

Section 11: Participation in a Criminal Offense

General Commentary

It is not only the principal perpetrator of a criminal offense or the principal perpetrator of its attempted commission who may be criminally liable. Persons who participated in the criminal offense in a wider sense may also be liable. The MCC sets out five grounds upon which a person may be held to have participated in a criminal offense: (1) participation in a common purpose; (2) ordering, soliciting, or inducing the commission of a criminal offense; (3) inciting the commission of a criminal offense; (4) facilitating the commission of a criminal offense (through aiding, abetting, or otherwise assisting the perpetrator of the criminal offense); and (5) in accordance with the doctrine of “command responsibility” in relation to the criminal offenses of genocide, crimes against humanity, and war crimes. The commentaries to each individual article below discuss each ground of participation.

In some states, a person who participates in a criminal offense under any of these five grounds of liability is considered to be an *accessory* to a criminal offense. The implication of being designated as an accessory to a criminal offense is that the person is viewed by the court as having assisted in the criminal offense but not as having directly participated. An accessory is regarded in a different light by the court than the principal perpetrator and, when convicted of a criminal offense, is punished in a different manner.

In contrast, Article 33 of the MCC, like the criminal codes of many states, treats an aider or an abettor as an *accomplice* to the criminal offense. An accomplice is liable for a criminal offense in the same way as the principal perpetrator of the offense. The implication of accomplice liability as provided for under Article 33 of the MCC is that an aider or an abettor will be subject to the same penalty range that applies to a principal perpetrator of the criminal offense. Given that some of the grounds listed in Articles 28–31 may involve a lesser degree of participation than that of the person who actually perpetrates the criminal offense, a court determining the appropriate penalty for an accomplice may consider this lesser degree of participation as a mitigating factor. Reference should be made to Article 51(1)(e) and its accompanying commentary.

In this sense, the person can be charged with a criminal offense (albeit on the grounds of aiding, abetting, ordering, and so forth) and is liable to the same penalties as the principal perpetrator if convicted of the offense. So, for example, if A orders B to

kill C, then A will be liable if B murders C and will face a penalty of ten to thirty years' imprisonment or life imprisonment.

The grounds of participation contained in the MCC include those contained in Article 25 of the Rome Statute of the International Criminal Court. A state that is party to the statute should ensure that all of these grounds of participation are covered in domestic legislation, or that equivalent grounds exist. Commonly, grounds of participation such as aiding and abetting are already covered in existing domestic legislation. What might not be covered is command responsibility, a ground specific to the crimes of genocide, crimes against humanity, and war crimes. The precise articulation of this ground of participation is contained in Article 28 of the Rome Statute of the International Criminal Court. Article 32, below, integrates the precise language used in Article 28 into the MCC.

Article 28: Participation in a Common Purpose

It is a criminal offense to contribute to the commission or attempted commission of a criminal offense by a group of persons acting with a common purpose. Such contribution must be intentional and must:

- (a) 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 criminal offense under the MCC; or
- (b) be made in the knowledge of the intention of the group to commit the criminal offense.

Commentary

The form of liability contained in Article 28 is taken from Article 25(3)(d) of the Rome Statute of the International Criminal Court. A state seeking to comply with its obligations under the statute must ensure that domestic legislation contains this ground of criminal liability. This form of liability is also contained in Article 2(5)(g) of the United Nations Convention for the Suppression of the Financing of Terrorism.

“Common purpose liability” has frequently been used as a ground of participation before the International Criminal Tribunal for the former Yugoslavia. The terminology used at the International Criminal Tribunal for the former Yugoslavia is that of “joint criminal enterprise,” or criminal enterprise encompassing a “common criminal plan” or a “common criminal purpose” (for the multiplicity of terms, see the summary in *Prosecutor v. Radoslav Brđjanin, Momir Talic*, case no. IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend,

June 26, 2001, paragraph 24). Much jurisprudence exists on the precise meaning of *joint criminal enterprise*. It is instructive to look to this jurisprudence for guidance as to the meaning of Article 25(3)(d) of the Rome Statute of the International Criminal Court (replicated here in this article of the MCC).

