumstantial evidence (that the victim had been subjected to beatings by hands, feet and police batons) excluded every other possibility except that the accused had been aware that death could occur as a result of their conduct and that therefore they must have intended this consequence.³⁵²

9.6.6. ASSOCIATION FOR THE PURPOSE OF COMMITTING CRIMES

Article 187 of the 1998 Criminal Code criminalises:

- organizing and connecting in some other manner three or more persons for the purpose of committing crimes;
- and becoming a member of such a group;

as modes of liability for perpetrating, *inter alia*:

- Genocide;
- Crimes against humanity;
- War crimes against civilians;
- War crimes against the wounded and sick;
- War crimes against prisoners of war; and
- Taking of hostages.

9.6.6.1. ACCESSORY / AIDING AND ABETTING

Article 38 of the 1998 Criminal Code criminalises intentionally aiding and abetting the perpetration of a crime.

Article 38(2) of the 1998 Criminal Code defines the following as examples of aiding and abetting:

- giving advice or instructions on how to commit a criminal offence;

³⁴⁹ *Simić et al.*, 2nd inst., p. 4-5.

³⁵⁰ *Ibid.* at p. 5.

³⁵¹ *Čepin*, 1st inst., p. 18; *See also Simić et al.*, 1st inst., p. 12.

³⁵² *Simić et al.*, 1st inst., p. 12.

- providing the perpetrator with the means for the perpetration of a criminal offence;
- removing obstacles for the perpetration of a criminal offence;
- giving an advance promise to conceal the criminal offence, the perpetrator, or the means by which the criminal offence was committed; and
- concealing the traces of a criminal offence or the objects procured by the criminal offence.

Judges can find other acts as constituting aiding and abetting.

9.6.7. SUBSEQUENT ASSISTANCE TO THE PERPETRATOR

Article 187(b) of the 1998 Criminal Code criminalises hiding or providing food, clothing or money to perpetrators of criminal acts or taking care of such perpetrator in another manner in order to prevent his discovery or arrest. This mode of liability applies to the following crimes:

- Genocide, aggressive war, crimes against humanity, war crimes against civilians, war crimes against wounded and sick, war crimes against prisoners of war (Articles 156 - 160);
- Terrorism, public incitement to terrorism, recruiting and training for terrorism, endangering the safety of internationally protected persons, taking of hostages, misuse of nuclear or radioactive material (Articles 169 - 172);
- Hijacking an aircraft or a ship (Article 179); and
- Endangering the safety of international air traffic and maritime navigation (Article 181).

9.7. SERBIA

Notes for trainers:

- This section focuses on Serbian law. Participants should appreciate that the courts in Serbia apply the SFRY Criminal Code and FRY Criminal Code to crimes arising from the conflict in the former Yugoslavia.
- The modes of liability applied by the courts in Serbia are set out in this section so that participants can discuss their elements and application in practice.
- In addition, the relevant case law, as far as it is known, is highlighted. Participants should be encouraged to discuss the decisions taken in these cases and whether they will be followed in future cases.
- Participants can also discuss the application of their national laws and case law to the facts of the case study. They could be asked to determine whether the accused in the case study could be successfully prosecuted for any of the modes of liability applicable in their national jurisdictions.
- It will be useful for participants to compare the law and jurisprudence of Serbia with the jurisprudence of the ICTY and the provisions in the ICC Rome Statute.

When trying the war crimes cases arising from the conflict in the former Yugoslavia, the Serbian courts do not apply the current 2006 Criminal Code. Rather, they apply either the SFRY Criminal Code or the FRY Criminal Code (which incorporates the modes of liability provided for in the SFRY Criminal Code), as *tempore criminis* laws.

However, the modes of liability and perpetration of the relevant criminal offences under 2006 Criminal Code will be set out here for comparison.

9.7.1. OVERVIEW

There are general modes of liability included in the 2006 Serbian Criminal Code that apply to all crimes. These modes of liability include:

- Perpetration;
- Co-perpetration;
- Incitement; and
- Accessory liability or aiding and abetting.

Chapter XXXIV of the 2006 Criminal Code includes the following modes of liability for international crimes:

- Perpetrating/Co-perpetrating;
- Ordering;
- Instigating;
- Organizing a group for commission of crimes; and
- Superior responsibility.

9.7.2. INSTIGATING

Article 375(7) of the 2006 Criminal Code criminalises instigating as a mode of liability for the crimes of:

- Genocide;
- Crimes against humanity;
- War crimes against civilians;
- War crimes against the wounded and sick; and
- War crimes against prisoners of war.

