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Punir les crimes de masse : Entreprise criminelle commune ou coaction ?

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JOINT CRIMINAL ENTERPRISE AND CO-ACTION : A COMPARISON

BY

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The above contributions have given us a sound basis on which to reflect : I think we have understood the difficulties of and ambiguities in approaching the issue of collective criminality and individual responsibility in the context of mass crimes. The recent case law of international tribunals proposed two theories to try to tackle this problem. The first theory, called "joint criminal enterprise", was elaborated by the Appeals Chamber (AC) of the International Criminal Tribunal for Former Yugoslavia (ICTY) and subsequently taken up by the International Tribunal for Rwanda (ICTR), the International Court of Sierra Leone (ICSL) and, most recently, by the Extraordinary Chambers of the Cambodian Tribunals (E.C.C.T). The second theory, "co-action," was built up within the International Criminal Court (ICC), in particular by Preliminary Trial Chamber (PTC) I, in the cases of *Lubanga* and *Katanga and Ngudjolo Chui*. It clearly presents itself as an alternative theory of individual responsibility in relation to joint criminality, as PTC I bluntly rejects the ICTY's theory of joint criminal enterprise, arguing that it is not part of international customary law and not referred to in the Rome Statute. Under this background, I would like to touch upon three categories of issues : the sources of both JCE and co-action (I); their constitutive elements (II); and I will briefly conclude

with some remarks on the consequences and efficiency of those two theories (III).

I. — The sources

I will examine here both formal and material sources.

A. — The formal sources : the battle around customary international law

The issue here is the following : what are the legal basis for these forms of responsibility ? It must be said that neither JCE nor co-action finds a clear textual basis in international law.

The statutes of the *ad hoc* tribunals make no mention at all of any form of joint action or joint criminality. This is also true for the statutes of the SCSL or the E.C.C.T.

The case of the Rome statute is less clear. There are in fact two provisions on which a theory of joint criminality could be based :

— First, article 25 §3-a states :

> 3. 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;

— Second, article 25§3-d provides :

> 3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person : (...)
>
> (*d*) 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.

At first sight, the language of paragraph 3-a gave a very limited version of joint criminality, with the idea of a crime perpetrated "jointly with another," literally, with one other person. Paragraph 3-d, on the contrary, seemed to give much more room for the development of a theory showing similarities with JCE (see the analysis of the constitutive elements below). Except that the paragraph begins by "[i]n any other way contributes to the commission..." This part of the sentence played a central role in the interpretation of this provision by the ICC preliminary Chamber I in *Lubanga* (Decision on the confirmation of charges, 29 January 2007, §§334-337) : on this basis, the Chamber found that paragraph 3-d was in fact meant to be a residual clause, gathering all forms of accessory liability not listed in 3-b and 3-c. Thus, according to the Chamber, co-action could only be found in 3-a, but not in 3-d.

Apart from the statutes, the tribunals also considered customary law to be a valid source of forms of responsibility reflecting joint criminality. In the *Tadić* appeals judgement (AJ) of 15 July 1999, the Appeals Chambers based its reasoning both on a theological interpretation of its statute (there *must be* such form of responsibility, otherwise, not all violations of international humanitarian law can be punished) and on an attempt to show evidence of a legal conception of joint criminality which would find a valid basis in customary international law. It is however really doubtful that, when the Appeals Chamber wrote its judgement, there was in fact any coherent conception of joint criminality in international custom.

To prove the existence of such a customary rule, the Chamber referred to a collection of post war criminal trials. Certainly, from this analysis, comes out a general idea of "criminal enterprise" and of an individual responsibility for participating into such an enterprise. But it is unclear whether some precise constitutive elements, as enumerated by the Chamber, really flow from these precedents. At least, while JCE I and II seem to be quite safely reflected in a range of cases, JCE III is clearly established on a less solid ground.

Tadić AJ also cites national laws and cases, which are even less convincing. In particular, one can wonder how the Appeal Chamber succeeded in finding JCE or something approximating to JCE in French criminal law...