This form of liability is not explicitly provided for by the statutes of the international tribunals. The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia considered that it was implied by the statute, however, and found support for the concept of joint criminal enterprise (JCE) in several domestic sources of law as well as in post–World War II prosecutions by military tribunals. Among these are the concepts of “criminal association,” which exists in some systems, and “common design,” which exists in other systems. JCE may be distinguished from grounds of liability such as conspiracy, penalizing membership in certain groups, and complicity, concepts frequently used at a domestic level in different systems. The distinctiveness of JCE is that co-perpetration in a joint criminal enterprise is a form of commission of the criminal offense. As opposed to merely knowing about the commission of the criminal offense, the co-perpetrator in a JCE shares the intent of the principal perpetrator. The defendant Ojdanic in the *Mulinovic* decision unsuccessfully argued that JCE does not constitute a mode of liability within the tribunal’s jurisdiction because “it is equivalent to a collective responsibility based upon membership in a criminal organization.” To demonstrate that JCE is not a “vehicle for organisational liability,” the Appeals Chamber stated that “[c]riminal liability pursuant to a joint criminal enterprise is not liability for mere membership or for conspiring to commit crimes, but a form of liability concerned with the participation in the commission of a crime as part of a joint criminal enterprise, a different matter” (*Prosecutor v. Mulinovic et al.*, Decision on Dragoljub Ojdanic’s Motion Challenging Jurisdiction—Joint Criminal Enterprise, case no. IT-99-37-AR72, May 21, 2003, paragraph 26).

JCE is a mode of participation in a criminal offense that consists of “an understanding or arrangement amounting to an agreement between two or more persons that they will commit a crime” (*Prosecutor v. Krnojelac*, case no. IT-97-25-T, Judgment, March 15, 2002, paragraph 80). As mentioned previously, the participants in the venture may be individually liable for the acts of the other members.

Three categories of this mode of liability have been established by the international tribunals. The first category refers to cases where all co-accused possess the same criminal intention to act pursuant to the common design. This type of JCE constitutes the basis of the doctrine, as the participants in the enterprise may be held criminally liable for acts they did not commit but that they agreed to commit in a collective sense. Comparison between this form of participation and the law of conspiracy used in some legal systems stops when one considers the finding of the Appeals Chamber in the *Mulinovic* case. It stated that where proving the existence of a mere agreement suffices in the case of conspiracy, liability for participation in a JCE is incurred when the parties to the agreement take action in furtherance of that agreement (*Prosecutor v. Mulinovic et al.*, case no. IT-99-37-AR72, Decision on Dragoljub Ojdanic’s Motion Challenging Jurisdiction—Joint Criminal Enterprise, May 21, 2003, paragraph 23).

The second category of JCE is known as the systemic form (*Prosecutor v. Vasiljević*, Appeal Judgment, February 25, 2004, case no. IT-98-32-A, paragraph 98) and refers to an organized system of ill treatment. It is a variation of the first category, created to

refer specifically to the cases of concentration camps, where JCE is performed through an institutional structure. In this case, the prisoners of the camp are ill treated in pursuance of the JCE by “members of military and administrative units such as those running concentration camps; i.e. by groups of persons acting pursuant to a concerted plan” (*Prosecutor v. Tadić*, case no. IT-94-1-A, Appeal Judgment, July 15, 1999, paragraph 202). This category of JCE may not only apply to international crimes such as genocide, crimes against humanity, and war crimes but may also extend to other criminal offenses perpetrated through any institutional structure.

The third category of JCE supported by the international tribunals concerns “cases involving a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose” (*Tadić* appeal judgment, paragraph 204). This type of JCE refers especially to cases of mob violence. It will be a matter for a court interpreting Article 28 to consider whether it wishes to go so far as to include this third category of JCE in its interpretation of JCE. It must be borne in mind when deciding this issue that the International Criminal Tribunal for the former Yugoslavia adjudicated only on the criminal offenses of genocide, crimes against humanity, and war crimes and not on other offenses commonly found in the domestic legislation or in the MCC. Many scholars and practitioners believe that this category stretches the definition and meaning of JCE too far, going beyond the definition of JCE elucidated in many domestic courts. Certainly, in the case of a domestic court implementing Article 28, the court should assess very carefully exactly how far it wishes to extend this concept in relation to “ordinary” criminal offenses. In such a case, a person may be more properly charged under Article 31 of the MCC, rather than Article 28, for facilitating the criminal offense.

The subjective element required for proof of participation in a JCE differs according to the category of the doctrine under consideration. With regard to the first category, the intent to perpetrate a certain criminal offense must be shared by all participants in the JCE. Within the frame of the second category, the participant must have had personal knowledge of the system of ill treatment, as well as the intent to further it. The intention to further the criminal purpose and to contribute to the joint criminal enterprise is required to establish the existence of the third category of JCE. Moreover, criminal liability for a crime falling outside the common purpose may arise if (1) it was foreseeable that such a crime might be perpetrated by one or other members of the group, and (2) the accused willingly took that risk.

