

## **Types of individual criminal responsibility according to article 25 (3) of Rome Statute**

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### ***Abstract***

*In this Article, we outline the concepts of international law that relate to cases of individual liability as well as to contradictions in the international legal system and provide the possibility to understand the legal aspects that emerge from certain conditions. Present international law is primarily based on the notion of independent international duty (majorly of governments and international organisations). This definition often does not provide a substantive or institutional tool for the distribution of responsibilities between a majority of participants in circumstances where contributions to negative results can not be applied on the basis of the particular cause of each person. The main tasks of the article is firstly to identify and define the main historical background and concepts that allow us to assess the law pertaining to individual responsibility and to conceptualize the relevant practice of the International Criminal court as well as to discuss the potentials and limits of the current framework of international responsibility in dealing with situations of both collective and individual responsibility.*

**Keywords:** *individual responsibility, international crimes, Rome Statute, collective liability.*

**JEL Classification:** K14, K33

### **1. Introduction**

This article focuses on the determination of the individual responsibility in participation in international crimes. Since the case law of the International Criminal Court and the International Tribunals has always been highly problematic from the factor of perspective of national criminal law, particularly civil legal structures, since there has been a prevalent opinion in international criminal law that the normal modes of involvement that have been established in national criminal jurisdictions are not appropriate.

In this Article, we outline the concepts of international law that relate to cases of individual liability as well as to contradictions in the international legal system and provide the possibility to understand the legal aspects that emerge from

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certain conditions. We outline main objects related to the determination of the individual and collective responsibility.

The discussed topic is studied based on the dialectical, historical, comparative methods.

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## 2. Historical introduction of individual responsibility

In International law, the definition of responsibility is very often referring to obligations that ex ante structure the conduct of the relevant actors.

The international responsibility of individuals shares a common characteristic with that of States (and international organizations): its source is the violation of an obligation (of abstention) arising under international law. However, apart from this, the responsibility of individuals is markedly different:

- it is largely, if not exclusively, criminal;
- it is implemented by international tribunals (while as regards State responsibility, the intervention of an international court or tribunal is exceptional and is entirely dependent upon the consent of the States concerned) j and
- it is quite exceptional at the international level, occurring only if an international criminal tribunal has been created to adjudicate upon its existence, either by treaty, or by a resolution of the Security Council.

In the absence thereof, a crime may be defined by an international legal instrument or under customary international law (or both: e.g., piracy, slavery, racial discrimination), but its sanction—that is to say, the penal implementation of punishment—is left to the domestic courts of States.

This intrusion of criminal responsibility into international law constitutes one of the causes of the loss of conceptual unity of the notion of responsibility in international law; however, it is not the only such cause.<sup>3</sup>

It should be noted that only after the Second World War, the international organizations started to determine personal responsibility in case of serious violations of human rights as well as the collective responsibility of perpetrators and State responsibility<sup>4</sup>.

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<sup>3</sup> James Crawford; Alain Pellet; Simon Olleson; Dr Kate, (2010), *The Law of International Responsibility*, Oxford University Press. ISBN: 9780199296972, May 2010, 1376 p., retrieved from: <http://pellet.actu.com/wp-content/uploads/2016/02/PELLET-2010-The-Definition-of-Responsibility-in-International-Law.pdf>, consulted on 1.10.2020.

<sup>4</sup> Greppi, E. (1999). *The evolution of individual criminal responsibility under international law*. „Revue Internationale de la Croix-Rouge/International Review of the Red Cross”, 81(835), 531-553. doi:10.1017/S1560775500059782.

Starting with the Nuremberg, we have to understand that all the future provisions were started with the discussion of individual criminal responsibility under international law and mainly set to major rules: conspiracy and common plan liability as forms of participation.

In Article 6(a), Crimes Against Peace, the legislators also included provision that made a person criminally liable for the naming, preparing, preparation, initiation or conduct of a war of aggression or war in breach of international treaties, agreements or promises, or involvement in a common scheme or a plot to carry out any of the above. Moreover, as it is stated in the last paragraph of Article 6, following the definitions of Crimes against Peace<sup>5</sup>, Crimes against Humanity and War Crimes: “Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.”<sup>6</sup> These two excerpts appear to create both a substantive crime of conspiracy, in the former, and a form or mode of participation in the latter.<sup>7</sup>

Following the Nuremberg processes, we have to remember about the ICTY and the ICTR which were established as tribunals in response to the specific contexts of mass violence in the Former Yugoslavia and Rwanda, respectively. However, none of the establishing laws related to conspiracy or joint scheme liability, except for conspiracy to commit genocide, which has been enumerated for it in the Genocide Convention since 1948. Reference should be made to the well-established CIL in the implementation and interpretation of the crimes under both the Statutes. The Statutes were supposed to formalize the CIL, in reaction to ex post facto criticism of the crimes being tried in Nuremberg.