This being said, the *Tadić* AJ in 1999 gave the impulse for the development of a complex theory of JCE, that was progressively refined and reached a great level of coherence in the last judgements issued by the ICTY and also by the ICTR. So that one can consider that in 2007, in particular with the *Brđanin* AJ (3 April 2007), the "doctrine" of JCE was almost stabilized and became quite easily foreseeable for the future accused.

It was thus a surprise (at least for the writer of these lines) when, in *Lubanga*, the Pre-Trial Chamber I decided that JCE had no basis at all in customary international law (Decision on confirmation of charges, 29 January 2007)! Not only it bluntly contradicted years of accumulated case law by the ICTY, but it also pretended that the Appeals chambers of the two *ad hoc* tribunals seriously erred during all these years. According to Pre-Trial Chamber I, the content of customary international law was different from what the ICTY believed it to be : it did not recognize JCE as a form of responsibility, but co-action — the same concept that the Chamber thought was inscribed in article 25 §3-a. The PTC I reiterated its position in its decision on the confirmation of charges in *Katanga and Ngudjolo Chui* (30 September 2008); in the Decision on the Warrant of Arrest for *Omar Al Bashir* (4 March 2009); and in the Decision on the Prosecutor's Application under Article 58 for *Abu Garda* (7 May 2009). It must also be noted that PTC III adhered to the same doctrine in *Jean Pierre Bemba*, Decision on the application for a Warrant of Arrest (10 June 2008)...

In fact, the "precedents" and the evidences of *opinio juris* invoked by PTCs were even more unconvincing than the ones referred to by the ICTY Appeals Chamber in *Tadić*. More precisely : the PTCs referred to doctrinal sources, mainly from Germany (with multiple references to a single author, Claus

Roxin) and to three judicial precedents, two of which were in fact quashed in appeal :

— the German federal supreme court judgement in the "*Politbüro*" case (*BGHSt*, 40, pp. 236ff, 26 July 1974);

— the judgement of the Argentinian Court of Appeal criminal section of the federal district in Buenos Aires, in *Videla and others* (Docket n° 13, 9 December 1985), which was quashed by the Argentinian Supreme Court;

— and also the judgement of the ICTY Trial Chamber in *Stakić*, which was quashed precisely on this issue by the Appeals Chamber. The AC considered that the TC erred in applying the doctrine of co-action, instead of JCE.

In brief, the status of co-action in international law is clearly even more uncertain than the one of JCE. At least, JCE can find some support in several post WW II trials. This is clearly not the case for "co-action" as articulated by the PTC I. In particular, the reading of the decision of confirmation of charges in *Katanga and Ngudjolo Chui* is quite disturbing, as the PTC keeps on insisting that co-action is "widely accepted," but is unable to substantiate this claim with sufficient evidence of practice by states or international tribunals.

There is, here, a matter for an almost infinite meditation. Customary law has always been a mystery and we know that everyone and every institution have a tendency to see it as it would like it to be. The truth is probably that, in 1999, there was no such doctrine in general international law, or that it was not so well established as the Appeals Chamber pretended it to be in *Tadić*. In other words, it was, for the most, judge-made law. The same can be said about co-action, which entirely created by PTC I of the ICC. The only difference is probably that when co-action "appeared" in the ICC, JCE already had almost 8 years of existence in the ICTY; and had already been imported and applied before the ICTR and the SCSL. To this regard, JCE was safer in terms of legality than co-action, which still appears today as a young and rather vague doctrine.

B. — The material sources

On this issue, the Decision on the confirmation of charges in *Lubanga* is quite explicit and useful. The PTC starts by saying that "the definitional criterion of the concept of co-perpetration is linked to the distinguishing criterion between principals and accessories to a crime where a criminal offence is committed by a plurality of persons." (§327). On this basis, the PTC describes three approaches of such a distinction (§§328-330) :

— An *objective approach* which "focuses on the realisation of one or more of the objective elements of the crime. From this perspective, only those who physically carry out one or more of the objective elements of the offence can be considered principals to the crime."

— A *subjective approach*, that the PTC identifies with the ICTY's JCE, which "moves the focus from the level of contribution to the commission of the offence as the distinguishing criterion between principals and accessories, and places it instead on the state of mind in which the contribution to the crime was made. As a result, only those who make their contribution with the shared intent to commit the offense can be considered principals to the crime, regardless of the level of their contribution to its commission."