In relation to the material element, or the *actus reus*, the following must be proven: (1) a group of persons; (2) the existence of a common plan, design, or purpose that amounts to or involves the commission of a crime; and (3) the participation of the accused in the common design involving the perpetration of one of the crimes provided for in the statute (*Tadić* appeal judgment, paragraphs 227–228).

Article 29: Ordering, Soliciting, or Inducing

1. It is a criminal offense to order, solicit, or induce the commission of a criminal offense that in fact occurs.
2. It is a criminal offense to attempt to order, solicit, or induce a criminal offense that carries with it a penalty of more than five years, where no criminal offense was in fact committed.

Commentary

The terms *ordering*, *soliciting*, and *inducing* are all found in Article 25(3)(b) of the Rome Statute of the International Criminal Court. A state wishing to implement its obligations under the convention should ensure that these grounds of liability are contained in domestic legislation. Various other international conventions require that these grounds of liability be included in domestic legislation.

The term *order* implies that a person in a position of authority, through the use of a superior-subordinate relationship, compels another person to commit a criminal offense. *Order* is synonymous with *direct*, a ground of participation found in many systems and also referred to in a number of international conventions, such as the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime, Article 5(2)(b). The use of solicitation to bring about a criminal offense is a more oblique form of participation under which a person seeks to instigate or bring about the offense, for example through prompting the perpetrator. There are some overlaps between the terms *solicit* and *induce*. The latter ground of participation also involves a person seeking to instigate the commission of a criminal offense. Inducement involves some asserting of persuasion or influence.

In relation to criminal offenses carrying with them a penalty of one to five years, a person who ordered, solicited, or induced their commission cannot be prosecuted unless the criminal offense actually occurred. This means that a person who ordered, solicited, or induced the commission of such an attempted criminal offense cannot be prosecuted for it. For criminal offenses that carry a penalty of more than five years, there is no need to prove that the criminal offense in fact occurred.

Article 30: Incitement

1. It is a criminal offense for one person to incite another person to commit a criminal offense if the incited criminal offense was committed under the inciter's influence.
2. Attempt under Article 27 applies to Article 30 only where the incited criminal offense carries with it a penalty of more than five years.

Commentary

The term *incitement* is classified very differently in different legal systems. In some systems, incitement of another person to commit a criminal offense is termed an inchoate offense or an incomplete offense. This means the perpetrator is punished for the act of incitement, irrespective of whether the act prompted the incitee to commit the criminal offense. Incitement is in itself a substantive criminal offense. In other legal systems, incitement is treated as a participatory offense. This means the inciter is punished in the same manner as the principal perpetrator of the offense (reference should be made to Article 33). In such cases, the inciter is punished only when the incitee commits the criminal offense that he or she was incited to commit. In other systems, incitement as a participatory offense is punished irrespective of whether the offense occurred (although the law usually requires that the offense that is incited be a serious criminal offense). Under the MCC, a person will be punished as a principal perpetrator where the criminal offense is subsequently committed by the incitee under the influence of the inciter. In the case of more serious criminal offenses (i.e., those carrying a penalty of more than five years), the inciter can be charged with attempt under Article 27.

In addition to incitement as a ground of participation, there is also a specific “incitement to crime on account of hatred” offense. Under Article 161, for a person to be convicted, the incitement must be both “public” and “direct.” In addition, the motivating factor for committing the criminal offense must be hatred. Reference should be made to Article 161, “Incitement to Crime on Account of Hatred,” and its accompanying commentary.

Article 31: Facilitation

It is a criminal offense, for the purpose of facilitating the commission of a criminal offense, to aid, abet, or otherwise assist in its commission or its attempted commission, including providing the means for its commission.

Commentary

The terms *aid*, *abet*, and *otherwise assist* are all found in Article 25(3)(f) of the Statute of the International Criminal Court. Various other international conventions also require that these grounds of liability be included in domestic legislation.

Often the terms *aid* and *abet* are merged and taken to mean the same thing. Their meaning is distinct, however. To aid means to give assistance to someone, while to abet means to facilitate the commission of a criminal offense. The term *otherwise assist* could include other means of facilitating or supporting the commission of a criminal offense, such as counseling (giving help or advice prior to the commission of the offense), instructing the perpetrator on how to carry out the offense, or providing the perpetrator with the instrumentalities of crime. There is an overlap between aiding, abetting, and otherwise assisting, the latter being a residual ground of liability for facilitation of a criminal offense.