Dusko Tadić was the first defendant to be prosecuted by the ICTY. He was absolved by the Trial Chamber to kill five civilians in the village of Jaskići after the military force to which he belonged had passed through the village on an ethnic cleansing mission. In 1999, the Appeals Chamber overturned its guilty verdict upon that crime, first finding that the only fair inference that the Trial Chamber could draw was that the armed party to which the Appellant belonged had killed the five men in Jaskići.<sup>8</sup>

After all, the Appeals Chamber agreed that the facts did not demonstrate that Tadić had personally killed either of the men and thus the Chamber had to make the decision: whether the actions of one person could give rise to the criminal guilt of another if they were both involved in the execution of a common criminal plan; and the degree of men's rea required in that case<sup>9</sup>.

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<sup>5</sup> Nuremberg Trial Proceedings Vol. 1 Charter of the International Military Tribunal, retrieved from: <https://avalon.law.yale.edu/imt/imtconst.asp>, consulted on 1.10.2020.

<sup>6</sup> Jikia, Mariam. (2008). *Individual Criminal Responsibility According to Article 25 of ICC Statute*. Scientific-Practical and Reviewed Journal “Justice”. 3. 90-104.

<sup>7</sup> Pamela J. Stephens, *Collective Criminality and Individual Responsibility: The Constraints of Interpretation*, 37 „Fordham International Law Journal” 501 (2014).

<sup>8</sup> Prosecutor v. Tadić, Case No. IT-94-1-A, Judgement of the Appeals Chamber, para. 183 (Int’l Trib. For the Former Yugoslavia July 15, 1999).

<sup>9</sup> Tadic case: the verdict. Retrieved from: <https://www.icty.org/?q=en/press/tadic-case-verdict>, consulted on 1.10.2020.

In the light of the lack of any concept of a shared strategy in the ICTY Statute, the Tribunal has nevertheless agreed to apply the doctrine in Article 7(1) of the ICTY Statute<sup>10</sup>: “A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 5 of the present Statute, shall be individually responsible for the crime”.<sup>11</sup>

With the establishment of the International Criminal Court, the Rome Statute was the first legal act, determined individual responsibility and the co-participation of perpetrators in commitment of international crimes. The result is the amendments to the international criminal law, including the law regarding forms of responsibility in collective crimes.<sup>12</sup> What is more important the limits of individual responsibility had been carefully considered in the Statute. The Rome Statute contains a detailed provision outlining the requirements for individual criminal responsibility that reflects the compromises made in its negotiations<sup>13</sup>. Article 25 of the Statute<sup>14</sup> provides in relevant part:

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.<sup>15</sup>

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<sup>10</sup> Statute of the International Criminal Tribunal for the Former Yugoslavia, retrieved from: [https://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept09\\_en.pdf](https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf), consulted on 1.10.2020.

<sup>11</sup> Caspar Plomp, *Aiding and Abetting: The Responsibility of Business Leaders under the Rome Statute of the International Criminal Court* (2014) 30(79) „Utrecht Journal of International and European Law” 4, DOI: <http://dx.doi.org/10.5334/ujiel.cl>.

<sup>12</sup> Andre Nollkaemper & Dov Jacobs, *Shared Responsibility in International Law: A Conceptual Framework*, 34 „Michigan Journal of International Law” 359 (2013).

<sup>13</sup> Pamela J. Stephens, *op. cit.*, 2014, p. 501.

<sup>14</sup> Rome Statute of the International Criminal Court: [https://legal.un.org/icc/statute/99\\_corr/cstatute.htm](https://legal.un.org/icc/statute/99_corr/cstatute.htm), consulted on 1.10.2020.

<sup>15</sup> Pamela J. Stephens, *op. cit.*, 2014, p. 501.