It provides that “whoever calls for or incites to commission” these crimes shall be liable for instigating those crimes.

9.7.3. ORDERING

Ordering as a mode of liability for criminal acts punishable under Chapter XXXIV of the 2006 Criminal Code is also included in:

- Genocide (Article 370);
- Crimes against humanity (Article 371);
- War crimes against civilians (Article 372);
- War crimes against wounded and sick (Article 373);
- War crimes against prisoners of war (Article 374);
- Use of forbidden means of combat (Article 376);
- Unlawful production, traffic and keeping forbidden weapons (Article 377);
- Ordering that there should be no survivors among enemy soldiers (Article 378(4));
- Marauding (Article 379);
- Violation of protection granted to a bearer of flag (Article 380);
- Cruel treatment of wounded sick and prisoners of war (Article 381);
- Unjustified delay of repatriation of the prisoners of war (Article 382);
- Destruction of cultural heritage (Article 383);
- Abuse of international signs (Article 385); and
- Aggressive war (Article 386).

The Serbian courts, as already noted, apply the SFRY Criminal Code or FRY Criminal Code for charges arising out of the conflicts in the former Yugoslavia. With regard to ordering as mode of liability envisaged for specific offences from the chapter dealing with criminal acts against

humanity and international law, the FRY Criminal Code provisions reflect the corresponding SFRY Criminal Code provisions. See above, section 9.4.1.2.

In the *Suva Reka* case, where the defendants were charged under Article 142 in conjunction with Article 22 of the FRY Criminal Code, the appellate court upheld the first instance court's reasoning that the order does not have to have a particular form, but can be issued in various ways. The circumstances of the case can serve as evidence that certain insufficiently explicit statements actually represented an order. The court also noted that the existence of an order cannot be proven in the absence of clear evidence that a certain statement was issued, and particularly in the absence of evidence about its content.³⁵³

The court upheld the first instance court's conclusion that since the words of the accused lacked an explicit incitement to commit crimes, they could be considered as an order only if such a conclusion would undoubtedly arise from other circumstances and evidence, which was not the case.³⁵⁴

The order does not have to have a particular form, but can be issued in various ways.

The court further noted that as opposed to cases of superior responsibility (see Module 10), it is essential to show the existence of clear and unambiguous orders. Statements that are not manifestly orders to commit a crime will only constitute orders to commit war crimes where:

- other circumstances of the case clearly indicate that there is a plan to commit a criminal offence;
- it is communicated to persons familiar with the plan;
- those persons are aware of what the message intends to say; and
- the message leads only to the desired reaction.³⁵⁵

The court upheld the first instance court's conclusion that since the words of the accused lacked an explicit incitement to commit crimes, they could be considered as an order only if this conclusion would undoubtedly arise from other circumstances and evidence, which was not the case.³⁵⁶

³⁵³ War Crimes Department of the Appellate Court in Belgrade, *Suva Reka*, Case No. Kž1 Po2 4/2010, 2nd Instance Verdict, 30 Jun 2010, ¶ 3.1.2.2. Available at: <http://www.bg.ap.sud.rs/cr/Arts./sudska-praksa/pregled-sudske-prakse-apelacionog-suda-u-beogradu/krivicno-odeljenje/ratni-zlocini/kz1-po2-4-2010.html>.

³⁵⁴ *Ibid.* at ¶ 2.4.1.2.

³⁵⁵ *Ibid.* at ¶ 2.5.1.

³⁵⁶ *Ibid.* at ¶ 2.5.1.

9.7.4. INCITING

Article 34 of the 2006 Criminal Code criminalises intentional incitement as a mode of liability.

Article 34(2) of the 2006 Criminal Code criminalises the intentional incitement of the commission of a crime, even if the commission of that crime has not been attempted.

9.7.5. ORGANISING A GROUP

Article 375 of the 2006 Criminal Code criminalises:

- conspiring with another;
- organising a group; and
- becoming a member of a group;

for the purpose of committing:

- Genocide;
- Crimes against humanity;
- War crimes against civilians;
- War crimes against wounded and sick; or
- War crimes against prisoners of war.

9.7.6. PERPETRATING/CO-PERPETRATING

Perpetration of the criminal acts punishable under Chapter XXXIV of the 2006 Criminal Code is included as a mode of liability in every article within the Chapter.