The mental element, or *mens rea*, of aiding and abetting is the intention on the part of the aider or the abettor that his or her conduct facilitate the commission of the criminal offense, denoted by the words “for the purpose of facilitating the commission of a criminal offense,” contained in Article 31. While the aider or abettor may know of the *mens rea* of the principal perpetrator, he or she does not have to share it. Instead, a separate intention element is considered. For a discussion of the meaning of *intention*, reference should be made to Article 18, “Intention, Recklessness, and Negligence,” and its accompanying commentary. In the context of the MCC, intention can involve either the volition on the part of the perpetrator to facilitate a criminal offense or cognition that the act of aiding, abetting, or otherwise assisting will facilitate the commission of a criminal offense.

If the principal perpetrator of a criminal offense does not fully complete the offense and merely attempts it (thereby being liable for attempted commission of the offense), a person may still be held liable for aiding, abetting, or otherwise assisting the attempted commission of a criminal offense, unless the principal perpetrator abandons his or her efforts to commit a criminal offense or otherwise prevents its completion as discussed in Article 27.

Article 32: Responsibility of Commanders and Other Superiors for the Criminal Offenses of Genocide, Crimes against Humanity, and War Crimes

1. In the case of genocide, crimes against humanity, and war crimes, a criminal offense is committed by a military commander or a person effectively acting

as a military commander when genocide, crimes against humanity, or war crimes are committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, in a situation where:

- (a) that military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such criminal offenses; and
- (b) that military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

2. With respect to superior and subordinate relationships not described in Paragraph 1, a criminal offense is committed by a superior when genocide, crimes against humanity, or war crimes are committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

- (a) the superior either knew or consciously disregarded information that clearly indicated that the subordinates were committing or about to commit such criminal offenses;
- (b) the criminal offenses concerned activities that were within the effective responsibility and control of the superior; and
- (c) the superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Commentary

Command responsibility is a form of participation that is unique to the international offenses of genocide, crimes against humanity, and war crimes. Two sorts of persons may be held liable under the doctrine of command responsibility: military commanders under Article 32(1) and nonmilitary commanders who are in a superior-subordinate relationship with the perpetrators of genocide, crimes against humanity, and war crimes under Article 32(2). This ground of liability is used to convict commanders who may hold a great deal of responsibility for the commission of genocide, crimes against humanity, and war crimes but who may have never “gotten their hands dirty” in that they did not actually commit the physical acts of the criminal offense. There may have been a direct order to commit an act of genocide, crimes against humanity, or war crimes but there may be difficulty proving there was such an order. Alternatively, the commander may not have issued direct orders or taken any positive steps to induce his or her subordinates to commit the offense. In the latter case, under the doc-

trine of command responsibility, a commander may be held liable for his or her negligence in not preventing, repressing, or retrospectively dealing with the commission of the offense. It is not a form of vicarious liability where the commander is actually held liable for the actions of his or her forces or subordinates but rather a direct form of liability grounded in negligence. Negligence is a ground of liability when a person falls below a standard of behavior expected of a reasonable person.

Military commanders and nonmilitary commanders are held to different standards of expected behavior under Article 32, as is evidenced by the differences in wording of the two provisions. Once it is established that a person is a commander, the court will move to look at the actions or inactions of the commander in light of the requirements of Article 32. In the case of command responsibility, the commander is liable when forces under his or her “effective command and control”—“effective authority or control” in the case of military commanders and “effective authority and control” in the case of nonmilitary commanders—commit the criminal offenses of genocide, crimes against humanity, and war crimes. A military commander is responsible when he or she knew the forces were going to commit these offenses, or ought to have known, and where he or she did not take reasonable measures to repress or prevent the offenses, or submit the matter to competent authorities for investigation or prosecution. A nonmilitary commander is responsible only when he or she knew or consciously disregarded information that clearly indicated that subordinates were committing or were about to commit an offense. It must also be proven that the criminal offense concerned activities within the “effective responsibility and control” of the nonmilitary superior.

When these three elements are proven, a person may be convicted upon this ground of participation. The International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, both of which have examined the doctrine of command responsibility, have held that a conviction for command responsibility does not preclude conviction upon other grounds of participation. But as a general rule, where an offender is convicted as a principal perpetrator or accomplice, no conviction is entered under the heading of command or superior responsibility.

In considering the precise meaning and scope of the provision, reference should be made to the jurisprudence of the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Criminal Court. When reading the jurisprudence of the former tribunals, it is worth bearing in mind that their governing statutes—Article 7(3) of the Statute of the International Criminal Tribunal for the former Yugoslavia and Article 6(3) of the Statute of the International Criminal Tribunal for Rwanda—use different wording than the Statute of the International Criminal Court, which is the basis of Article 32 of the MCC.

Article 33: Punishment as a Perpetrator

The same penalties that apply to a perpetrator apply to a person who has participated in a criminal offense under Articles 28–32.