We agree with Jilia Mariam, who states in her article that the Rome Statute determines four levels of responsibility for commission of a crime; for ordering and instigating; for assistance; for contribution to a group crime. In compliance with the legal precedent of the ad hoc tribunals, ordering, instigating, aiding and responding to community crimes-all demand that the crime itself has either been committed, or at least attempted.<sup>16</sup>

### 3. Commission of Crime accordingly to Article 25 (3) of Rome Statute

Article 25 (3)(a) of ICC Statute entails three different types of commission: commission as an individual, joint commission and commission through another person. Person whose conduct is covered by the definition of the crime in terms of Article 25 (3)(a) is liable under international criminal law.<sup>17</sup>

As it indicated in the Legal Analysis provided by War Crimes Research office : The primary question that has arisen from this jurisprudence is whether the Court was correct in identifying the fourth form of liability, so-called “indirect co-perpetration,” which Pre-Trial Chamber I defined as a combination of perpetration “jointly with another” and perpetration “through another person”.<sup>18</sup> The Defense for Germain Katanga has challenged this finding, stressing the fact that Article 25(3)(a) refers to acts perpetrated “jointly with another or through another person,” rather than “jointly with another and through another person.”<sup>19</sup> The Katanga Defense further argues that the Court’s adoption of “indirect co-perpetration” is inappropriate in light of the fact that no other jurisdiction has ever applied the theory as applied by the Pre-Trial Chamber in the Katanga & Ngudjolo case.<sup>20</sup>

### 4. Assistance in committing a crime

Anyone who aids in the commission of a crime under international law is criminally liable under Article 25(3)(c) of the ICC Statute. The responsibility for the assistance is also determined by the case law of ad hoc Tribunals. According to case law of ad hoc Tribunal’s assistance should have a significant effect on the commitment of crime. As for the ICC Article 25(3)(c) does not require that the

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<sup>16</sup> Jikia, Mariam, *op. cit.*, 2008, p. 90-104.

<sup>17</sup> Ibid.

<sup>18</sup> Modes of liability and the mental element: analyzing the early jurisprudence of the International Criminal Court, War Crimes Research Office, International Criminal Court Legal Analysis and Education Project September 2010, Retrieved from: <https://www.wcl.american.edu/impact/initiatives-programs/warcrimes/our-projects/icc-legal-analysis-and-education-project/reports/report-13modes-of-liability-and-the-mental-element-analyzing-the-early-jurisprudence-of-the-international-criminal-court/>, consulted on 1.10.2020.

<sup>19</sup> Kucher O., Petrenko A. *International Criminal Responsibility After Katanga: Old Challenges, New Solutions.* „Russian Law Journal”. 2015;3(1):143-168. <https://doi.org/10.17589/2309-8678-2015-3-1-143-168>.

<sup>20</sup> <https://www.wcl.american.edu/impact/initiatives-programs/warcrimes/our-projects/icc-legal-analysis-and-education-project/reports/report-13-modes-f-liability-and-the-mental-element-analyzing-the-early-jurisprudence-of-the-international-criminal-court/>, consulted on 1.10.2020.

assistance has a substantial effect on the commission of the crime<sup>21</sup>. The level of personal involvement in the criminal events and the degree of individual criminal responsibility is determined by the mode of participation. Assistance covers acts that were not essential in causing the criminal result. Thus, assistance is one of the modes of participation and it's provided rather low degree of individual criminal responsibility than commission of crime or instigating and ordering.<sup>22</sup>

Per Article 25(3)(c), individual criminal responsibility arises when a person „[f]or the purpose of facilitating the commission of [a crime under the jurisdiction of the Court], aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission”.<sup>23</sup> Interpretations of this Article, as well as its relation to other parts of the Rome Statute, are diverse and competing. The question of how business leaders might be found responsible for their actions before the ICC is closely connected to the question of the preferable interpretation of Article 25(3)(c).<sup>24</sup>

### 5. Contribution to a Group Crime

Article 25(3)(d) of the ICC Statute regulates one of the modes of criminal participation: contributing to the commission of a crime by a group. Group means the association of at least three persons acting for the same purpose. The wording covers any contribution to the group crime. This provision applies to indirect forms of assistance (for example, financing the group), that do not warrant liability for either co-perpetration or aiding and abetting, as they have no substantial effect on the commission of the crime under international law.<sup>25</sup>

Let's looking deeper into case decisions.

As it is stated in Lydia de Leeuw article: only “significant” contributions can constitute the required actus reus under art. 25 (3) (d) (ii) Rome Statute. One must assess to what extent business transactions have contributed to the commission of crimes, and what was the scale, intensity and duration of these deals.<sup>26</sup>

Accordingly, to the Prosecution's observations on Article 25(3)(d) ICC-01/04-01/07-3367 from Katanga case<sup>27</sup>: “As described in paras. 15-16 above, pursuant to Article 25(3)(d), the Prosecution must prove that the accused meant to engage in the relevant conduct. This can be inferred from the following facts and circumstances described in paragraphs 30 to 60 above:

- a) Germain Katanga provided his contribution in the form of multiple acts and over a prolonged period of time;
- b) Germain Katanga provided different forms of contribution, which require preparation and concentration;

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<sup>21</sup> Caspar Plomp, *op. cit.*, 2014, p. 4.