9.7.6.1. CO-PERPETRATION

Article 33 of the 2006 Criminal Code³⁵⁷ criminalises co-perpetration as a mode of liability. It provides as follows:

If several persons by participating in the commission of the act with intent or by negligence, jointly commit the criminal offence or, in realization of a joint decision by another conduct with intent, significantly contribute to the commission of the criminal offence, each shall be punished as prescribed by law for such offence.

As noted above, however, the Serbian courts apply the SFRY Criminal Code or FRY Criminal Code for charges arising out of the conflicts in the former Yugoslavia. The FRY Criminal Code, similar to the SFRY Criminal Code, provides in Article 22 that “If several persons jointly commit a criminal

³⁵⁷ Official Gazette of the Republic of Serbia, No. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009.

act, by participating in its commission or in some other way, each of them shall be punished as prescribed for that act". See also section 9.4.1.5, above.

In the *Ovčara* case, the War Crimes Chamber of the Belgrade District Court noted that, in accordance with Article 22 of the FRY Criminal Code, co-perpetration existed when several persons, by participating in the commission of the act or in some other way, jointly commit a criminal offence.³⁵⁸ It also held that to establish this form of liability, both participation and awareness of the joint commission must be proved.³⁵⁹

Co-perpetration exists when several persons participate in or in some other way jointly commit a crime. To establish this form of liability, both participation and awareness of the joint commission must be proved.

For example in the *Suva Reka* case, the court found that the co-perpetration was carried out by the accused jointly surrounding the houses, forcing civilians out, gathering them in the nearby café and throwing grenades and shooting at them.³⁶⁰

To be liable as a co-perpetrator, it is necessary that a person at least partially undertakes the act of commission of the criminal offence.³⁶¹ It is not necessary for the accused to participate in each and every act of commission of the offence because by acting with intent the accused accepts as his own all the actions of other members of his unit.³⁶²

To satisfy the subjective element the person participating in the offence must be aware:

- of the conduct of the other co-perpetrators, and
- that his acts form part of the conduct of the other co-perpetrators, so that all individual acts, including the actual commission, represent one whole.³⁶³

The accused must also intend to commit the crime itself, or as stated by the court in the *Lekaj* case, the accused must "want the act as his own".³⁶⁴

The subjective element of a person is expressed by

To be liable as a co-perpetrator, it is not necessary for the accused to participate in each and every act of commission of the offence. By acting with intent the accused accepts as his own all the actions of other members of his unit.

³⁵⁸ Belgrade District Court, *Ovčara*, Case No. K.V. 4/2006, 1st Instance Verdict, 12 March 2009, p. 244.

³⁵⁹ *Ibid.*; see also Belgrade District Court, *Zvornik*, Case No. K.V. 5/2005, 1st Instance Verdict, 12 June 2008, p. 181.

³⁶⁰ Belgrade District Court, WCC, *Suva Reka*, Case No. K.V. 2/2006, 1st Instance Verdict, 23 April 2009, p. 179-181.

³⁶¹ *Ovčara*, 1st inst., p. 244; see also Belgrade District Court, *Škorpioni*, Case No. K.V. 6/2005, 1st Instance Verdict, 10 April 2007, p. 100.

³⁶² Supreme Court of Serbia, *Sinan Morina*, Case No. Kz. I RZ 1/08, 2nd Instance Verdict, 3 March 2009, p. 4.

³⁶³ *Ovčara*, 1st inst., p. 244 Serbian version (final); see also *Škorpioni*, 1st inst., p. 100.

³⁶⁴ Belgrade District Court, *Anton Lekaj*, Case No. K.V. 4/05, 1st Instance Verdict, 18 Sept. 2006, p. 34.

his will to commit the act in concert with others.³⁶⁵

In the *Škorpioni* case, the War Crimes Chamber noted that co-perpetration under the Rome Statute requires that an accused:

- contributed to the commission or attempted commission of a crime;
- acted within a group of persons which shared a common aim involving the commission of a crime falling under the jurisdiction of the court;
- contributed with intent;
- acted with the aim to accomplish the criminal activity or criminal aim of the group; or
- acted with awareness of the intention of the group to commit the crime.³⁶⁶

In the *Zvornik* case, the War Crimes Chamber, although not insisting on a “decisive” contribution, accepted the so-called theory of “authority over [the] act” (*Tatherrschaftslehre*), as it held the accused liable as co-perpetrators on the basis that:

[T]hey had *authority over [the] act*, that one accepted the conduct of the other as his own and joint ones, expressing the will to jointly commit the act.³⁶⁷

With regard to the level of contribution, the War Crimes Chamber in *Lekaj* noted that the accused must considerably contribute to the perpetration of the crime.³⁶⁸ The chamber held that the test of “considerable contribution” was met where the accused, while armed, brought the victim to the execution site where the victim was killed.³⁶⁹ The chamber held that the accused was aware of his conduct, intended to kill the victim and “wanted the act as his own”.³⁷⁰

In the Morina case, the Supreme Court held that the mere presence of the accused at the crime site, as a member of the unit carrying out an attack and committing crimes, sufficed for commission of the crime.