— And finally, a third approach based on *the concept of control over the crime*, chosen by the PTC to describe co-perpetration (*co-action*), which is based on the idea that "principals to a crime are not limited to those who physically carry out the objective elements of the offence, but also include those who, in spite of being removed from the scene of the crime, control or mastermind its commission because they decide whether and how the offense will be committed."

According to the PTC, the ICC Statute rejects the objective approach, as it does not limit the class of principals to those who have physically committed the crime, but also includes

the concept of indirect co-perpetration (commission through another person) (§333).

In the same manner, the PTC considers that the ICC Statute "does not take into account the subjective criteria." The reasoning here is quite unclear, but what I understand is that the PTC reads Article 25 §3-d as a form of accessory liability ("[i]n any other way contributes to the commission...", see *supra* about the interpretation of this sentence) and at the same time includes a subjective element of "furthering the criminal activity of the group in the knowledge of the criminal purpose." This association (of a subjective element concerning a common purpose to an accessory form of liability) would prove that the ICC Statute does not use the shared intent as a distinguishing criterion between principals and accessories.

There remains the third approach, the one based on the "control over the crime" which can and should be associated with the concept of indirect perpetration, according to the PTC, that is to say that the person who has control over the crime commits the crime through another person (§339 of Decision on confirmation of charges in *Lubanga*).

This link between co-perpetration and indirect perpetration is nothing but obvious, as shown by the decision of confirmation of charges in the *Katanga and Ngudjolo Chui* case. In its decision, the PTC interprets the "or" in article 25 §3-a — "jointly with another *or* through another person"— as an "and", explaining that this word can be understood as either "inclusive" or "exclusive" :

> "An inclusive disjunction has the sense of 'either one or the other, and possibly both', whereas an exclusive disjunction has the sense of 'either one or the other but not both'" (§491).

The theory is supplemented in the same decision by adding a new element — which is clearly not present in the Statute, but which seems probably the most interesting as well as the most problematic contribution by the PTC — that is to say the idea of *control over an organisation*.

Despite the PTC's triple assertion that such a concept is «incorporated into the framework of the Statute»,

«increasingly used in national jurisdictions» and «addressed in the jurisprudence of the international tribunals», we are again faced with a bold manifestation of judge-made law. However, in doing so, the PTC made a qualitative step and transformed its own doctrine of indirect co-perpetration into a concept that fits more the situations of mass criminality, in the sense that it allows the attribution of criminal responsibility to one individual for crimes perpetrated by a multiplicity of agents in the framework of a complex organization, for instance a state-like organization.

This is confirmed by the Decision of the PTC I on the Warrant of Arrest in the *Al-Bashir* case (4 March 2009, §§209 sq) : here, the potentialities of indirect co-perpetration through an organisation are fully revealed, as the alleged responsible for having "committed" the crime is no one else than the President of Sudan, that is to say the person who is at the top of the politico-administrative structure which is used as an instrument for crime. However, questions remain : the concept put forward by the PTC I in *Katanga and Ngudjolo Chui* seem to leave room for many interpretations. In particular, the "mechanistic" conception of State seem problematic : is it not possible to perceive some risk in the idea according to which "the actual executor of the order is merely a fungible individual" that is to say that "[a]ny one subordinate who does not comply may simply be replaced by another who will" (decision on confirmation of charge, §516). How then, can the responsability of the executor be described ? Can they even be said to be responsible ? Aren't they a mere instrument in the hands of those who have "control over the crime", like Eichmann's defence tried to pretend ? (See Isabelle Delpla's contribution above).