<sup>22</sup> Jikia, Mariam, *op. cit.*, 2008, p. 90-104.

<sup>23</sup> Rome Statute (n. 3) art. 25(3)(c).

<sup>24</sup> Caspar Plomp, *op. cit.*, 2014, p. 4.

<sup>25</sup> Jikia, Mariam, *op. cit.*, 2008, p. 90-104.

<sup>26</sup> Leeuw, Lydia. (2016). *Corporate Agents and Individual Criminal Liability under the Rome Statute*. „State Crime Journal”. 5. 242. 10.13169/statecrime.5.2.0242.

<sup>27</sup> <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/04-01/07-3367>, consulted on 1.10.2020.

c) Germain Katanga had a leading position within the group and he frequently interacted with members of the group when providing his contribution;

d) Germain Katanga knew that his conduct would contribute to the common purpose of the group of Ngiti combatants which was to wipe out Bogoro (see paras. 43-49).”<sup>28</sup>

The personal (*ratione personae*) jurisdiction of the ICC has to be remembered together with the principle of citizenship and the principle of territoriality. It applies to citizens of states parties to the Statute or if the crime was committed on the territory of such a state. This condition does not apply to cases when the relevant situation is referred to the ICC Prosecutor by the UN Security Council - in this case, citizens of states not participating in the Statute, as well as cases when a crime was committed on the territory of such a state, may fall under his jurisdiction. That is why the decision to issue warrants for the arrest of M. Gaddafi, S. Gaddafi and A. Al-Senussi was preceded by UN Security Council Resolution 1970 (2011) of February 26, 2011. The resolution calls for an immediate end to violence and repression, full respect for human rights and international law, and accountability for those responsible for this violence. In accordance with it, these requirements are given practical meaning through the introduction of travel bans, the "freezing" of assets, and an embargo on arms supplies. Considering that “the widespread and systematic attacks on civilians currently taking place in the Libyan Arab Jamahiriya may qualify as crimes against humanity”, the UN Security Council, acting under Chapter VII of the Charter of the United Nations and taking action under Article 41 of the Charter. By referring to the ICC Prosecutor the situation in Libya, which is not a member state of the ICC, the UN Security Council, on behalf of all members of this international organization, agreed that the investigation of this situation and the prosecution of all persons will be carried out in accordance with the rules provided for in the Rome Statute, Elements Crimes and the Rules of Procedure and Evidence.<sup>29</sup>

Moving on from the abstract analysis of the concepts of responsibility and liability to examine the concrete modes of their functioning in the international legal order, certain unifying elements are apparent. First, a failure to comply with the obligations of prevention and reparation by a State or an international organization constitutes an internationally wrongful act which takes one back into the realm of, and triggers, the mechanisms of responsibility. Further, in relation to liability, it is far from being accepted that damage is its fundamental basis or source. In this context, it is possible to argue that damage is only a factor entailing the implementation of the obligation to make reparation, whilst it is the risk engendered by hazardous activities which is the foundation of both the 'preventative' and 'reparative' aspects of liability (however uncertain the latter may be).<sup>30</sup>

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<sup>28</sup> Ibid.

<sup>29</sup> Volevodz Alexander Grigorievich, *International Criminal Procedure in the Gaddafi Case: Politics or Law?*, Retrieved from: <https://mgimo.ru/about/news/experts/191399/>, consulted on 1.10.2020.

<sup>30</sup> James Crawford; Alain Pellet; Simon Olleson; Dr Kate, *op. cit.*, 2010, p. 15.

## 6. Conclusions

To sum up, we may admit that objectivation of the obligation for global misconduct resulting from the excision of the harm as a requirement for obligation is at the root of a transformation of the role which the responsibility is called upon us to serve in a foreign culture which has less of a solely inter-state structure and is fully designed than those in the past.

The present article evaluated the definition of individual responsibility in accordance with the article 25 (3) of the Rome Statute.

We have to remember that the ICC Law does not end at the criminal liability of persons who commit offences under the Law. It also applies to people who are implicitly active in the conduct of offences under international law.

The significance of Article 25 of the ICC Law is reinforced by the presence of a distinct model of involvement, i.e., the presence of various ways of involvement in crime. The distinct paradigm, in particular, plays a major role for the International Criminal Court in relation to the assessment of individual criminal liability.

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