In the *Morina* case, the Supreme Court held that the mere presence of the accused at the crime site, as a member of the unit carrying out an attack and committing crimes, sufficed for commission of the crime.³⁷¹

9.7.7. ACCESSORY / AIDING AND ABETTING

Article 35 of the 2006 Criminal Code criminalises intentionally aiding and abetting the commission of a crime as a mode of liability.

³⁶⁵ *Ovčara*, 1st inst., pp. 244-245; See also *Škorpioni*, 1st inst., p. 100.

³⁶⁶ See also *Škorpioni*, 1st inst., p. 100; See also *Lekaj*, 1st inst., p. 34 (upheld on appeal); *Zvornik*, 1st inst., p. 181.

³⁶⁷ *Zvornik*, 1st inst., p. 181 (emphasis in the original).

³⁶⁸ *Lekaj*, 1st inst., p. 34.

³⁶⁹ *Ibid.*

³⁷⁰ *Ibid.*

³⁷¹ *Morina*, 2nd inst., p. 4.

Article 35(2) of the 2006 Criminal Code defines aiding and abetting as:

- giving instructions or advice on how to commit a criminal offence;
- providing the perpetrator with means for committing a criminal offence;
- creating conditions or removal of obstacles for committing a criminal offence;
- prior promise to conceal the commission of the offence, offender, means by which the criminal offence was committed, traces of criminal offence and items gained through the commission of criminal offence.

As noted above, the Serbian courts apply the SFRY Criminal Code or the FRY Criminal Code for charges arising out of the conflicts in the former Yugoslavia. Aiding and abetting (accessory liability) was covered by Article 24 of the FRY Criminal Code, which reflected Article 24 of the SFRY Criminal Code. See above, section 9.4.1.6.

In the *Škorpioni* case, the War Crimes Chamber relied on Article 24 of the FRY Criminal Code when it held that someone who intentionally aided another person in the commission of a criminal offence was liable as an accessory.³⁷² The chamber held that the *actus reus* of aiding involved every act contributing to the commission of a criminal offence through supporting, advancing or facilitating the commission of the criminal act.³⁷³

The chamber further held that it is necessary to show that the assistance provided had a substantial effect on the commission of the criminal offence.³⁷⁴ The chamber held that the extent to which the accused's conduct actually aided, advanced or facilitated the commission of the criminal offence needs to be evaluated on a case-by-case basis.³⁷⁵

In this case, the chamber found that the accused had aided in the killing of civilians by:

- being present at the place of the killings;
- attending the killings;
- acting as a guard; and
- holding his automatic rifle.³⁷⁶

Regarding the accused's subjective intent, the chamber held that the person providing assistance must have carried out the acts with the intent to aid, encourage or provide moral support with regard to the relevant criminal offence. The accessory must also know that his acts aided the main perpetrator in the commission of the specific criminal offence.³⁷⁷

³⁷² *Škorpioni*, 1st inst., p. 101.

³⁷³ *Ibid.*

³⁷⁴ *Ibid.*

³⁷⁵ *Ibid.*

³⁷⁶ Supreme Court of the Republic of Serbia, *Škorpioni*, Kz. I r.z. 2/07, 2nd Instance Verdict, 13 June 2008, p. 17, referring to 1st inst. at p. 102, ¶ 1.

³⁷⁷ *Škorpioni*, 1st inst., p. 101.