Finally, it is worth noting that the ICTR Appeals Chamber has developed, concurrently to its acceptance of the JCE doctrine, a third approach of co-perpetration which is very near to the "co-action" doctrine of the ICC. Indeed, in *Gacumbitsi* (7 July 2006), the AC chose an unusual approach by convicting the accused for having "committed" acts of genocide, even

though he was not physically implicated in the perpetration of those acts, and without having recourse to the theory of JCE, and even less to the notion of "co-perpetration". In this case, the AC only noticed that "the accused was physically present at the scene of the Nyarubuye Parish massacre, which he 'directed' and 'played and leading role in conducting and especially supervising'. It was he who personally directed the Tutsi and Hutu refugee to separate — and that action, which is not adequately described by any other mode of Article 6 §1 liability *was as much an integral part of the genocide as the killings which it enabled*". (See also *Seromba AJ*, 12 mars 2008, §161; and the Rukundo TJ, 27 February 2009, §§562-563).

II. — The constitutive elements

A. — The objective elements

1. — *Several persons*

Both JCE and co-action require a group of persons to act jointly. The ICC PTC says «two or more persons», while the ICTY does not set a minimum number of persons, although in general, the JCEs under consideration gathered more than two persons (see for instance *Vasiljević*).

Members of the JCEs are recognized by the fact that they were acting "in furtherance of the common purpose". Co-action, on its side, stresses the element of co-ordination in between the participants, that is to say that "participation in the commission of a crime without co-ordination with one's co-perpetrators" — read : even though this participation is made objectively and subjectively in furtherance of the common purpose — "falls outside the scope of co-perpetration within the meaning of article 25(3)(a) of the Statute." (Decision on the confirmation of charges, *Lubanga*, §343).

Before the ICTY, there was a discussion to know whether the "main perpetrators" — those who "pull the trigger" — should be proven to be members of the JCE (see *Brđanin AJ*,

3 April 2007, §§410-414). This is of course an issue that does not arise with co-action, which is built by the PTC in close connection with the concept of indirect perpetration, that is to say committing a crime through another person or an organisation.

It is interesting to see that the ICTY's chambers — as well as the SCSL chambers — gave an answer to this debate that comes very close to the result reached through the doctrine of indirect co-perpetration. Indeed, in *Brđanin*, the Appeals Chamber decided that it was not required to prove that the main perpetrators were part of the JCE : it was sufficient to prove that the main perpetrators committed their crime in the furtherance of the common purpose and that the one or several members of the JCE used the main perpetrators as a "tool" to commit the crime (§412; see also SCSL, TC, *RUF judgement*, 2 March 2009, §1992). This idea of the physical perpetrator being used as a "tool" is very near to the concept of indirect perpetration developed by the ICC's PTCs. It may also be compared to the concept of indirect perpetration developed by the ICTR AC in *Gacumbitsi* and *Seromba* mentioned above.

2. — *Common purpose*

The common purpose element is common to both JCE and co-action. For both the ICTY and the ICC's PTCs, the common purpose can be in itself criminal *or* be non criminal though implicating the commission of certain crimes, for instance as a means to achieve the common purpose. Both institutions also agree that the "common purpose" does not have to result from an agreement, or be explicit and can even appear spontaneously among the participants.

3. — *Individual contribution*

This is probably where the two doctrines differ the most. As far as JCE is concerned, the case law has been stabilized in *Brđanin* AJ (§430) : "the Appeals Chamber observes that,

although the contribution need not be necessary or substantial, it should at least be a significant contribution to the crimes for which the accused is to be found responsible."

The standard used is thus the "significant" contribution, which is clearly less stringent then the standard of "substantial" participation (which is however requested as far as "opportunistic visitors" in a detention camp are concerned, see *Kvočka and others*, AJ, §§599-600).

PTC I has set a clearly higher standard, closely linked to the concept of "joint control over the crime", that is to say that each participant should make a "co-ordinated essential contribution... resulting in the realisation of the objective elements of the crime." (*Lubanga*, §346). The PTC continues (§347) :

> "In the view of the Chamber, when the objective elements of an offence are carried out by a plurality of persons acting within the framework of a common plan, only those whom essential tasks have been assigned — and who, consequently, have the power to frustrate the commission of the crime by not performing their tasks — can be said to have joint control over the crime." (1)

Clearly, the group of persons that can be held liable through co-action is much smaller than in the JCE. To take simple examples, it is almost certain that neither Duško Tadić, nor Mitar Vasiljević could have been convicted on the basis of co-action, whereas they have been held responsible on the basis of JCE (III for Tadić and I for Vasiljević).