In this case the chamber found that the accused was aware that by being present at the killings while armed and taking guard next to the persons killing the civilians, he contributed to the commission of the crime, he was aware of the consequence that would result from his actions, and he wanted such consequence.³⁷⁸

The War Crimes Chamber held that although the accused did not shoot or kill anyone himself:

[H]e showed [...] his decision and his attitude towards this criminal offence and the event, because if the other accused acted in the same manner [...] no one would have been killed and the injured parties would have been alive.³⁷⁹

Regarding accessory liability, the chamber held that it was not necessary to prove the existence of a joint organised plan or the prior existence of such a plan, as no plan or agreement was necessary.³⁸⁰

The Supreme Court of the Republic of Serbia in this case, however, quashed the War Crimes Chamber verdict in relation to the conviction for aiding and abetting and returned the case to the first instance chamber for re-trial.³⁸¹ The Supreme Court held that the reasoning of the War Crimes Chamber with regard to the accused's subjective intent was contradictory, making the first instance verdict unclear.³⁸² The Supreme Court held that it was unclear whether the accused was aware that by the act of aiding, he contributed to the commission of the criminal offence, and whether he wanted such a consequence.³⁸³

In the *Zvornik II* case, the trial chamber pointed out that aiding as a form of co-perpetration can also be committed by omission, when the person omits to act in line with his duties.³⁸⁴

It is necessary that the omission significantly influenced the commission of the crime and that the accused was aware that his conduct aided the commission of the crime by the principal perpetrator.³⁸⁵

It is necessary that the omission significantly influenced the commission of the crime and that the accused was aware that his conduct aided the commission of the crime by the principal perpetrator.

In the case *Grujić and Popović*, the Higher Court, without reference to a specific source, stated that this mode of liability exists under customary international

³⁷⁸ *Škorpioni*, 2nd inst., p. 17, referring to 1st inst. at p. 105, ¶ 5.

³⁷⁹ *Ibid.* at p. 18, referring to 1st inst. at p. 117, ¶ 2.

³⁸⁰ *Škorpioni*, 1st inst., p. 101.

³⁸¹ *Škorpioni*, 2nd inst., p. 17, referring to 1st inst. at p. 1-2, 17 *et seq.*

³⁸² *Škorpioni*, 2nd inst., p. 17.

³⁸³ *Ibid.* at p. 18.

³⁸⁴ Belgrade High Court, WCD, *Grujić and Popović*, (Zvornik II), Case No. K.Po2 28/2010, 1st Instance Verdict., 22 Nov. 2010, p. 298.

³⁸⁵ *Ibid.*, at p. 299.

law.³⁸⁶

The court explained that in international criminal law theory and jurisprudence, the obligation to act arises either from legal provisions, or from “previously undertaken acts of a guarantor by which he created a dangerous situation”. In the *Zvornik II* case, the capture and internment of civilians undertaken by the accused imposed on him an obligation and responsibility to provide for their protection while they were in captivity. Furthermore, the responsibility of the accused in such a situation is not limited only to controlling units under his direct command.³⁸⁷

The court made reference to foreign case law and the ICRC Commentary to AP II, which use the notion of “indirect subordination”. This establishes the obligation of a military commander who is responsible for prisoners to intervene and undertake all necessary measures even if the civilian population, which is not under his authority, or soldiers that are not under his command, are hostile towards the prisoners and threaten them with abuse.³⁸⁸

The accused responsible for aiding need not have knowledge about the crime the perpetrator was planning to commit.

To be responsible for aiding, the accused need not have knowledge about the crime the perpetrator was planning to commit. He does not have to be aware of all the details of the crime and the information available to him at the time of his failure to act does not have to include concrete details of the crime which is about to be committed. The court found that what suffices, according to international customary law, is that

the accused was aware of “significant risk/higher probability of risk” that the crime was to be committed.³⁸⁹ The court found that the accused was aware that the prohibited outcome of the acts was probable and knew that there was a concrete probability that the direct perpetrators would commit the crimes because of the reputation of the direct perpetrators and the repetition of the acts by the same group of persons.³⁹⁰

In that case, aiding by omission involved significant support of the actions of direct perpetrators and significant contribution to the crime by removing obstacles for its commission. The court considered that under customary international law, it is not necessary to prove that the omission of the superior caused the commission of the crime by his subordinate. For the existence of causal nexus, it is necessary to establish that subordinates would not have committed the crime had not the commander omitted to perform his duty.³⁹¹

For the existence of causal nexus, it is necessary to establish that subordinates would not have committed the crime had not the commander omitted to perform his duty.

³⁸⁶ *Ibid.*

³⁸⁷ *Ibid.*, at p. 300.

³⁸⁸ *Ibid.*, at p. 301.

³⁸⁹ *Ibid.*

³⁹⁰ *Ibid.*

³⁹¹ *Škorpioni*, 1st inst., p. 301.

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