B. — The subjective elements

It is well known that there are three categories of JCEs, depending on the nature of the subjective element required. JCE I, the elementary form, is characterized by the shared intention of the co-authors to commit the crime (knowing that

(1) See also *Katanga and Ngudjolo Chui*, Decision on the confirmation of charges, §526 : "Designing the attack, supplying weapons and ammunitions, exercising the power to move the previously recruited and trained troops to the fields; and/or coordinating and monitoring the activities of those troops, may constitute contributions that must be considered essential regardless of when are they exercised (before or during the execution stage of the crime."

the common purpose can be criminal in itself or can be non criminal, though it implicates the commission of a crime, for instance when the crime is accepted as a means of implementing the common purpose). JCE II "systemic form" or "concentration camps" form, is a variation of the first form, and implies the knowledge of a system designed for inflicting inhuman treatments to the prisoners and the intention to contribute to the functioning of this system. JCE III is the "enlarged" form, based on *dolus eventualis*, and means that the accused can be held responsible for a crime falling out of the common purpose, if only the occurrence of such a crime was foreseeable and the accused deliberately took the risk that the crime occurs.

This last form — which was applied in 1999 by the Appeals Chamber to Duško Tadić — is also the most controversial. The use of *dolus eventualis* is the reason why JCE is described by some as a "Just Convict Everyone" doctrine.

The subjective elements of co-action reflects the restrictive approach which has already been noticed as far as the objective elements are concerned, that is to say that, obviously, the group of persons potentially liable under this form of responsibility is much more restrictive than it is under the JCE doctrine.

The first subjective element still allows the comparison between JCE and co-action : the PTC I requires that the accused "fulfil the subjective elements of the crime with which he or she is charged, including any requisite *dolus specialis* or ulterior intent for the type of crime involved." (*Lubanga*, §349).

That is to say that the accused should have intention and knowledge in connection with the crime contemplated in the common purpose or implied by the common purpose. The PTC admits that the *dolus* can take the form of *dolus directus* of the first degree, *dolus directus* of the second degree (what I would call *dol indirect*) and also of *dolus eventualis*. This acceptance of *dolus eventualis* as a potential subjective element for co-action, allows the comparison with JCE I but also III. Indeed,

it can be enough to prove that the accused was aware that there was a risk that the crime (that may not be included into the common purpose) be committed and that they deliberately accepted this risk.

However, the second and the third subjective elements radically restrain the reach of the concept. The second element is linked to the idea of coordination in between several actors : as the PTC I puts it, "[t]he suspects must be mutually aware and mutually accept that implementing their common plan will result in the realisation of the objective elements of the crimes." It means that not only the accused fulfils the subjective element of the crime, but that they are also aware that they actually implementing the common plan, together with other persons, will result in the perpetration of the crime. What is required is a "mutual awareness", that is to say that the accused knows that the coordinated activities of several persons furthering the common purpose will result in the commission of the crime.

The third element reflects the requirement of "joint control over the crime". According to the PTC I, "the suspects must be aware of the factual circumstances enabling them to control the crimes jointly" :

> "This requires that each suspect was aware : (*i*) of his essential role in the implementation of the common plan; (*ii*) of his ability — by reason of the essential nature of his task — to frustrate the implementation of the common plan, and hence the commission of the crime, by refusing to activate the mechanisms that would lead almost automatically to the commission of the crimes."

Those two elements complement the corresponding objective elements and restrict the reach of the doctrine so that, in reality, it seems framed in order to target "senior leaders", and to leave out its reach the subordinates.

But what then becomes the responsibility of persons who found themselves at the intermediary level of a hierarchy, like officers who were not in a position either to "coordinate" or to have control over the crime (that is to say to frustrate the implementation of the common plan) but who did act in the furtherance of this plan ?

Conclusion

Theories of joint criminality still have an uncertain basis in international law. In a way, JCE has more solid grounds, because it was applied in multiple cases before the ICTY and was taken up by other international tribunals. Co-action as contemplated by the ICC is really new. And it seems that all the work that was done by the ICTY Appeals Chamber between 1999 and 2007 to clarify JCE is still to come as far as co-action is concerned... Is it really what we want and expect in terms of legal security and also, when it comes to respecting the principle of legality? I am aware that it is maybe not worth asking the question, now that this doctrine has been used several times by the PTCs and is actively supported by the Office of the Prosecutor. However, it is worth to be noted that the PTCs' case law has not, until now, been confirmed either by a trial chamber or by the Appeal Chamber.

Second, JCE and co-action are based on distinct assumptions, *i.e.* shared intention to further the common purpose for JCE ("subjective approach") and "joint control over the crime" for co-action ("control over the crime approach"). When one looks more closely to the constitutive elements, it seems obvious that this theoretical shift has practical consequences.

My worry is the following : whereas it seemed fair to worry, to some extent, about the "catch them all" effect of JCE — especially when it comes to JCE III— one can wonder whether co-action does not represent, on the contrary, a "catch only few of them" theory. The problem is to know what will be done of the *others*, and in particular, how to determine the nature of the responsibility of persons who are not senior leaders but still in a position to play an "important" role in a phenomenon of joint criminality ?(2)

(2) This note is added just before sending the text to the publisher, while writing the preface : the beginning of an answer to that question has probably been given in the *Mbarushimana* decision on the warrant of arrest, as noted in the preface. It appears that PTC I means to use Article 25 §3-d in order to trigger the responsability of the members of the group which *are not* co-perpetrators according to Article 25 §3-a : those will thus be convicted as aidors and abettors, in conformity with the PTC I's interpretation of Article 25 §3-d in *Lubanga*.

To conclude, I would like to ask three questions regarding the implementation of co-action as framed by the ICC's PTCs :

— *Question 1 :* Is the requirement of "coordination" between the co-perpetrator not too restrictive ? Sometimes, senior leaders which are part of the same government, are acting in furtherance of the same purpose (for instance killing a part of the population) although their actions are not coordinated, in the sense that one member of the government does not rely on the other to have the crime committed. Imagine, for instance, the minister of defence heading the defence forces and the ministry of the interior commanding the police : those security forces may, in some cases, act separately in a non-coordinated manner (and sometimes even more : in competition), although they do act in furtherance of the same common purpose. Does it mean that the ministry of interior could only be held liable for the crimes committed by the police and the ministry of defence for the crimes committed by the army ? Should not we assume, on the contrary, that this is in fact one government, which is acting in the pursuance of one policy, although through a number of institutions, sometimes acting in a non-coordinated manner ? And that all the persons who made an "important" contribution to this government with the intention of furthering the common purpose should be held responsible for all the crimes committed in the furtherance of this criminal goal ?

— *Question 2 :* Is the criteria of "control over the crime" through another person, and particularly through an organization, not going to raise difficult issues when applied to concrete facts ? Such a criteria might be applied safely to a "well-organized" state or organization, with strict hierarchy and authority of the leaders over the subordinates,(3) in other words... to a fierce

(3) See the reasoning in the decision on the arrest warrant in *Al Bashir*, 4 March 2009, §§216 sq.

dictature!(4) But then, how to deal with cases where a person holds only partial control of the state's apparatus, or has no control as such, but exert an influence which has the effect of triggering others to order the perpetration of crimes? In other words, is the PTC's conception of "control" not too mechanical to contemplate the diversity of situations?

— *Question 3 :* Finally, is it possible to reconcile the inclusion of *dolus eventualis* in the definition of the common purpose and the requirement of "control" over the crime? Is it possible for someone to have control over a crime which is, at best, materialized by a risk? If "control" means the capacity to "frustrate the commission of a crime", how can this capacity be understood when applied to a risk that the crime happens?

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(4) See the description made by the PTC I in *Katanga and Ngudjolu Chui*, decision on the confirmation of charges, §513 : "In the view of the Chamber, it is critical that the chief, or the leader, exercises authority and control over the apparatus and that his authority and control are manifest in subordinates' compliance with his orders. His means for exercising control may include his capacity to hire, train, impose discipline, and provide resources to his subordinates."

II.

Entreprise criminelle commune et coaction : quelle cohérence ?

Présidence

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